

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 OF THE ASIAN AMERICAN LEGAL DEFENSE
AND EDUCATION FUND, ASIAN/ASIAN AMERICAN
FACULTY AND STAFF ASSOCIATION OF THE
UNIVERSITY OF TEXAS AT AUSTIN, ASIAN DESI
PACIFIC ISLANDER AMERICAN COLLECTIVE OF THE
UNIVERSITY OF TEXAS AT AUSTIN, OTHER ASIAN
AMERICAN AND PACIFIC ISLANDER EDUCATION AND
YOUTH-SERVING ORGANIZATIONS, AND HIGHER
EDUCATION OFFICIALS AS AMICI CURIAE IN
SUPPORT OF RESPONDENTS**

KENNETH KIMERLING
KHIN MAI AUNG
THOMAS L. MARIADASON
ASIAN AMERICAN LEGAL
DEFENSE AND EDUCATION FUND
99 Hudson Street, 12th Floor
New York, NY 10013-2815
(212) 966-5932
kaung@aaldef.org

DEAN RICHLIN
HEMMIE CHANG
ROBERT E. TOONE
Counsel of Record
DIANA JONG
FOLEY HOAG LLP
155 Seaport Boulevard
Boston, MA 02210
(617) 832-1000
rtoone@foleyhoag.com

TABLE OF CONTENTS

Table of Authorities	iii
Interest of the Amici Curiae	1
Summary of the Argument	3
Argument.....	7
I. UT'S ADMISSION PROCESS DOES NOT DISCRIMINATE AGAINST OR DISADVANTAGE ASIAN AMERICAN APPLICANTS.....	7
A. UT Does Not Treat Asian Americans as Overrepresented.	8
B. UT Has Not Limited Asian American Admissions to Match the Racial Demographics of Texas.....	11
C. There Is No Evidence of Negative Action Against Asian Americans at UT.	14
1. Narrowly tailored affirmative action programs do not constitute negative action against Asian American applicants.	14
2. SAT score data at UT do not show negative action against Asian Americans.....	18
II. UT'S POLICY OF INDIVIDUALIZED REVIEW IS BENEFICIAL TO ASIAN AMERICANS AND PACIFIC ISLANDERS.....	25
A. The "Model Minority" Myth Masks Tremendous Diversity Within the Asian American and Pacific Islander Community.	25

B. The Different Immigration Histories of Asian American and Pacific Islander Subgroups Have Shaped Their Socioeconomic Experiences in the United States.....	27
C. Substantial Economic and Educational Disparities Exist Among Asian American Subgroups in Texas.	31
D. Members of Disadvantaged Asian American and Pacific Islander Subgroups Benefit from UT’s Individualized and Narrowly Tailored Admissions Process.	34
III. THE EDUCATIONAL BENEFITS OF STUDENT DIVERSITY ACCRUE TO ALL STUDENTS.	37
Conclusion	39
Appendix	

TABLE OF AUTHORITIES

Cases

<i>Gratz v. Bollinger</i> , 539 U.S. 244 (2003).....	15
<i>Grutter v. Bollinger</i> , 539 U.S. 306 (2003)	<i>passim</i>
<i>Hopwood v. Texas</i> , 78 F.3d 932 (5th Cir. 1996)	12
<i>Parents Involved in Community Schools v. Seattle School Dist. No. 1</i> , 551 U.S. 701 (2007)	38
<i>Regents of the Univ. of Cal. v. Bakke</i> , 438 U.S. 265 (1978).....	3, 38
<i>Smith v. University of Washington Law School</i> , 392 F.3d 367 (9th Cir. 2004).....	26, 36
<i>Vietnamese Fishermen’s Assoc. v. Knights of the Ku Klux Klan</i> , 518 F. Supp. 993 (S.D. Tex. 1981).....	34

Statute

Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978	28
---	----

Other Authorities

Michelle Adams, <i>Isn’t it Ironic? The Central Paradox at the Heart of “Percentage Plans,”</i> 62 Ohio State L.J. 1729 (2001).....	34
<i>Affirmative Action for the Rich: Legacy Preferences in College Admission</i> (Richard D. Kahlenberg ed. 2010).....	16

Sigal Alon & Marta Tienda, <i>Diversity, Opportunity, and the Shifting Meritocracy in Higher Education</i> , 72 <i>Am. Soc. Rev.</i> 487 (2007).....	22
Angelo N. Ancheta, <i>Race, Rights, and the Asian American Experience</i> (1998)	27
Ben Backes, <i>Do Affirmative Action Bans Lower Minority College Enrollment and Attainment? Evidence from Statewide Bans</i> , 47 <i>J. Hum. Resources</i> 435 (2012)	16
William G. Bowen & Derek Bok, <i>The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions</i> (2d. ed. 2000).....	18-19
Tomiko Brown-Nagin, <i>The Diversity Paradox: Judicial Review in an Age of Demographic and Educational Change</i> , 65 <i>Vand. L. Rev. En Banc</i> 113 (2012), available at http://www.vanderbiltlawreview.org/content/articles/2012/07/Brown-Nagin_65_Vand_L_Rev_En_Banc_113.pdf	36
Coalition for Asian American Children and Families, <i>Hidden in Plain View: An Overview of the Needs of Asian American Students in the Public School System</i> (2004), available at http://www.cacf.org/click_track/click_track.php?files=51	31

College Board, <i>College-Bound Seniors Total Group Profile Report</i> (July 2010), available at http://professionals.collegeboard.com/profdownload/2010-total-group-profile-report-cbs.pdf	24
Consolidated Brief of Lt. Gen. Julius W. Becton, Jr. et al. as <i>Amici Curiae</i> in Support of Respondents, <i>Grutter v. Bollinger</i> , 539 U.S. 306 (2003) (No. 02-241).....	7
Department of Homeland Security, <i>Yearbook of Immigration Statistics: 2010</i> , available at http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2010/ois_yb_2010.pdf	28
William T. Dickens & Thomas J. Kane, <i>Racial Test Score Differences as Evidence of Reverse Discrimination: Less Than Meets the Eye</i> , 38 Indus. Rel. 331 (1999)	19
Mark E. Engberg & Sylvia Hurtado, <i>Developing Pluralistic Skills and Dispositions in College: Examining Racial/Ethnic Group Differences</i> , 82 J. Higher Educ. 416 (2011).....	38
Thomas J. Espenshade & Alexandria Walton Radford, <i>No Longer Separate, Not Yet Equal: Race and Class in Elite College Admission and Campus Life</i> (2009)	17
Thomas J. Espenshade & Chang Y. Chung, <i>The Opportunity Cost of Admission Preferences at Elite Universities</i> , 86 Soc. Sci. Q. 293 (2005) ...	17

Claude S. Fischer et al., <i>Inequality by Design: Cracking the Bell Curve Myth</i> (1996)	18
Campbell Gibson & Kay Jung, U.S. Census Bureau, <i>Historical Census Statistics on Population Totals by Race, 1790 to 1990, and by Hispanic Origin, 1970 to 1990 for the United States, Regions, Divisions and States</i> (2002), available at http://www.census.gov/population/www/documentation/twps0056/tab58.pdf	11-12
Patricia Gurin et al., <i>Diversity and Higher Education: Theory and Impact on Educational Outcomes</i> , 72 Harv. Educ. Rev. 330 (2002)	38
John Iceland, <i>Beyond Black and White: Metropolitan Residential Segregation in Multi-Ethnic America</i> 33 Soc. Sci. Res. 248 (2004).....	34-35
Jerry Kang, <i>Negative Action Against Asian Americans: The Internal Instability of Dworkin's Defense of Affirmative Action</i> , 31 Harv. C.R.-C.L. L. Rev. 1 (1996)	15, 18
Jerome Karabel, <i>The Chosen: The Hidden History of Admission and Exclusion at Harvard, Yale, and Princeton</i> (2005)	10
William C. Kidder, <i>Misshaping the River: Proposition 209 and Lessons for the Fisher Case</i> (2012), available at http://ssrn.com/abstract=2123653	19

William C. Kidder, <i>Negative Action Versus Affirmative Action: Asian Pacific Americans are Still Caught in the Crossfire</i> , 11 Mich. J. Race & L. 605 (2006).....	17, 36-37
William C. Kidder, <i>Situating Asian Pacific Americans in the Law School Affirmative Action Debate: Empirical Facts About Thernstrom’s Rhetorical Acts</i> , 7 Asian L.J. 29 (2000).....	15
Claire Jean Kim, <i>The Racial Triangulation of Asian Americans</i> , 27 Pol. & Soc’y 105 (1999) ..	24
Jennifer L. Kobrin et al., <i>A Historical View of Subgroup Performance Differences on the SAT Reasoning Test</i> (The College Board 2007), available at http://professionals.collegeboard.com/profdownload/pdf/06-1868%20RD CBR06-5_070105.pdf	19
Adrian Liu, <i>Affirmative Action & Negative Action: How Jian Li’s Case Can Benefit Asian Americans</i> , 13 Mich. J. Race & L. 391 (2008)	15
Goodwin Liu, <i>The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions</i> , 100 Mich. L. Rev. 1045 (2002).....	19
Charles J. McClain, <i>Tortuous Path, Elusive Goal: The Asian Quest for American Citizenship</i> , 2 Asian L.J. 33 (1995)	27

