

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 HOUSTON COMMUNITY COLLEGE
SYSTEM AS *AMICUS CURIAE*
IN SUPPORT OF RESPONDENTS**

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INTEREST OF *AMICUS CURIAE*

Amicus curiae is Houston Community College System (“HCC”).¹ With an enrollment of more than 70,000 students per semester, HCC is one of the largest community college systems in the United States.² HCC provides students with an educational foundation, often in order to prepare them for success at Texas public universities. HCC’s students reflect the Houston area’s rich racial diversity. In 2011, for example, the HCC student body was 31% African-American, 34% Hispanic, 18% white, 14% Asian-American, and 3% from other backgrounds.³

HCC has a direct interest in the outcome of this case. Petitioner and her *amici* have asked the Court to end its recognition of the freedom of academic institutions to select their students by considering race as one factor in a holistic review of the

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

² Houston Community College, *HCC At a Glance*, <http://www.hccs.edu/portal/site/hccs/menuitem.3a486331336fe02f3227a2ced07401ca/?vgnnextoid=298f4cc6a366f110VgnVCM200001b4710acRCRD&appInstanceName=default> (last visited Aug. 8, 2012).

³ Office of Institutional Research, Houston Community College, *Houston Community College 2011-2012 Fact Book* 10, <http://www.hccs.edu/hcc/System%20Home/Departments/OIR/Publications/2010-2011%20Fact%20Book.pdf>.

individual applicant. Such a reversal would not only impact freshman admissions to four-year colleges, but would also harm transfer applicants, including those students who transfer from HCC to UT. UT's personal achievement rubric for freshman admissions, which includes race as a factor, is the same for transfers. Because the vast majority of transfer applicants to UT are admitted under a race-conscious admissions program, a wholesale reversal of *Bakke* and *Grutter* would diminish UT's opportunity to capture the educational benefits of diversity made possible through the admission of these students.

HCC recognizes that “[i]n the near future, Texas will have no majority race; tomorrow’s leaders must not only be drawn from a diverse population but must also be able to lead a multicultural workforce and to communicate policy to a diverse electorate.” Supp. J.A. 24a. Even so, we have not yet reached the day when educational opportunities are equally available to persons of all socio-economic, racial and ethnic backgrounds. HCC believes it is helping to educate many of Texas’s future leaders today; but it does not do so alone. HCC joins with UT in its recognition that there are educational benefits that flow from a diverse student body, and asks that the Court continue to permit universities to offer educational opportunities to students from diverse backgrounds.

BACKGROUND

Transfer admissions have received scant attention in this and other race-conscious admissions cases. Yet students who transfer to UT from HCC

and elsewhere make a significant contribution to UT's educational efforts by broadening campus diversity. Indeed, the addition of racially diverse transfer students brings UT closer to the goal of providing students with the educational benefits that flow from a diverse campus.

As the record demonstrates, UT currently uses two metrics to determine freshman admissions for students not admitted under the Top Ten Percent Law: an Academic Index ("AI") and a Personal Achievement Index ("PAI"). J.A. 139a. The AI is calculated on the basis of a student's high school class rank, standardized test scores, and the extent to which the student exceeded the high school curriculum required by UT. Supp. J.A. 27a. UT created the PAI to identify candidates whose merits (e.g., leadership qualities, work experience, community service) may not be reflected in the AI score. Supp. J.A. 28a. The PAI is the result of three scores. Applicants receive a score for each of two required essays, and a "personal achievement score" for the applicant's file as a whole. Supp. J.A. 153a. A candidate's race may contribute to the personal achievement score when considered in the context of the rest of the student's file. Significantly, in conducting this holistic review, an applicant's particular racial background does not determine whether race will be a 'plus' for his or her candidacy. As UT's Director of Admissions explained: "race, within the context of the rest of the application, can be beneficial to any applicant, to Whites as well as minority applicants." J.A. 206a. Because this review is highly individualized, "it's one of those criteria factors that may benefit some students, may

not benefit other students, but it's not based on their race, it's based on the context of their file." J.A. 209a.