Sunny X. Niu & Marta Tienda, <i>Test Scores, Class Rank, and College Performance: Lessons for Broadening Access and Promoting Success</i> , <i>Rassegna Italiana di Sociologia</i> (forthcoming), available at http://theop.princeton.edu/reports/forthcoming/NiuTienda_2011.pdf	21
Note, <i>Racial Violence Against Asian Americans</i> , 106 Harv. L. Rev. 1926 (1993).....	27
NYU CARE, <i>Asian Americans and the Benefits of Campus Diversity: What the Research Says</i> (2012), available at http://www.nyu.edu/projects/care/CARE-asian_am_diversity_D4.pdf	38
NYU CARE & The College Board, <i>Asian Americans and Pacific Islanders: Facts, Not Fiction: Setting the Record Straight</i> (2008), available at http://professionals.collegeboard.com/profdownload/08-0608-AAPI.pdf	30-31
Valerie Ooka Pang et al., <i>Asian American and Pacific Islander Students: Equity and the Achievement Gap</i> , 40 Educ. Researcher 378 (2011).....	31
Jay Rosner, <i>Disparate Outcomes by Design: University Admissions Test</i> , 12 Berkeley La Raza L.J. 3767 (2001)	22
Natsu Taylor Saito, <i>Model Minority, Yellow Peril: Functions of “Foreignness” in the Construction of Asian American Legal Identity</i> , 4 Asian L.J. 71 (1997)	26-27

Maria Veronica Santelices & Mark Wilson, <i>Unfair Treatment?: The Case of Freedle, the SAT, and the Standardization Approach to Differential Item Functioning</i> , 80 Harv. Educ. Rev. 106 (2010)	19
Robert T. Teranishi, <i>Asians In the Ivory Tower: Dilemmas of Racial Inequality in American Higher Education</i> (2010)	26, 28-30
Texas Education Agency, <i>2009-2010 Academic Excellence Indicator System, available at http://ritter.tea.state.tx.us/perfreport/aeis/2010/district.srch.html</i>	32
U.S. Census Bureau, <i>2006-2010 American Community Survey 5-Year Estimates, available at http://factfinder2.census.gov/bk/mk/table/1.0/en/ACS/10_5YR/B02006/0400000US48 0400000US48.97000</i>	32-33
U.S. Census Bureau, <i>2008-2010 American Community Survey 3-Year Estimates, available at http://factfinder2.census.gov/bk/mk/table/1.0/en/ACS/10_3YR/DP03/0400000US48 1600000US4804000 1600000US4816612</i>	32
U.S. Census Bureau, <i>2010 American Community Survey 1-Year Estimates, available at http://factfinder2.census.gov/bk/mk/table/1.0/en/ACS/10_1YR/S0201//popgroupp~012 015 020 024 029 050 400</i>	29-30

U.S. Census Bureau, <i>Texas Profile of General Demographic Characteristics: 2000</i> , available at http://factfinder2.census.gov/bkmk/table/1.0/en/DEC/00_SF1/DP1/0400000US48	12
U.S. Census Bureau, <i>Texas Profile of General Demographic Characteristics: 2010</i> , available at http://factfinder2.census.gov/bkmk/table/1.0/en/DEC/10_DP/DPDP1/0400000US48	12, 31
UT Austin, <i>1990-1991 Statistical Handbook—Students</i> , available at http://www.utexas.edu/academic/ima/sites/default/files/SHB90-91Students.pdf	12
UT Austin, <i>1995-1996 Statistical Handbook—Students</i> , available at http://www.utexas.edu/academic/ima/sites/default/files/SHB95-96Students.pdf	12
UT Austin, <i>2001-2002 Statistical Handbook—Students</i> , available at http://www.utexas.edu/academic/ima/sites/default/files/SHB01-02Students.pdf	12
UT Austin, <i>2009-2010 Statistical Handbook—Students</i> , available at http://www.utexas.edu/academic/ima/sites/default/files/SHB09-10Students.pdf	12
UT Austin, <i>Implementation and Results of the Texas Automatic Admissions Law</i> , Oct. 29, 2009, available at http://www.utexas.edu/student/admissions/research/HB588-Report12.pdf	22-23

UT Austin, *Implementation and Results of the Texas Automatic Admissions Law*, Dec. 23, 2010, available at <http://www.utexas.edu/student/admissions/research/HB588-Report13.pdf>.....12, 14, 21, 23

Frank H. Wu, *Yellow: Race in America Beyond Black and White* (2003) 27

Min Zhou & Carl Bankston, *Straddling Two Social Worlds: The Experience of Vietnamese Refugee Children in the United States*, Urban Diversity Series No. 111 (2000), available at <http://www.eric.ed.gov/PDFS/ED439180.pdf>... 29

INTEREST OF THE AMICI CURIAE¹

The Asian American Legal Defense and Education Fund (“AALDEF”), 18 Asian American and Pacific Islander education and youth-serving organizations, and 52 higher education faculty and officials (listed in full in the Appendix) submit this brief as amici curiae in support of Respondents in this case. Amici comprise a broad range of organizations and individuals working on issues affecting Asian Americans and Pacific Islanders in kindergarten through 12th grade and higher education.

AALDEF, headquartered in New York City and founded in 1974, is a national organization that protects and promotes the civil rights of Asian Americans. By combining litigation, advocacy, education, and organizing, AALDEF’s Educational Equity Program promotes the rights of Asian American and Pacific Islander students in K-12 and higher education. AALDEF has an interest in this litigation because its work with community-based youth advocates across the country reveals that

¹ In accordance with Supreme Court Rule 37.3(a), all parties have consented to the filing of amicus briefs, and copies of the letters of general consent have been filed with the Clerk. Pursuant to Supreme Court Rule 37.6, counsel for amici state that this brief was not authored, in whole or in part, by counsel to a party, and no monetary contribution to the preparation or submission of this brief was made by any person or entity other than amici or their counsel.

Asian American and Pacific Islander students benefit from individualized race-conscious admissions policies as well as from diverse educational settings.

Two amici are organizations with the express purpose of supporting Asian American and Pacific Islander staff and students at the University of Texas at Austin (“UT”). The Asian/Asian American Faculty and Staff Association aims to unite Asian and Asian American faculty and staff at UT and promotes networking and support for equal opportunity, growth, and mutual benefit among its constituents. The Asian Desi Pacific Islander American Collective is a student organization dedicated to empowering Asian American and Pacific Islander students at UT.

Several other amici are professional associations dedicated to supporting Asian American and Pacific Islander faculty and staff at institutions of higher education nationwide. These amici’s members and participants include over 1000 Asian American and Pacific Islander higher education professionals with firsthand knowledge of the benefits of diversity at their places of employment.

Other amici are nonprofit organizations that advocate on behalf of or provide social services to Asian American and Pacific Islander high school-aged youth across the United States. Many of these youth-serving organizations are members of the National Asian American Education Advocates Network, a K-12 education advocacy consortium.

These amici have a unique understanding of the needs and experiences of underserved Asian American and Pacific Islander youth who are preparing for college.

Finally, many undersigned amici are individual faculty members and officials at institutions of higher education. Ten are employed at UT itself. A number of these amici are education, legal, and social science scholars whose work examines the diverse educational experiences of Asian American and Pacific Islander communities. Many have taught in higher education and produced scholarship about the impact of educational admissions policies on Asian American and Pacific Islander students.

Based on these collective experiences, amici are well qualified to answer a key question before the Court: how narrowly-tailored, individualized, race-conscious admissions policies impact Asian American and Pacific Islander students in higher education.

SUMMARY OF THE ARGUMENT

The admission of students with a “broad[] array of qualifications and characteristics” advances the compelling interest of colleges and universities in attaining a diverse student body and the educational benefits that follow. *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 315 (1978) (opinion of Powell, J.)). By considering the achievements of undergraduate applicants in the context of the attributes and obstacles that have influenced them,

institutions like UT not only enrich academic discourse and classroom learning, but also open new pathways for success.

Racial and ethnic origin is but “one modest factor among many others” considered in the larger achievement matrix that UT uses in its individualized review of applicants who are not entitled to automatic admission under Texas’s Top Ten Percent Law (“Top 10% Law”). *See Grutter*, 539 U.S. at 393 (Kennedy, J., dissenting). It provides an important texture to an applicant’s profile without predominating over other defining qualities and factors. Asian Americans and Pacific Islanders—a unique cross-section of identities and experiences that spans a range of comparative privilege and disadvantage—benefit from this individualized approach to admissions, as do African Americans, Latinos, and Whites.