UT conducts a modest consideration of race for transfer applicants in nearly the exact same way as it does for freshman applicants. Transfer applicants who are not automatically admitted through UT's Coordinated Admission Program ("CAP"),⁴ may benefit from a holistic review of his or her application that includes a consideration of the applicant's race. Just as is the case for non-Top Ten Percent freshman admissions, UT considers the transfer applicant's race as part of the "special circumstances" factor of the "transfer admissions index" ("TAI")—the transfer admissions counterpart to the PAI.⁵

⁴ UT treats those students automatically admitted under CAP as transfer students. *See* J.A. 391a, 393a. Under CAP, Texas residents who are not admitted as freshmen to UT may later be automatically admitted as transfers after meeting specific academic requirements at another UT System university. *See id.* Also, as of 2009, the Top Ten Percent Law qualified certain transfer applicants for admission based on their high school academic record. Tex. Educ. Code § 51.8035 (requiring, for instance, that a transfer student first "complete[] the core curriculum at a public junior college or other public or private lower-division institution of higher education with a cumulative grade point average of at least 2.5 . . ."). To date, no transfer student has been admitted under the Top Ten Percent law. Telephone Interview with Michael Washington, Associate Director of Admissions, University of Texas—Austin (July 26, 2012).

⁵ An applicant's TAI is evaluated in combination with his or her academic index ("AI"), which includes consideration of undergraduate GPA, SAT or ACT score, and the applicant's

Transfer students significantly increase the diversity of the UT campus. In the years 2007 through 2011, 11,740 transfer students enrolled at UT, including 2,297 African-Americans and Hispanics.⁶ UT admitted the vast majority of these students, approximately two-thirds, under the AI/TAI rubric where race is a potential factor.⁷

Transfer students from HCC play a significant role in expanding diversity at UT and other four-year institutions. Of the 110,295 students who transferred from HCC to four-year institutions between 2001 and 2011, 29,986 were African-American and 20,495 were Hispanic.⁸ HCC also has a strong record of sending transfer students, including minority students, to UT, including 532 African-American students and 824 Hispanic students during this same time period. *Id.* Transfer students from HCC and elsewhere have a

“academic trend”—i.e., whether the candidate has demonstrated consistent academic improvement (or decline) semester over semester. Telephone Interview with Michael Washington, Associate Director of Admissions, University of Texas—Austin (July 13, 2012).

⁶ Office of Information Management and Analysis, University of Texas, *Statistical Handbook 2011-2012*, Table S17, <http://www.utexas.edu/academic/ima/sites/default/files/SHB11-12Complete.pdf>.

⁷ Each year, approximately one-third of enrolled transfer students are admitted under CAP and approximately two-thirds are admitted under the AI/TAI rubric. Telephone Interview with Michael Washington, Associate Director of Admissions, University of Texas—Austin (July 13, 2012).

⁸ Office of Institutional Research, Houston Community College System, *Transfers to 4 Year Institutions by Academic Year and by Ethnicity* (Jul. 31, 2012) (on file with author).

significant, positive impact on diversity at UT. Their contributions should not be ignored.

SUMMARY OF ARGUMENT

UT's limited consideration of race for students not automatically admitted to UT is consistent with this Court's prior decisions and withstands strict scrutiny. For both freshman and transfer applicants, UT makes admissions decisions based on a holistic, individualized review of each applicant's file. Petitioner's accusations that UT engages in racial balancing completely ignore the way UT conducts its admissions program. In addition to individualized review, UT does not keep an ongoing tally of how many underrepresented students have been admitted, nor does UT provide an admissions boost only to applicants from underrepresented racial backgrounds.

The record is also clear that UT's limited consideration of race more than minimally increases diversity at UT. In essence, Petitioner contends that when combined with the Top Ten Percent Law, UT's consideration of race in admissions is ineffectual and thus not narrowly tailored. However, Petitioner ignores the fact that transfer students who are admitted under a race-conscious rubric also add diversity. By ignoring the contributions of transfer students to campus diversity, Petitioner provides a false accounting of the effectiveness of UT's narrowly tailored admissions program.

UT's admissions program is designed to achieve a compelling interest—creating a diverse student body. The record demonstrates the Top Ten Percent

Law was enacted in large part because of the persistence of *de facto* segregation in public high schools. Capturing the educational benefits that flow from diversity is thus an especially compelling interest for UT and the State of Texas. UT's race-conscious admissions program should be upheld.

ARGUMENT

I. UT's limited consideration of race as a 'plus' factor in individual admissions decisions is consistent with this Court's precedent and withstands strict scrutiny.

This Court has long recognized that the First Amendment imbues our nation's universities with academic freedoms that are essential to fulfilling their mission of preparing tomorrow's leaders. *See, e.g., Sweezy v. N.H.*, 354 U.S. 234, 250 (1957); *Shelton v. Tucker*, 364 U.S. 479, 487 (1960); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967). The university's constitutionally protected freedom "to make its own judgments as to education includes the selection of its student body." *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003) (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (Powell, J., plurality op.)). Indeed, this discretion is one of "the four essential freedoms of a university." *Bakke*, 438 U.S. at 312 (Powell, J.).

The vast majority of UT students are granted admission by the Texas Legislature through the Top Ten Percent Law. UT thus exercises its academic freedom to assemble its student body only in the area of "non-Top Ten Percent" freshman and non-automatic transfer admissions. Because race may be

considered for these groups of admits, UT's admissions program faces the Court's "most rigorous scrutiny." *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 519 (1989) (Kennedy, J., concurring). Yet, strict scrutiny is a test UT can withstand. As the record amply demonstrates, UT only considers race as one potential factor among many others in the context of the entirety of each individual's application.

A. UT has a compelling interest in admitting students who will add diversity.

The principal aim of a flagship university is to educate the smartest, hardest working and most interesting class of students to be productive citizens and quality leaders in the public and private spheres. UT's consideration of race as part of a comprehensive review of a student's admissions application is not for the purpose of allocating a benefit according to race, but for the purpose of creating a diverse student body in furtherance of a legitimate and recognized educational purpose. The admission of well qualified students from diverse backgrounds benefits not only those students, but also the other students at the university.

As this Court held in *Grutter*, a university has a "compelling governmental interest in attaining a diverse student body." 539 U.S. at 328; *see also Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1* ("*Parents Involved*"), 551 U.S. 701, 722 (2007). UT's considered judgment is that campus diversity assists in "break[ing] down stereotypes," promotes "cross-racial understanding," and "better prepares students for an increasingly diverse workforce and

society.” Supp. J.A. 1a. These are precisely the same educational benefits recognized by the Court in *Grutter*. See *Grutter*, 539 U.S. at 330. Though UT’s good-faith espousal of these educational principles is to be presumed, see *id.* at 329; cf. *Parents Involved*, 551 U.S. at 797 (Kennedy, J., concurring), the evidence provides confirmation. See, e.g., Supp. J.A. 171a-202a. But it is not only UT’s good faith that demonstrates its interest is compelling; there is a consensus among educators that “opportunities to learn from those with different points of view, backgrounds, and experiences” assists the educational mission of the university. William G. Bowen & Derek Bok, *The Shape of the River* 280 (1998).

UT’s judgment that diversity promotes understanding is bolstered by the expert report of Dr. Patricia Gurin, who states that “[s]tudents learn more and think in deeper, more complex ways in a diverse educational environment.” Patricia Gurin, *Expert Report of Patricia Gurin*, 5 Mich. J. Race & L. 363, 365 (1999). Creating a diverse student body furthers the university’s efforts to teach students to think critically. As Professor Gurin notes, “[a] university composed of racially and ethnically diverse students . . . a curriculum that deals explicitly with social and cultural diversity, and interaction with diverse peers produce a learning environment that fosters *conscious, effortful, deep thinking*.” *Id.* at 372 (emphasis added). The deep thinking that diversity fosters, moreover, contributes to our democracy by “equipping students for meaningful participation. Students educated in diverse settings are better able to participate in a

pluralistic democracy Democracy is predicated on an educated citizenry. Simply put, students educated in diverse settings are better able to participate in our democratic process.” *Id.* at 374 (emphasis removed).