Petitioner and some of the amici who support her position erroneously assert that African Americans and Latinos are the only beneficiaries of UT’s admissions policy. From this faulty premise, they incorrectly contend that UT has expanded admissions opportunities for African Americans and Latinos at the expense of Asian Americans and Whites.

In reality, a narrowly tailored, *Grutter*-compliant admissions program like UT’s strongly benefits the Asian American and Pacific Islander community. UT’s individualized review allows for the consideration of educational inequities faced by

students from certain subgroups that are frequently hidden by the aggregation of data into a single “Asian” category. Students belonging to these subgroups in Texas and elsewhere have faced pervasive social and economic disadvantages akin to that experienced by many African Americans and Latinos, educational attainment levels that are among the lowest of all ethnic and racial groups, and even racial intimidation and harassment. Many of their parents (if not the students themselves) made a difficult transition to the United States as refugees, and others come from communities that have been subjected to colonization on their own native land. By considering the role that these students’ racial and ethnic origin have had on their experiences and achievements, UT’s admissions process encourages racial disaggregation and individualized treatment and thwarts the harmful “model minority” myth that masks tremendous diversity within the Asian American and Pacific Islander community.

Several key arguments presented by Petitioner and her amici rely on factual distortions and the improper treatment of Asian Americans as a monolithic group. First, they assert that UT has deemed Asian Americans to be “overrepresented” on its campus. That claim is completely untrue. Second, they assert that UT has limited admission of Asian American students in order to match the racial demographics of Texas. Since UT adopted its race-conscious policy, however, the percentage of Asian American students enrolled at UT has

exceeded the percentage of Asian Americans in Texas by more than a factor of five.

Third, Petitioner and her amici attempt to show that UT has engaged in discrimination against Asian American applicants, but their analyses are hopelessly riddled with legal and methodological errors. They conflate distinct concepts—affirmative action and negative action—producing a muddled and highly misleading picture of admissions at UT and other selective universities. In reality, UT utilizes affirmative action to take into account the race of applicants on an individualized basis and enroll students from diverse backgrounds. This is entirely distinct from negative action, whereby a university discriminates against a racial group in order to suppress their levels of enrollment. The undersigned amici would vigorously oppose any form of negative action, formal or informal, affecting Asian Americans or any other group—but there is simply no evidence of it at UT. Petitioner’s amici also attempt to prove discrimination based on differential standardized test scores, but they ignore the strong consensus of social scientists that such differences reflect disparities already present in the applicant pool and, indeed, have existed for many years in UT’s Top 10% plan and other race-neutral admission programs.

In the end, despite claims by Petitioner and her amici that Asian Americans and Pacific Islanders are poised to reclaim opportunities lost to diversity initiatives should this Court rule against UT’s admissions program, the overwhelming evidence

indicates the opposite. Many Asian applicants in communities struggling with low educational attainment will suffer if admissions programs such as UT's are dismantled.

Equally important, Asian Americans and Pacific Islanders—along with students of other races—will not experience the kind of diversity that enriches their education and prepares them for careers in an increasingly intercultural and global workplace. Petitioner's challenge endangers “[b]road access to the education that leads to leadership roles [and that is] essential to public confidence in the fairness and integrity of public institutions.” Consolidated Brief of Lt. Gen. Julius W. Becton, Jr. et al. as *Amici Curiae* in Support of Respondents at 9, *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) (No. 02-241).

For these reasons and those described below, this Court should uphold UT's admissions policy and the rulings of the courts below.

ARGUMENT

I. UT'S ADMISSION PROCESS DOES NOT DISCRIMINATE AGAINST OR DISADVANTAGE ASIAN AMERICAN APPLICANTS.

The record below establishes that in its effort to obtain the educational benefits that result from student diversity, UT uses race within the context of “a highly individualized, holistic review” that gives “serious consideration to all the ways an applicant might contribute to a diverse educational

environment.” *See Grutter*, 539 U.S. at 337. As Petitioner has admitted, UT has not established a “goal, target, or other quantitative objective” for the admission of any particular group. *See* JA 131a. Instead, it allows applicants of all races, including Asian Americans and Pacific Islanders, to benefit from the consideration of their race in the distinctive context of their background and experience. As discussed below, the arguments by Petitioner and her amici that Asian Americans are somehow victimized by this policy of individualized review are entirely unfounded in law and fact.²

A. UT Does Not Treat Asian Americans as Overrepresented.

Petitioner and her supporting amici repeatedly claim that UT has deemed Asian Americans to be “overrepresented” in its student population. *See* Pet. Br. at 7, 19, 28 n. 7; *see also* Brief for the Asian American Legal Foundation and the Judicial Education Project as Amici Curiae in Support of Petitioners (“AALF Br.”) at 2, 9, 12-13 n.7, 22. From this premise alone, Fisher concludes that UT “employs race in admissions decisions to the detriment of Asian Americans.” Pet. Br. at 7. Amici AALF similarly asserts that “[t]he very fact that UT currently deems Asian Americans overrepresented

² Petitioner and her amici do not allege particular harm to Pacific Islanders resulting from UT’s individualized admissions process.

. . . shows that the use of race in admissions will aim to reduce the representation of Asian Americans while increasing the representation of Hispanics and African Americans.” AALF Br. at 2.

Such a claim – involving the numerical balancing of racial groups by a university bureaucracy and the imposition of a glass ceiling on a group deemed to have performed too well – would be deeply troubling, if true. It is not.

There is no support for Petitioner’s claims in the record. She cites UT’s Proposal to Consider Race and Ethnicity in Admissions, dated June 25, 2004, *see* Pet. Br. at 7 (citing SJA 25a), but nowhere in this document is the word “overrepresented” used. Instead, UT described African American and Hispanic students as underrepresented based on their overall enrollment and classroom presence at the university. UT did not find, and there is no basis for concluding, that Asian Americans or any other group has been deemed overrepresented.

Petitioner also refers to the District Court opinion in this case. *See* Pet. Br. at 19 (citing App. 154a). There, in finding that under *Grutter*, UT could consider Texas population data in determining “which minority groups qualify as underrepresented and which ones do not,” Judge Sparks observed that “compared to their percentage of Texas’ population as a whole, Hispanics remain underrepresented” while Asian Americans “are largely *over* represented compared to their percentage of Texas’ population.” *See* App. 154a-155a (emphasis in original). The

court's empirical observation about the differences between the UT student population and Texas demographics does not support Petitioner's claim about UT's admission policies. To the contrary, as the District Court observed, the fact that the percentage of Asian American students at UT is five times larger than the percentage of Asian Americans in Texas is compelling evidence that no ceiling has been imposed. *See* App. 156a, n.11. In other words, as discussed in Section II.B, *infra*, the data only negate Petitioner's claim that UT has limited Asian American admissions to mirror Texas demography.

For this reason, admission policies at UT cannot reasonably be compared to the abhorrent quotas and restrictive policies imposed against Jews throughout the past century. *See* AALF Br. at 18-19; Brief Amicus Curiae of the Louis D. Brandeis Center for Human Rights Under Law, The 80-20 National Asian-American Educational Foundation, et al., in Support of Petitioner ("80-20 Br.") at 20-34. Without question, there is a disturbing history of discriminatory admission policies, particularly at elite private universities, affecting Jews, African Americans, Asian Americans, women, and others. *See* Jerome Karabel, *The Chosen: The Hidden History of Admission and Exclusion at Harvard, Yale, and Princeton* (2005). Nor do amici deny the possibility that some institutions may apply exclusionary policies against minority applicants, including Asian Americans, today. As discussed below, amici would vigorously oppose any cap, quota, or other kind of negative action, formal or informal,

against any racial group. Nevertheless, there is no evidence that UT has suppressed Asian American admissions in any manner. Indeed, all evidence is to the contrary.

B. UT Has Not Limited Asian American Admissions to Match the Racial Demographics of Texas.

Petitioner and her supporting amici claim that UT has limited admission of Asian American students to “mirror the demographics of Texas.” See Pet. Br. at 19; *see also id.* at 28 (referring to “UT’s differing treatment of Asian Americans and other minorities based on each group’s proportion of Texas’s population”); AALF Br. at 2 (asserting that “UT currently deems Asian Americans overrepresented and seeks to reduce demographic differences between its student population and the State as whole”). This claim is also baseless.