Justice Powell was correct. There are sound educational reasons why institutions of higher education have, virtually without exception, concluded that diversity of all kinds, including racial and ethnic diversity, is important in the context of higher education. *See Bakke*, 438 U.S. at 312-13. Overturning *Bakke* and *Grutter* would only bring the nation further from the “promise of liberty and equality on which it was founded.” *Parents Involved*, 551 U.S. at 787 (Kennedy, J., concurring). Given the reality that opportunity is all too often denied on account of race, refusing to permit schools to consider race in admissions would strip our campuses of a powerful educational tool. *See id.*

B. UT conducted a rigorous and careful study that led to the implementation of a narrowly tailored race-conscious admissions program.

Though UT has for many years recognized that there are educational benefits that flow from diversity, UT conducted a rigorous internal review prior to deciding whether to implement a race-conscious admissions program in the wake of *Grutter*. Rather than adopting a hastily fashioned copy of the Michigan plan, UT carefully studied its own campus in order to tailor a program to the specific needs of the university and the students it serves. UT authorized the consideration of race in

undergraduate admissions only “after several months of study and deliberation, including retreats, interviews, review of data of diversity in the classroom and other factors” J.A. 396a. The result is a process that focuses on the individual and only considers race as one factor among many. Moreover, no applicant receives a ‘plus’ solely due to his or her membership in a particular race; ‘plus’ considerations are awarded only after determining whether an individual has demonstrated achievement by overcoming racial barriers, or would otherwise bring a unique perspective to UT.

1. UT reviews freshman and transfer applicants as individuals—it does not engage in racial balancing.

The key feature of a narrowly tailored race-conscious admissions program is treating applicants as individuals rather than merely as members of a group. As Justice Powell noted, “[u]niversities . . . may make individualized decisions, in which ethnic background plays a part, under a presumption of legality and legitimate educational purpose.” *Bakke*, 438 U.S. at 318 n.53. He went on to say that “[s]o long as the university proceeds on an individualized, case-by-case basis, there is no warrant for judicial interference in the academic process.” *Id.*

The requirement of individual consideration was the “entire gist of the analysis” in *Grutter*. *Parents Involved*, 551 U.S. at 722. A narrowly tailored use of race in admissions is thus a “highly individualized, holistic review” that gives “serious consideration to all the ways an applicant might contribute to a diverse educational environment.” *Grutter*, 539 U.S.

at 337. This broader assessment of diversity, where race “is but a single though important element,” *id.* at 325 (quoting *Bakke*, 438 U.S. at 315 (Powell, J., plurality op.)), is a shield against racial balancing, which is “patently unconstitutional,” *Parents Involved*, 551 U.S. at 723 (quoting *Grutter*, 539 U.S. at 330).

UT’s race-conscious admissions program is the paradigmatic example of the type of holistic, individualized review that is recommended by this Court’s decisions. As the District Court found, and the record affirms, UT considers race only as a “factor of a factor of a factor of a factor.” *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587, 608 (W.D. Tex. 2009). It is merely one element, considered alongside “socio-economic status of family,” “single parent home,” “language spoken at home,” “family responsibilities,” “socio-economic status of school attended,” and “average SAT/ACT of school attended in relation to student’s own SAT/ACT.” J.A. 433a. These “special circumstances” are also considered with other factors, such as “leadership,” “extracurricular activities,” “awards/honors,” “work experience,” and “service to school or community.” J.A. 433a. Where race is potentially considered, it may apply to persons of *any* race—not just “underrepresented” minorities. J.A. 206a. Race will then only amount to a ‘plus’ factor when considered in “the context of the file.” J.A. 207a.