A simple comparison of the numbers of Asian Americans that UT admitted and enrolled and the percentage of Asian Americans in Texas shows that UT has not tried to match the two. The Asian American population in Texas has rapidly expanded over the last 30 years, reaching 3.8% of the state population in 2010.³ Nevertheless, Asian American

³ In 1980, 120,000 Asian Americans lived in Texas, making up only 0.8% of the overall state population. See Campbell Gibson & Kay Jung, U.S. Census Bureau, *Historical Census Statistics on Population Totals by Race, 1790 to 1990, and by Hispanic Origin, 1970 to 1990 for the United States, Regions, Divisions*

enrollment at UT has increased at an even faster rate. From 1986 to 2001, enrollment of Asian Americans at UT increased from 6% to 19%. See UT Austin, *1995-1996 Statistical Handbook—Students* 21; UT Austin, *2001-2002 Statistical Handbook—Students* at 25.⁴ From 1999 to 2010, enrollment of Asian Americans from Texas remained in the range of 17% to 20%. See SJA 157a; UT Austin, *Implementation and Results of the Texas Automatic Admissions Law*, Dec. 23, 2010 (“2010 Top 10% Report”) at 8. The latter period encompasses both six years of race-neutral admissions (following *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996)) and six years of race-conscious admissions (following

and States, tbl.58 (2002). By 1990, that number had grown to 319,000, or 1.9% of the state population, *id.*, and by 2000 it reached 562,000 or 2.8% of the overall state population, see U.S. Census Bureau, *Texas Profile of General Demographic Characteristics: 2000*. From 2000 to 2010, the Asian American population in Texas expanded to 965,000 or 3.8% of the state population. See U.S. Census Bureau, *Texas Profile of General Demographic Characteristics: 2010*. This 72% increase outpaced even the Hispanic or Latino population, which increased by 42% from 6.7 million to 9.5 million.

⁴ Admissions numbers reflect a similar trend. From 1990 to 2009, the number of Asian American applicants whom UT admitted rose from 10% to 18% of all admitted students. See UT Austin, *1990-1991 Statistical Handbook—Students* 23; UT Austin, *2009-2010 Statistical Handbook—Students* 24. UT’s Statistical Handbooks consolidate data on Asian American admittees from within and outside Texas. UT’s Top 10% Reports distinguish between these groups.

Grutter). If the “core purpose” of the current policy has in fact been “to decrease or limit” the percentage of Asian Americans students to match “the racial composition of the State,” see AALF Br. at 7-8, UT has done, as the District Court observed, “a particularly bad job of it,” App. 156a, n.11.

Acknowledging that “the total number and percentage of Asian Americans have in fact increased at UT in the last ten years,” amicus AALF weakly posits that UT’s “efforts at racial balancing” have been “less effective than it would like.” AALF Br. at 12-13 n.7. But there is no basis in the record to suggest that UT has sought this goal. To the contrary, the record shows that the consideration of race in UT’s admissions process can positively impact applicants of any race, and the university makes no effort to monitor the number of applicants admitted in any particular group to ensure that a particular threshold is met. See JA 206a (Ishop Dep.); JA 284a-285a (Walker Dep.); JA 398a.

AALF then speculates that “many Asian Americans in Texas go to public school and may benefit from the Top Ten program,” which would “mean only that the racial preferences and discrimination applied to students who are not in the top 10% of their classes must be even more aggressive in order to supplement or mitigate the effects of that program.” AALF Br. at 12-13 n.7. AALF cites no evidence in support of this argument. In reality, the data show that from 2004 to 2010 a higher percentage of Asian American students admitted by UT have been admitted through

individualized (non-Top 10%) admissions than the corresponding percentage of Hispanic admittees. *See* SJA 158a tbl.2a; 2010 Top 10% Report at 9 tbl.2a.⁵ These numbers confirm that rather than attempting to match the racial composition of its student body with Texas demographics, UT has admitted students outside the Top 10% plan based on an individualized review of each applicant’s performance and personal circumstances.

C. There Is No Evidence of Negative Action Against Asian Americans at UT.

1. Narrowly tailored affirmative action programs do not constitute negative action against Asian American applicants.

Following on their inaccurate claims that UT deems Asian Americans to be “overrepresented” in its student body and treats them differently “based solely on demographics,” Petitioner and her amici argue that UT engages in “overt” discrimination “against Asian-American applicants.” *See* Fisher Br. at 28, 55; *see also* AALF Br. at 2, 9, 12-13 n.7, 22. Again, these arguments are entirely unsupported by evidence in the record or empirical data.

⁵ In 2008, the year for which Fisher applied for admission, 16% of the total number of Asian Americans admitted to UT from Texas high schools were admitted through individualized review, as opposed to 13% of Hispanic students. SJA 158a tbl.2a.

Furthermore, they conflate two distinct concepts—affirmative action and negative action—producing a muddled and highly misleading picture of admissions at UT and other selective universities.

Under this Court's holdings in *Gratz v. Bollinger*, 539 U.S. 244 (2003), and *Grutter*, universities may pursue educational diversity (of which racial diversity is one element) by taking into account the race of applicants in a narrowly tailored manner to enroll students from diverse backgrounds. An individualized affirmative action program is completely distinct from negative action, which involves discrimination by a university to suppress enrollment of a particular racial group, such as Asian Americans. See William C. Kidder, *Situating Asian Pacific Americans in the Law School Affirmative Action Debate: Empirical Facts About Thernstrom's Rhetorical Acts*, 7 Asian L.J. 29, 33, 60 (2000); Jerry Kang, *Negative Action Against Asian Americans: The Internal Instability of Dworkin's Defense of Affirmative Action*, 31 Harv. C.R.-C.L. L. Rev. 1, 3-4 (1996). To allege racial discrimination by comparing admissions for Asian Americans exclusively with other minorities—as Petitioner and her amici do—is to fall victim to a causation fallacy assuming “a finite number of minorities that can be admitted [to a university and] that spots for certain minorities must come at the expense of other minorities.” See Adrian Liu, *Affirmative Action & Negative Action: How Jian Li's Case Can Benefit Asian Americans*, 13 Mich. J. Race & L. 391, 421 (2008). In other words, it assumes that college

admissions is a “zero sum” game where minorities compete exclusively with one another for seats, and not with Whites as well.⁶

In reality, all applicants to UT and other selective institutions with a race-conscious admissions policy complying with *Gratz* and *Grutter* compete in a single pool, regardless of race. Even though racial quotas have been illegal since this Court’s ruling in *Bakke*, Petitioner’s amici treat collegiate admissions as if a quota for Whites keeps their numbers constant and caps the total number of minorities. In fact, many of the spots theoretically made available by ending affirmative action would go to Whites, who comprise a much larger percentage of the population than Asians. See, e.g., Ben Backes, *Do Affirmative Action Bans Lower Minority College Enrollment and Attainment? Evidence from Statewide Bans*, 47 J. Hum. Resources 435, 448-50 (2012). This fact breaks the causal link that Petitioner’s amici repeatedly claim between race-conscious admissions and alleged discrimination against Asians.⁷ Therefore, any

⁶ It also ignores the reality that some universities (but not UT) give preference in admission to children of alumni, a policy that disproportionately benefits White applicants. See *Affirmative Action for the Rich: Legacy Preferences in College Admission* 127 (Richard D. Kahlenberg ed. 2010).

⁷ Petitioner’s amici rely heavily on researcher Thomas Espenshade’s work to show how differences between SAT scores of Asian Americans and other groups demonstrate a “penalty” on Asians. See AALF Br. at 9-10; 80-20 Br. at 5-6. Espenshade’s estimates, however, pertain to 1997 data for

suppression in the admission of Asian Americans

three elite private universities and are therefore inapplicable to this case. Furthermore, while it is true that Espenshade sought to “quantify the effects of race-conscious admissions policies,” see AALF Br. at 9, amici do not make clear that “race-conscious admissions” for Espenshade include not only affirmative action but also negative action against Asian Americans. In other words, when Espenshade suggests that Asian Americans would benefit from the elimination of race-conscious admissions, he includes in his analysis the removal of a 50-SAT-point advantage that White applicants received over Asian Americans (*i.e.*, negative action). See Thomas J. Espenshade & Chang Y. Chung, *The Opportunity Cost of Admission Preferences at Elite Universities*, 86 Soc. Sci. Q. 293, 298 (2005) (assessing removal of “disadvantage in admission” experienced by Asian Americans as well as preferences for other groups); *id.* at 301 (referring to “what some might term ‘disaffirmative action’ for Asians”). The same data in Espenshade’s more recent book confirm that in his model, in terms of the overall impact on Asian American admission offers, ending negative action was estimated to have an effect more than five times greater than the effect of ending affirmative action for African American and Latino students. See Thomas J. Espenshade & Alexandria Walton Radford, *No Longer Separate, Not Yet Equal: Race and Class in Elite College Admission and Campus Life* 334 tbl.9.1, App. tbl.C.9.1 (2009). Other academics have challenged Espenshade’s work as misleading or “internally contradictory” because it “confounds the role of negative action . . . with the role of affirmative action,” and have described his conclusions as “untenable” because they assume that “the role of negative action is truly de minimis.” See, *e.g.*, William C. Kidder, *Negative Action Versus Affirmative Action: Asian Pacific Americans Are Still Caught in the Crossfire*, 11 Mich. J. Race & L. 605, 614-15 (2006).

must be caused by something other than race-conscious affirmative action. This is where negative action comes in.

Negative action creates a de facto cap on admissions for Asian American students. It can be implemented by inflexible, numerical quotas or by an unquantified admissions calculation. Kang, *supra*, at 3-4. The analysis of whether a university is engaging in negative action against Asian American students must be divorced from any inquiry about the legality of a race-conscious admissions policy. Negative action against Asian American (or other minority) applicants may be real, but it is a phenomenon unrelated to affirmative action. The existence of a narrowly tailored, race-conscious admissions plan has no bearing on whether a university engages in negative action.

2. SAT score data at UT do not show negative action against Asian Americans.

Claims about differential standardized test scores by race are often highly misleading, if not demonstrably false. Differences in average scores among racial or ethnic groups at institutions such as UT reflect the racial/ethnic test score disparities already present in the applicant pool, resulting from socioeconomic differences, educational practices, and other environmental factors. See Claude S. Fischer et al., *Inequality by Design: Cracking the Bell Curve Myth* 46 (1996); William G. Bowen & Derek Bok, *The Shape of the River: Long-Term Consequences of*

Considering Race in College and University Admissions 16 (2d ed. 2000). They are to be expected regardless of whether race neutral or race conscious criteria are used. See, e.g., Maria Veronica Santelices & Mark Wilson, *Unfair Treatment?: The Case of Freedle, the SAT, and the Standardization Approach to Differential Item Functioning*, 80 Harv. Educ. Rev. 106 (2010); William T. Dickens & Thomas J. Kane, *Racial Test Score Differences as Evidence of Reverse Discrimination: Less Than Meets the Eye*, 38 Indus. Rel. 331 (1999).⁸ Substantial racial/ethnic SAT score averages on par with UT's individualized admissions pool are found nationwide, including at other leading universities like UC Berkeley and UCLA that use race-neutral admissions. William C. Kidder, *Misshaping the River: Proposition 209 and Lessons for the Fisher Case* 29-36 (2012). The College Board, which created the SAT, has itself acknowledged this phenomenon. See Jennifer L. Kobrin et al., *A Historical View of Subgroup Performance Differences on the SAT Reasoning Test* 19 (The College Board 2007) (finding that score gaps between different racial groups have "remained generally consistent" for 20 years).

⁸ These disparities would exist even in the extreme (but counterfactual) case of a university admitting students in rank order based *solely* on their SAT scores. See Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 Mich. L. Rev. 1045, 1064 (2002).

This is as true at UT as elsewhere. Even though Petitioner's amici repeatedly suggest that Asian American applicants must achieve higher SAT scores in order to gain admission to UT, *see, e.g.*, AALF Br. at 9-12, 30, only two cite actual UT score data. Amicus 80-20 observes that for the class admitted to start in the fall and summer of 2009 (the year after Fisher applied for admission), enrolled Asian American students admitted through individualized admissions had a mean SAT score of 1991 (on a scale of 2400), compared to mean scores for White (1914), Hispanic (1794), and African American (1524) enrollees. 80-20 Br. at 6. Amici Richard Sander and Stuart Taylor cite the same data. *See* Brief Amicus Curiae for Richard Sander and Stuart Taylor, Jr. in Support of Neither Party at 3-4 & n.4. Although these amici attribute these differences to UT's race-conscious admissions policy, their claim is fatally undermined by the fact that similar variations in SAT scores existed throughout UT's *race-neutral* admissions between 1997 and 2004. *See* SJA 55a-62a. For example, in 2004, the year before the current race-conscious policy took effect, the mean SAT score for enrolled Asian American students admitted through individualized review was (on a scale of 1600) 37 points higher than Whites, 115 points higher than Hispanics, and 188 points higher than African Americans in the same pool. *See id.* at 62a. Similar gaps have existed and continue to exist in SAT scores for students admitted under the race-neutral Top 10% plan. For example, in 2009 Top 10%-admitted Asian American enrollees

had a mean SAT score of 1874, compared to 1864 for Whites, 1628 for Hispanics, and 1584 for African Americans. *See* 2010 Top 10% Report at 14.⁹ It is spurious for amici to attack UT's admissions policy based on a longstanding phenomenon that has existed under race-neutral and race-conscious policies alike.

In addition, Petitioner's amici treat SAT scores as the ultimate and indeed only indicator of merit in educational admissions. In fact, standardized test scores are only one among many factors considered in UT's individualized review process, *see* Section II.D, *infra*, and their predictive power has been called into question by numerous studies, *see, e.g.*, Sunny X. Niu & Marta Tienda, *Test Scores, Class Rank, and College Performance: Lessons for Broadening Access and Promoting Success*, *Rassegna Italiana di Sociologia* (forthcoming) (manuscript at 2, 13). Significantly, students admitted under the Top 10% plan achieve on average better grade point averages in their first year at UT than non-Top 10% students, even though non-Top 10% students have on average higher SAT scores. *See* JA 343a-344a; SJA 49a-53a. SAT scores can also be boosted by test-preparation courses, to the advantage of those with financial means rather than merit. *See* Brief of

⁹ Similar score gaps can be found in reported ACT scores. 2010 Top 10% Report at 15. Beginning in 2009, UT stopped concordancing applicants' ACT scores into equivalent SAT scores due to changes in the structures of both tests. *Id.* at 3.

the Asian American Center for Advancing Justice et al. as Amici Curiae in Support of Respondents (“AAJC Br.”) at § III.C (citing Jay Rosner, *Disparate Outcomes by Design: University Admissions Test*, 12 Berkeley La Raza L.J. 377, 383-84 (2001); Sigal Alon & Marta Tienda, *Diversity, Opportunity, and the Shifting Meritocracy in Higher Education*, 72 Am. Soc. Rev. 487, 490-91 (2007)). For these reasons, while a statistically significant difference in SAT scores between Asian American and White admittees might be one indicator of negative action, it would be far from sufficient to establish a prima facie case of discrimination.

Petitioner’s amici make no effort to analyze differences between the SAT scores of Asian and White students at UT.¹⁰ An examination of those scores does not show that negative action is afoot. First, mean SAT scores of Whites and Asians at UT admitted through individualized admissions (both before and after implementation of the current policy) reflect only small differences.¹¹ Second, an

¹⁰ As discussed in Section II, *infra*, Asian Americans are a highly diverse community with a broad range of religious and cultural differences, immigration histories, and socioeconomic experiences. This diversity is reflected in substantial SAT and educational attainment disparities among different Asian American subgroups.

¹¹ The score differential between 1996 and 2008 fluctuated within 6 and 46 points, which is minimal in light of the range of possible scores. See SJA 50a, 52a; UT Austin, *Implementation*

analysis of (i) SAT scores by major and (ii) concentration of racial groups across majors reveals a likely nondiscriminatory reason for these differences. UT requires Texas residents to apply to undergraduate programs by selecting a first-choice and second-choice major.¹² Based on these priorities, UT admits students generally into one of six colleges (Liberal Arts, Social Work, Nursing, Business, Communications and Geosciences) or into a specific major at three other colleges (Natural Sciences, Education, and Engineering). Asian Americans at UT are more concentrated in those schools with the highest mean SAT scores at UT (Business, Engineering, and Natural Sciences) and have the lowest concentration in schools with the lowest SAT scores (Liberal Arts, Fine Arts, and Education). See SJA 54a-63a; 166a; 2010 Top 10% Report at 14-15. By contrast, Whites have larger concentrations in schools with the lowest SAT scores. Thus, along with the complex nature of individualized review, the various environmental factors, and issues with the predictive power of SAT scores, students' selection of majors explains in part the minor

and Results of the Texas Automatic Admissions Law, Oct. 29, 2009, at 12 tbl.6a, 13 tbl.6c.

¹² Admissions for Texas residents are handled centrally by UT for eleven of its undergraduate schools. JA 408a. The School of Architecture and College of Fine Arts make their own admissions decisions. JA 409a.

difference in scores between Asian American and White enrollees at UT.¹³

Petitioner’s amici have not meaningfully analyzed these data. Nor do they address the longstanding SAT score disparities among admittees under UT’s race-neutral Top 10% plan, which, as discussed above, indicate the impact of factors independent of race-conscious admissions. Nor are they able to correlate higher standardized test scores with better academic performance at UT. Instead, they seek to manipulate the causation fallacy to “triangulate” Asians as unwitting victims of UT’s individualized admissions process.¹⁴ The Court should reject this unfounded effort.