This is precisely the kind of permissible consideration of race Justice Powell embraced in *Bakke*, and that the Court adopted in *Grutter*. In fact, it is more individualized even than the

Michigan Law program insofar as UT “does not keep an ongoing tally of the racial composition of the entering class during its admissions process.” *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 235 (5th Cir. 2011). UT has thus safeguarded individual assessment “through the entire process.” *Grutter*, 539 U.S. at 392 (Kennedy, J., dissenting).

Petitioner attempts to brush away UT’s painstaking effort to fairly employ race as a potential admissions factor with unfounded claims of “racial engineering” and proclamations that “[b]ecause UT is not using racial classifications to pursue a compelling state interest, that should be the end of the matter.” Pet. Br. 20. Petitioner’s claim, made in the face of overwhelming evidence to the contrary, rests on the faulty premise that UT is simply working to achieve some sort of racial balance. Yet, an examination of UT’s admissions program does not reveal “an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups” *Grutter*, 539 US. at 324-25 (quoting *Bakke*, 438 U.S. at 315 (Powell, J., plurality op.)). Instead, UT’s program considers “a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.” *Id.* at 325.

Confronted with the fact that UT is not trying to match the composition of the student body to the composition of the Texas population,⁹ Petitioner is

⁹ Though Petitioner charges that UT is seeking to bring its campus into demographic alignment with the rest of the state,

forced to resort to a more attenuated claim of racial balancing. Petitioner alleges that UT improperly treats ethnic groups differently, claiming that UT “gives no admissions preference to” Asian-Americans even though there are fewer Asian-Americans than Hispanics at UT. *See* Pet. Br. 28. That claim is inconsistent with the record. Nothing in evidence states that UT always gives a preference to Hispanics or never gives a preference to Asian-Americans. In fact, the very notion of a “preference” ignores the careful, individualized review undertaken during the examination of each student’s PAI or TAI.

When developing a student’s personal achievement score as part of the PAI or TAI, UT reviews the applicant’s leadership qualities, extracurricular activities, awards and honors, work experience, service to school or community and special circumstances. Supp. J.A. 28a. It is only under this “special circumstances” analysis that UT considers race—and race is only considered in the

Pet. Br. 27, the record demonstrates otherwise. If UT had a mission to engage in racial balancing, it has failed miserably. According to 2011 U.S. Census Bureau estimates, 38.1% of Texans are of Hispanic or Latino origin, 12.2% are Black, and 4% are Asian-American. U.S. Census Bureau, *Texas Quickfacts*, <http://quickfacts.census.gov/qfd/states/48000.html> (last updated June 7, 2012). Yet, in the Fall of 2011, only 20 percent of UT’s undergraduate enrollees were Hispanic and only 4.6% were African-American. Office of Information Management and Analysis, University of Texas, *UT Austin Fast Facts-Fall 2011*, http://www.utexas.edu/academic/ima/sites/default/files/UT_Austin_Fast_Facts_2011.pdf. Meanwhile, 17.8% of UT’s Fall 2011 undergraduate enrollees were Asian-American. *Id.*

context of other factors. Petitioner's racial balancing claim ignores UT's comprehensive process for determining who does and does not receive a "preference." Clearly Asian-American, Hispanic, African-American and, significantly, white applicants are all eligible to be awarded a high personal achievement score if they deserve it.

2. The impact of UT's race-conscious admissions policy is not "minimal."

Petitioner's central narrow-tailoring challenge is that UT's consideration of race has an alleged "minimal effect." Pet. Br. 20. In support, Petitioner claims that race-neutral means would be as effective at achieving UT's desired diversity as UT's race-conscious program.¹⁰ *Id.* at 21. Yet, Petitioner's cherry-picked statistics fail to show the true impact of UT's race-conscious admissions policies because they ignore transfer students.