¹³ Consistent with UT’s experience, national studies show that SAT scores for students who intend to study engineering and natural sciences tend to be at the high end of standardized test score distributions. See College Board, *College-Bound Seniors Total Group Profile Report* 13 (July 2010).

¹⁴ See Claire Jean Kim, *The Racial Triangulation of Asian Americans*, 27 *Pol. & Soc’y* 105, 122-23 (1999) (observing that opponents of affirmative action in 1980s attempted to shift debate “from the real issue at hand—whether or not several leading universities imposed racial quotas on Asian American students to preserve the Whiteness of their student bodies—to the false issue of whether affirmative action programs designed to benefit Blacks and Latinos unfairly discriminated against Asian Americans”).

II. UT'S POLICY OF INDIVIDUALIZED REVIEW IS BENEFICIAL TO ASIAN AMERICANS AND PACIFIC ISLANDERS.

An overriding theme of Petitioner's and her amici's briefs is that UT's admissions process for non-Top 10% applicants is discriminatory because it uses race to benefit Latinos and African Americans, but not Asian Americans. *See, e.g.*, Pet. Br. at 7, 46; 80-20 Br. at 3; Brief of the Texas Association of Scholars as Amicus Curiae in Support of the Petitioner at 7. In fact, UT's policy of individualized review strongly benefits Asian Americans and Pacific Islanders by allowing for the consideration of economic and educational inequities faced by students from certain subgroups—differences that are often hidden by the aggregation of data into a single “Asian” category and the promulgation of the pervasive and harmful “model minority” myth.

A. The “Model Minority” Myth Masks Tremendous Diversity Within the Asian American and Pacific Islander Community.

The treatment of any racial population as monolithic is problematic, and falls prey to racial stereotyping. Asian Americans, as amicus AALF correctly observes, are “a highly heterogeneous group coming from numerous countries and widely varied ethnic, cultural, intellectual, economic, and political backgrounds.” AALF Br. at 28. Because Asian Americans as well as Pacific Islanders, with whom Asians have historically been aggregated into

a combined racial category, have such high levels of diversity, including a wide array of languages and religious and cultural traditions, it is impossible to generalize a “typical” Asian American experience. Robert T. Teranishi, *Asians In the Ivory Tower: Dilemmas of Racial Inequality in American Higher Education* 26 (2010). As discussed below, narrowly tailored, individualized admissions programs like UT’s are well suited to take into account the heterogeneity of the Asian American and Pacific Islander community as they pursue the substantial educational benefits of student diversity. *See, e.g., Smith v. University of Washington Law School*, 392 F.3d 367, 378 (9th Cir. 2004) (upholding admissions program that recognized “different cultures, backgrounds, and languages” of “applicants whose families or who themselves originated from the Philippines, Viet Nam, Cambodia, Taiwan and the People’s Republic of China”).

In particular, the “model minority” myth, which correlates Asian American and Pacific Islander identity with academic and professional achievement and mobility, fails to capture the complex reality of their experience. This “monolithic image of success” inappropriately “lumps all Asian Americans together, implying that the needs of recent Southeast Asian refugees can be ignored because third- or fourth-generation Japanese or Chinese Americans have been relatively successful.” Natsu Taylor Saito, *Model Minority, Yellow Peril: Functions of “Foreignness” in the Construction of Asian American Legal Identity*, 4 *Asian L.J.* 71, 90

(1997). The stereotype also downplays what AALF rightly describes as “the long and ugly history of racial discrimination against Asian Americans,” see AALF Br. at 13-14, and contributes to the persistence of discrimination today, see Frank H. Wu, *Yellow: Race in America Beyond Black and White* 49-77 (2003); Note, *Racial Violence Against Asian Americans*, 106 Harv. L. Rev. 1926, 1930-39 (1993).

B. The Different Immigration Histories of Asian American and Pacific Islander Subgroups Have Shaped Their Socioeconomic Experiences in the United States.

The history of U.S. policy on Asian immigration has vacillated from openness in the late 1800’s—when the country needed the pioneering efforts of Asian immigrants—to exclusion during the internment camps of World War II and the anti-Asian immigration acts which largely closed U.S. borders to Asian immigration until the 1950’s. See Angelo N. Ancheta, *Race, Rights, and the Asian American Experience* 21-27 (1998); see also Charles J. McClain, *Tortuous Path, Elusive Goal: The Asian Quest for American Citizenship*, 2 Asian L.J. 33 (1995) (discussing challenges by Asian immigrants in nineteenth and twentieth centuries to denial of American citizenship). Since then, differences in the migration paths taken by Asian American and Pacific Islander subgroups have led to substantial economic and educational disparities in the Asian American community today.

Some Asian immigrants voluntarily traveled to the United States for better opportunities, were prepared to leave their homelands, and had connections here to help get them on their feet. Many were admitted to the United States under immigration policies giving employment preference to professionals “holding advanced degrees” or who have “exceptional ability.” *See, e.g.*, Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978. Large percentages of immigrants from countries like Singapore, Korea, India, China, Japan, and Taiwan arrived as the result of employment preferences, and “[t]he capital that these individuals possess is often correlated with educational and social mobility in the United States.” Teranishi, *supra*, at 31.¹⁵

By contrast, the cultural capital of refugees who entered in the “surge of immigration from Southeast Asian countries . . . starting in 1975 under refugee and asylee status” has been profoundly different. *Id.* More than one million Vietnamese, Cambodian, Hmong, Mien, and Laotians arrived from 1975 to 1990 after the end of the Vietnam War, and nearly all were refugees. Most started their new lives in

¹⁵ In 2010, the United States admitted 81,331 immigrants from Asia under the employment-based preference. *See* Department of Homeland Security, *Yearbook of Immigration Statistics: 2010* at 31. Thirty six percent of the admittees were from India, 20% were from China, and 14% were from South Korea. In contrast, only 253 individuals (0.3%) were admitted under the employment-based preference from Vietnam.

America with few material goods, their remaining family members scattered or lost, and often traumatized by war, their escape, and often years in refugee camps. They were forced to navigate a country and social and educational systems unfamiliar to them and for which they were unprepared, hindered by a lack of English fluency and inherent economic and social disadvantages.

Native Hawaiians, a subgroup of Pacific Islanders, and Pacific Islanders in U.S. territories such as Guam and Samoa are not immigrants at all, and like Native Americans have been subjected to colonization and marginalization on their own native land. Their post-colonial histories and relative lack of agency have made these communities the most misrepresented of any group of Asian Americans and Pacific Islanders by the model minority myth. *See Id.* at 34.

Today, many Southeast Asian and Pacific Islander communities remain economically disadvantaged and struggle with long-term poverty, language and literacy issues as well as post-traumatic stress disorder. *See, e.g.,* Min Zhou & Carl Bankston, *Straddling Two Social Worlds: The Experience of Vietnamese Refugee Children in the United States*, Urban Diversity Series No. 111, 20-22 (2000). In 2010, while other ethnic groups had poverty rates at or below the national average for Asian American of 12.5%, rates for Hmong (27.5%), Cambodians (21.9%), Laotians (16.0%) and Vietnamese (15.6%) were substantially higher. U.S. Census Bureau, *2010 American Community Survey*

1-Year Estimates (“ACS 1-Year Estimates”); *see also* Teranishi, *supra*, at 35. Unemployment rates for Hmong (9.9%), Laotians (8.8%), and Cambodians (9.4%) also exceeded the average for all Asian Americans (5.6%). Poverty (18.8%) and unemployment (9.8%) rates for Native Hawaiians and Pacific Islanders are similarly high. ACS 1-Year Estimates.

These socioeconomic factors are accompanied by poorer educational outcomes. Southeast Asians lag behind other Asian American subgroups in educational attainment. In 2010, over 30% of Hmong, Cambodian, Vietnamese, and Laotian individuals over the age of 25 did not have a high school degree, compared with an average of 15% for all Asian Americans. *See id.* Predictably, the road to higher education only gets tougher for Southeast Asians, with attainment rates for bachelor’s degrees at about 11% for groups other than Vietnamese, who are just above 18%. *Id.*¹⁶ The high degree of variation in educational attainment and academic preparation within the Asian American and Pacific Islander community is demonstrated by the fact that their test scores “actually have the widest standard deviation for any racial group.” NYU CARE & The College Board, *Asian Americans and Pacific*

¹⁶ While only 12.6% of Native Hawaiians and Pacific Islanders did not have a high school degree, the percentage who earned a bachelor’s degree fell to 11.4%, compared to 29.6% of all Asian Americans. ACS 1-Year Estimates.

Islanders: Facts, Not Fiction: Setting the Record Straight 10-12 (2008) (discussing how variation in test scores reflects “differences in social and cultural capital among the population”); *see also* Valerie Ooka Pang et al., *Asian American and Pacific Islander Students: Equity and the Achievement Gap*, 40 *Educ. Researcher* 378, 382 tbl.2 (2011) (establishing that Filipino, Lao, Cambodian, Native Hawaiian, Guamanian, Samoan, and Other Pacific Islanders perform less well than Whites and other Asian American ethnic groups on California Achievement Test); Coalition for Asian American Children and Families, *Hidden in Plain View: An Overview of the Needs of Asian American Students in the Public School System* 14-16 (2004).

C. Substantial Economic and Educational Disparities Exist Among Asian American Subgroups in Texas.

Consistent with national data, significant economic and educational disparities can be found among Asian American subgroups in Texas. According to the 2010 Census, the three largest Asian American ethnic groups in Texas are, in descending order, Indian, Vietnamese, and Chinese.¹⁷ Students in Texas communities with a high concentration of Indian and Chinese students

¹⁷ Native Hawaiians and Pacific Islanders make up 0.1% of the population in Texas. *See* U.S. Census Bureau, *Texas Profile of General Demographic Characteristics: 2010*.

tend to be more affluent and achieve higher SAT scores.¹⁸ For example, Coppell, an upper-middle class suburb that has benefited economically from development near the Dallas/Fort Worth International Airport, has one of the most distinguished school districts in the state. Fifty-seven percent of the Asian American population in the Coppell school district is Indian.¹⁹ Median

¹⁸ Even though the Texas Education Agency (“TEA”) does not report disaggregated data on Asian American subgroups, disparities can be assessed by comparing economic and educational data for census designated places with data on different Asian subgroup concentrations as surveyed by the U.S. Census Bureau. This analysis shows that as the proportion of Indian and Chinese students in the population increases, both average SAT scores for Asian students and the percentage of Asian students who test as “college ready” tend to increase and the percentage of Asian students deemed “economically disadvantaged” tends to decrease. (The TEA reports only students’ math and critical reading scores, even though UT also considers applicants’ writing scores in its admissions process.) These trends run inversely as the proportion of Vietnamese students increases: average SAT scores and the percentage of Asian students who test as “college ready” tend to decrease and the percentage of Asian students considered “economically disadvantaged” tends to increase. See U.S. Census Bureau, *2006-2010 American Community Survey 5-Year Estimates* (“ACS 5-Year Estimates”); Texas Education Agency, *2009-2010 Academic Excellence Indicator System Reports*; see also U.S. Census Bureau, *2008-2010 American Community Survey 3-Year Estimates*.

¹⁹ Approximately 12% of the Asian American population in Coppell ISD is Chinese, and 4% is Vietnamese. See ACS 5-Year Estimates

income in Coppell is \$101,510, and less than 10% of its students are deemed to be economically disadvantaged. The average SAT score for Asian American students in Coppell is 1213, and 79% of Asian students test as college ready.

By contrast, students in communities with higher Vietnamese populations tend to be more economically disadvantaged, achieve lower SAT scores, and are less prepared for college. For example, 54% of the Asian American population in the Arlington school district, another suburb of Dallas-Fort Worth, is Vietnamese.²⁰ Median income in this city is \$51,260, and 60% of its students are economically disadvantaged. The average SAT score for Asian American students in Arlington is 1056, and only 57% of Asian students test as college ready.

As discussed, the economic and educational disparities experienced by Vietnamese and other Southeast Asian communities in Texas reflect in large part their migration experiences. After leaving their homeland due to unrest or persecution and arriving with few economic resources, members of refugee communities have sometimes been met with hostility based on race or ethnic origin. In Texas, some Vietnamese refugees found opportunities in commercial shrimping along the Gulf coast.

²⁰ Approximately 10% of the Asian American population in Arlington ISD is Chinese, and 14% is Indian. *See* ACS 5-Year Estimates

Working long hours, these refugees began buying their own boats, only to face intimidation and harassment by armed White supremacists. See *Vietnamese Fishermen's Assoc. v. Knights of the Ku Klux Klan*, 518 F. Supp. 993, 1001-06 (S.D. Tex. 1981). Students growing up in these communities have faced unique challenges and have immeasurable potential to contribute to the diversity of the learning environment at UT.

D. Members of Disadvantaged Asian American and Pacific Islander Subgroups Benefit from UT's Individualized and Narrowly Tailored Admissions Process.

Petitioner argues that UT discriminates in favor of certain groups and against Asian Americans “by using race in admissions decisions to benefit the former but not the latter.” Pet. Br. at 46.²¹ This

²¹ Petitioner and her amici also suggest that UT's Top 10% plan is sufficient to enroll a critical mass of minorities on campus. See, e.g., Pet. Br. at 37-42. The effectiveness of such “percentage plans,” however, depends on a high level of de facto racial segregation in the underlying secondary school system. See Michelle Adams, *Isn't it Ironic? The Central Paradox at the Heart of “Percentage Plans”*, 62 Ohio St. L.J. 1729, 1733-1734 (2001). Amici question the wisdom of relying solely and on a long-term basis on a system that presupposes the existence of residential segregation for ensuring educational diversity at UT. In addition, this approach tends to disadvantage Asian Americans and Pacific Islanders because they tend to live in more integrated communities than other racial groups. See John Iceland, *Beyond Black and White: Metropolitan*

claim fundamentally misapprehends how the process works. Under UT's system of individualized review, no student automatically benefits just because he or she belongs to an underrepresented or disadvantaged group. To the contrary, all students, including Asian Americans, can benefit from UT's individualized consideration of their race in the distinctive context of their background and experience.

As an individual factor, race has no predetermined or numerical impact on an applicant's Personal Achievement Score ("PAS"). *See, e.g.*, JA 172a-173a (Ishop Dep.).²² Instead, as one admissions official observed, consideration of an applicant's race or racial background can be "as beneficial for some as their level of involvement with student council may be beneficial for some, as the strength of their letter of recommendation may be beneficial for some." JA 209a (Ishop Dep.). Importantly, the consideration of race in admissions can positively impact applicants regardless of whether they belong to an underrepresented

Residential Segregation in Multi-Ethnic America 33 Soc. Sci. Res. 248, 250 (2004).

²² In calculating the PAS, UT considers an applicant's demonstrated leadership qualities; awards and honors; work experience; involvement in extracurricular activities and community service; and special circumstances such as the applicant's socioeconomic status, family status and family responsibilities, and race. *See* SJA 152a.

minority or some other group. *See* JA 206a (Ishop Dep.); JA 284a-285a (Walker Dep.). In this respect, UT's plan is even more narrowly tailored than the plan in *Grutter*, in which the University of Michigan Law School considered race as a "plus factor" only with respect to applicants belonging to underrepresented minority groups. *See Grutter*, 539 U.S. at 321. In addition, no one at UT monitors the number of admittees in any particular group to ensure the enrollment of a critical mass of underrepresented minority students. *Compare* JA 398a, *with Grutter*, 539 U.S. at 318.

Because the consideration of race in UT's individualized admissions process can benefit any applicant, Asian Americans and Pacific Islanders (including but not limited to members of disadvantaged subgroups) can benefit from it as well. *See Smith*, 392 F.3d at 379 & n.11 (upholding admissions program that gave "plus factor" to Filipino applicants "in order to enroll a sufficiently large and diverse group of Asian Americans"); Tomiko Brown-Nagin, *The Diversity Paradox: Judicial Review in an Age of Demographic and Educational Change*, 65 Vand. L. Rev. En Banc 113, 120-21 (2012) (stating that UT admissions process can benefit "Asian students who defy the stereotype of the 'model minority' and are burdened by poverty—the reality for discrete Asian sub-groups in America"); Kidder, *Negative Action*, *supra*, at 623 (observing that "some underrepresented . . . groups (e.g., Filipinos, Southeast Asians, Pacific Islanders) can directly benefit from affirmative action in higher

education”). For UT applicants with lower SAT scores and GPAs, consideration of race in the distinctive context of their background and experience may give them a higher PAS. For example, a student of Southeast Asian origin whose parents are refugees and who attends a majority-minority public high school in Texas may receive a higher score than she would absent the consideration of race. A higher PAS will not guarantee her admission to UT, but might improve her chances.

In short, UT’s process of individualized review advances its compelling interest in achieving the educational benefits of student diversity, increases the likelihood of admission for those who do not have the same social mobility and capital as others, and has the potential to benefit all Asian American and Pacific Islander applicants. Claims that UT’s policy pits “one minority group against another,” *see* Pet. Br. at 45, or use consideration of race to divide minority applicants into winners and losers, *see* 80-20 Br. at 3; AALF Br. at 6, have no basis in the record.