Any estimate of the impact of UT's race-conscious admissions policies is insufficient unless it also considers transfer students. In 2007, UT enrolled 2,251 transfer students, not one of whom was automatically admitted under the Top Ten Percent Law and only one-third of whom were admitted

¹⁰ Using 2004 as her benchmark for race-neutral admissions, Petitioner claims that in 2008 only 33 students, or 0.5% of the incoming class, were affected by UT's race-conscious policies. Pet. Br. 39-40. Yet, if 2003 is used as a benchmark and the exact same calculations are performed for the 2007 admissions cycle, the result is that 185 students, or 2.68% of the freshman class, were affected by UT's consideration of race. Supp. J.A. 157a. This represents a more than fivefold increase over Petitioner's estimate.

under CAP.¹¹ Included among those non-automatic transfer enrollees were 270 Hispanic and African-American students.¹² Petitioner's claim that UT's race-conscious program has garnered only "trivial gains in minority enrollment," Pet. Br. 40, is thus simply wrong. By ignoring transfer admissions, Petitioner fails to give due regard to the effectiveness of UT's admissions program at capturing the educational benefits of diversity. Viewed in its true light, UT's race-conscious admissions program more closely resembles the program upheld in *Grutter* than the program struck down in *Parents Involved*. In *Grutter*, the Court noted that the consideration of race was "indispensable in more than tripling minority representation at the law school." *Parents Involved*, 551 at 704 (citing *Grutter*, 539 U.S. at 320). Though Petitioner claims that in 2008 "UT enrolled 216 African-American and Hispanic students through use of the race-affected AI/PAI analysis," Pet. Br. 39,

¹¹ Office of Information Management and Analysis, University of Texas, *Statistical Handbook 2011-2012*, Table S17, <http://www.utexas.edu/academic/ima/sites/default/files/SHB11-12Complete.pdf> (last visited Aug. 8, 2012).

¹² 270 is the approximate number of transfers admitted under the race-conscious program. That number is calculated by reducing the number of African-American and Hispanic transfer student enrollees by one-third. See discussion *supra* note 7. For consistency purposes only, we follow the Petitioner in omitting Native Americans and foreign students from this discussion. Yet as UT correctly points out, Petitioner's failure to consider the impact of other minority racial groups—and diversity within racial groups—gives short shrift to UT's broader educational purpose. This fuller notion of diversity is a hallmark of UT's race-conscious admissions program.

she fails to account for the additional 285 African-American and Hispanic students admitted as transfers.¹³

Petitioner's minimal impact argument also fails to grasp the full significance of UT's decision to employ a modest race-conscious admissions program. This is not merely a numbers game, but rather, concerns something of considerable heft: the sphere in which the university exercises one of its "four essential freedoms." *Bakke*, 438 U.S. at 312 (Powell, J., plurality op.). Because the Texas Legislature has opened the doors of UT's campus to those who satisfy a single, or otherwise narrow set of academic criteria, the area in which UT exercises its First Amendment freedom has been circumscribed. Instead of cutting off that freedom entirely, the Court should continue to permit UT to employ considerations of race in a modest way in furtherance of its educational mission. To ignore race, as Petitioner and her *amici* urge, is to take an impoverished view of the ways in which individuals can overcome obstacles, extend themselves, and enrich the campus. While Justice Harlan's statement that "[o]ur Constitution is color-blind" commands our assent as an aspiration, "in the real world, it is regrettable to say, it cannot be a universal principle." *Parents Involved*, 551 U.S. at

¹³ Office of Information Management and Analysis, University of Texas, *Statistical Handbook 2011-2012*, Table S 17, <http://www.utexas.edu/academic/ima/sites/default/files/SHB11-12Complete.pdf>. The 285 "race-affected" transfers is arrived at by reducing the number of African-American and Hispanic transfer student enrollees by one-third. See discussion *supra* note 7.

788 (Kennedy, J., concurring). Unfortunately, racial and ethnic barriers to equality in education continue to exist, and it is appropriate for universities to acknowledge students who have worked to overcome those impediments.

II. UT's admissions program must be evaluated in the context of Texas's long and persisting history of providing separate and unequal educational opportunities to minority high school students.

“Context matters when reviewing race-based governmental action under the Equal Protection Clause.” *Grutter*, 539 U.S. at 327. UT's admissions program sits within the context of a primary and secondary education system in Texas that continues to isolate students by race and discriminate between haves and have-nots. While the days of *de jure* segregation may be over, *de facto* separation of high school students by race is still a reality.

On the fiftieth anniversary of *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), fully one-half of Houston Independent School District campuses were either 75% Hispanic, 75% African-American, or 75% white. Jason Spencer, *50 Years After Brown v. Board, Diversity Lacking*, Houston Chronicle, May 16, 2004, at A1; *see also* Marta Tienda & Sunny Niu, Capitalizing on Segregation: Pretending Neutrality, College Admissions and the Texas Top 10% Law, 8 Am. L. & Econ. Rev. 312, 321 (2006). At Eliot Elementary school in Houston, 99.7% of the nearly 700 students in 2004 were Hispanic. *Id.* That same year, Houston's Worthing High School was over 96% African-American. *Id.* These examples

unfortunately teach the rule, rather than the exception, of the persistence of segregation among Texas's primary and secondary schools.

The Top Ten Percent Law is itself a tacit admission of this de facto racial segregation. It was specifically designed to use racial concentrations at public high schools to increase racial diversity at public universities. To the extent the Top Ten Percent Law has been successful in promoting racial diversity, it is because of this very dynamic: African-American and Hispanic students admitted to UT under the law are disproportionately from high schools in which "minority students comprise a significant or dominant majority of the student body." Tienda & Niu, *supra*, at 341.

As recently as 2005, the Texas Supreme Court confirmed the ongoing flaws in the Texas public school system, noting the "wide gaps in performance among student groups differentiated by race, proficiency in English, and economic advantage." *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 789 (Tex. 2005). More recently, the Texas Education Agency issued a report that shows African-American high school students are three times more likely to drop out than white students, while the drop-out rate for Hispanic students is twice as high as that of white students in Texas.¹⁴

¹⁴ Texas Education Agency, Document No. GE12 601 06, Secondary School Completion and Dropouts in Texas Public Schools 2010-11 56 (2012), *available at* http://www.tea.state.tx.us/acctres/dropcomp_index.html (last updated Aug. 3, 2012).

Despite the stark disparities that still exist in Texas public schools, some students reach levels of achievement that cannot be captured by the Top Ten Percent Law's one-dimensional criterion. A minority student in the second decile at an overwhelmingly non-minority high school may have accomplished an achievement equal to or greater than a white student in the same school. Likewise, a white student in the second decile of an overwhelmingly minority school may have reached a similar level of accomplishment. If invited to be part of the student body at UT, or a similarly selective institution, these students will be vehicles through which the educational benefits of diversity flow to other students. Minority and non-minority students who have overcome racial boundaries will likely be experienced in cross-racial communication, and bring a depth of understanding that will help to dispel harmful stereotypes while drawing others out of racial isolation.

It is only through an individual assessment of a student's application that includes an analysis of the role that race may have played in the student's secondary education, whereby a selective college or university can recognize these achievements. Those who excel in the face of racial adversity in Texas have achieved something noteworthy, and their participation in higher education will benefit all students.

Simply put, many Hispanic and African-American students grow up in different worlds compared to their white counterparts. UT has a compelling interest in identifying students who excel in the face of adversity. These students will

contribute to a diverse educational experience for all students, but it is only through a rigorous, individual review of a student's application, including race, that UT can fully harness the educational benefits that flow from diversity.

CONCLUSION

UT's modest consideration of race in admissions is a permissible exercise of the school's essential freedom under the First Amendment and satisfies the strict scrutiny demanded by the Equal Protection Clause. HCC supports UT's efforts to bring together a diverse group of students and to create an educational environment that will produce tomorrow's leaders. HCC requests that the Court affirm the decision of the Fifth Circuit upholding UT's admissions program.

Respectfully submitted,

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