III. THE EDUCATIONAL BENEFITS OF STUDENT DIVERSITY ACCRUE TO ALL STUDENTS.

Finally, it is critical to recognize the benefits from the diversity produced by an individualized race-conscious admissions process accrue to all students, including Asian Americans and Pacific Islanders. Studies have demonstrated that interactions with a

diverse student body, both in and out of the classroom, lead to positive learning and civic outcomes for Asian American students. See NYU CARE, *Asian Americans and the Benefits of Campus Diversity: What the Research Says* 1 (2012); Patricia Gurin et al., *Diversity and Higher Education: Theory and Impact on Educational Outcomes*, 72 Harv. Educ. Rev. 330, 351-353, 354 tbl.3 (2002); Mark E. Engberg & Sylvia Hurtado, *Developing Pluralistic Skills and Dispositions in College: Examining Racial/Ethnic Group Differences*, 82 J. Higher Educ. 416, 434 (2011) (observing that while “the effects of intergroup learning on the pluralistic measure were significant for all other groups,” Asian American students “seem to demonstrate the strongest benefit”). These benefits continue as students graduate and enter the “increasingly diverse workforce and society.” See *Grutter*, 539 U.S. at 330 (citation omitted). Student diversity also has positive social effects on the campus as a whole. See *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 797-98 (2007) (Kennedy, J., concurring); *Grutter*, 539 U.S. at 328-29; *Bakke*, 438 U.S. at 312-13. Asian Americans and other groups come to see each other more favorably, which leads to improved intergroup relations and reduced racial stereotyping. See *Grutter*, 539 U.S. at 328-29. Because UT’s process of individualized review is narrowly tailored to achieve the educational benefits of student diversity, this Court should uphold it as constitutional. See generally AAJC Br. at §§ I-II.

CONCLUSION

For the foregoing reasons, amici urge this Court to affirm the decision below.

Respectfully submitted,

KENNETH KIMERLING
KHIN MAI AUNG
THOMAS L. MARIADASON
ASIAN AMERICAN LEGAL
DEFENSE AND EDUCATION
FUND
99 Hudson St., 12th Floor
New York, NY 10013-2815
(212) 966-5932
kaung@aaldef.org

DEAN RICHLIN
HEMMIE CHANG
ROBERT E. TOONE*
DIANA JONG
FOLEY HOAG LLP
155 Seaport Boulevard
Boston, MA 02210
(617) 832-1000
rtoone@foleyhoag.com

*Counsel of Record

AUGUST 2012

APPENDIX: LIST OF AMICI CURIAE

Organizational Entities

Asian American Legal Defense and Education Fund
Asian Americans United
Asian Desi Pacific Islander American Collective,
University of Texas at Austin
Asian Pacific American Network of the American
College Personnel Association
Asian Pacific Americans in Higher Education
Asian/Asian American Faculty and Staff Association,
University of Texas at Austin
Asian/Pacific Islander Caucus-National Conference
on Race and Ethnicity in Higher Education
Asian Youth and Parents for Advocacy and
Leadership
Association for Asian American Studies
Boat People SOS – Delaware Valley
Center for Pan Asian Community Services, Inc.
Chinese for Affirmative Action
Coalition for Asian American Children and Families
Khmer Girls in Action
Lowell Community Health Center Teen Block
MinKwon Center for Community Action
Providence Youth Student Movement
Southeast Asia Resource Action Center

Vietnamese American Young Leaders Association of
New Orleans

Individuals

*(Titles and institutional affiliations are
provided for identification purposes only)*

Amy Agbayani
Director of Student Equity, Excellence and Diversity
University of Hawaii at Manoa

Sameer M. Ashar
Clinical Professor of Law
University of California, Irvine School of Law

Lorraine K. Bannai
Professor of Legal Skills and Director, Fred T.
Korematsu Center for Law and Equality
Seattle University School of Law

Tracy L. Buenavista
Associate Professor of Asian American Studies
California State University, Northridge

Benji Chang
Postdoctoral Research Fellow, Institute of Urban &
Minority Education
Teachers College, Columbia University

Robert S. Chang
Professor of Law and Executive Director, Fred T.
Korematsu Center for Law and Equality
Seattle University School of Law

Carolyn Chen
Professor of Sociology and Asian American Studies
and Director, Program in Asian American Studies
Northwestern University

Ge Chen
Assistant Vice President for Academic Diversity
Initiatives and Executive Director of TRIO
Program, Division of Diversity and Community
Engagement
University of Texas at Austin

Vichet Chhuon
Assistant Professor of Culture and Teaching
University of Minnesota College of Education and
Human Development

Gabriel Chin
Professor of Law
University of California, Davis School of Law

Doris M. Ching
Emeritus Vice President for Student Affairs
University of Hawaii System

Mary Yu Danico
Professor and Vice-Chair, Psychology and Sociology
Department
California State Polytechnic University, Pomona

Wei Ming Dariotis
Associate Professor of Asian American Studies
San Francisco State University

Rachel Endo
Chair, Teacher Education Department
Hamline University School of Education

Celia Genishi
Professor of Education
Teachers College, Columbia University

Neil Gotanda
Professor of Law
Western State College of Law

Jennifer Hayashida
Director, Asian American Studies Program
City University of New York, Hunter College

Luoluo Hong
Vice Chancellor for Student Affairs
University of Hawaii at Hilo

Madeline Hsu
Associate Professor of History and Director, Center
for Asian American Studies
University of Texas at Austin

Tarry Hum
Associate Professor of Urban Studies
City University of New York, Queens College and
Graduate Center

Anil Kalhan
Associate Professor of Law
Drexel University School of Law

Peter Nien-chu Kiang
Professor of Education and Director, Asian American
Studies Program
University of Massachusetts, Boston

William Kidder
Assistant Executive Vice Chancellor
University of California, Riverside

Kevin Kumashiro
Professor of Asian American Studies and Education
University of Illinois at Chicago

Jamie Lew
Associate Professor of Sociology and Anthropology
Rutgers, The State University of New Jersey

Nhi T. Lieu
Assistant Professor of American and Asian American
Studies
University of Texas at Austin

Melody Kapilialoha MacKenzie,
Associate Professor and Director, Ka Huli Ao Center
for Excellence in Native Hawaiian Law
University of Hawaii at Manoa School of Law

Anjana Malhotra
Korematsu Clinical Teaching Fellow and Co-
Director, Civil Rights Amicus and Advocacy
Clinic
Seattle University School of Law

Mari Matsuda
Professor of Law
University of Hawaii at Manoa School of Law

Samuel D. Museus
Assistant Professor of Educational Administration
University of Hawaii at Manoa

Don Nakanishi
Professor Emeritus and Director, Asian American
Studies Center
University of California, Los Angeles

Phil Tajitsu Nash
Professor of Asian American Studies
University of Maryland, College Park

A. Naomi Paik
Assistant Professor of American Studies, Asian
American Studies, and Women's and Gender
Studies
University of Texas at Austin

Yoon Pak
Associate Professor, College of Education
University of Illinois at Urbana-Champaign

Valerie Ooka Pang
Professor of Teacher Education
San Diego State University

Lisa Patel
Associate Professor of Teacher Education
Boston College School of Education

Alexander Pong
Senior Administrative Associate, Graduate and
International Admissions
University of Texas at Austin

OiYan Poon
Assistant Professor of Higher Education
Loyola University Chicago

Cathy J. Schlund-Vials
Associate Professor of English and Asian American
Studies and Director, Asian American Studies
Institute
University of Connecticut

Susan K. Serrano
Director of Research and Scholarship, Ka Huli Ao
Center for Excellence in Native Hawaiian Law
University of Hawaii at Manoa School of Law

Sona Shah
Program Coordinator, Center for Asian American
Studies
University of Texas at Austin

Snehal A. Shingavi
Assistant Professor of English
University of Texas at Austin

Alan Shoho
Professor of Educational Leadership and Policy
Studies
University of Texas at San Antonio

D. Kapua Sproat
Assistant Professor, Ka Huli Ao Center for
Excellence in Native Hawaiian Law
University of Hawaii at Manoa School of Law

Bob H. Suzuki
President Emeritus
California State Polytechnic University, Pomona

Eric Tang
Assistant Professor of African and African Diaspora
Studies and Core Faculty, Center for Asian
American Studies
University of Texas at Austin

Tony Vo
Outreach and Program Coordinator, Multicultural
Engagement Center
University of Texas at Austin

Jennifer Wang
Marketing Manager, Division of Diversity and
Community Engagement
University of Texas at Austin

Frank H. Wu
Chancellor and Dean
University of California Hastings College of the Law

Eric K. Yamamoto
Fred T. Korematsu Professor of Law and Social
Justice
University of Hawaii at Manoa School of Law

K. Wayne Yang
Assistant Professor of Ethnic Studies
University of California, San Diego

Kathleen Yep
Associate Professor and Asian American Studies
Chair, Intercollegiate Department of Asian
American Studies
Claremont Colleges