

No. 09-50822

**In the United States Court of Appeals  
for the Fifth Circuit**

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ABIGAIL FISHER AND RACHAEL MICHALEWICZ,  
*Plaintiffs – Appellants,*

v.

UNIVERSITY OF TEXAS AT AUSTIN, ET AL.,  
*Defendants – Appellees,*

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On Appeal from the United States District Court  
Western District of Texas, Austin Division  
The Honorable Sam Sparks, District Judge

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**BRIEF AMICUS CURIAE OF AMERICAN COUNCIL OF EDUCATION, AMERICAN ASSOCIATION OF  
COMMUNITY COLLEGES, AMERICAN ASSOCIATION OF STATE COLLEGES AND UNIVERSITIES  
AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, THE AMERICAN COLLEGE  
PERSONNEL ASSOCIATION, THE ASSOCIATION OF AMERICAN COLLEGES & UNIVERSITIES,  
AMERICAN DENTAL EDUCATION ASSOCIATION, THE ASSOCIATION OF AMERICAN  
UNIVERSITIES, THE ASSOCIATION OF AMERICAN MEDICAL COLLEGES, THE ASSOCIATION OF  
PUBLIC AND LAND-GRANT UNIVERSITIES, THE ASSOCIATION OF RESEARCH LIBRARIES,  
HISPANIC ASSOCIATION OF COLLEGES AND UNIVERSITIES, NATIONAL ASSOCIATION OF  
COLLEGE AND UNIVERSITY BUSINESS OFFICERS, NATIONAL ASSOCIATION OF INDEPENDENT  
COLLEGES AND UNIVERSITIES**

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**SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS**

The Undersigned counsel of record certifies that the persons and entities as described in the Rule 28.2.1 having an interest in the outcome of this case are those persons listed by Appellants and Appellees in their Opening Briefs. This certification is made so that the Judges of this Court may determine whether the case involves parties or issues which might require possible recusal.



Lawrence J. Fox

Attorney of Record for Amici  
curia, American Council of  
Education, et al.

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the *Amici* submit the following corporate disclosure statement: Each *Amici* is a not-for-profit organization under Section 501©(3) of the Internal Revenue Code. None have issued any shares or debt securities to the public and none have parent companies, subsidiaries, or affiliates that have issued any shares or debt securities to the public.

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**I. AMICI IDENTIFIED AND THE BASES OF THEIR INTEREST IN THIS CASE**

*Amici* are national organizations dedicated to the interests of improving higher education that recognize widespread access to a postsecondary education is a cornerstone of a democratic society. They have participated as *amici curiae* in numerous cases relevant to the analysis of this case and are intimately familiar with the relevant issues. *Amici* also represent a broad spectrum of organizations dedicated to the interests of higher education. The *American Council on Education* (ACE), for example, represents more than 1800 presidents and chancellors of various types of American accredited, degree-granting institutions. Since its founding in 1918, ACE has provided leadership and a unified voice on key higher education issues. This includes supporting and defending the efforts of colleges and universities to exercise their judgment regarding student admissions in a manner that meets each institution's educational mission.

The *American Association of State Colleges and Universities* (AASCU) represents more than 400 public colleges, universities, and systems of higher education throughout the United States and its territories. AASCU schools enroll more than three million students, or more than half the enrollment of all public four-year institutions.

*The American Dental Education Association (ADEA)* is the voice of dental education. Its members include all U.S. and Canadian dental schools and many allied and post-doctoral education programs. Its mission is to be a leader in the dental education community to address contemporary issues influencing education, research and the delivery of oral health care.

*The Association of American Colleges & Universities (AAC&U)* is the leading national association concerned with the quality, vitality, and public standing of undergraduate liberal education. Its members are committed to extending the advantages of a liberal education to all students, regardless of academic specialization or intended career. Founded in 1915, AAC&U now comprises 1,200 member institutions—including accredited public and private colleges and universities of every type and size.

*The Association of Public and Land-Grant Universities (A·P·L·U)*, founded in 1887, is an association of public research universities, land-grant institutions, and state public university systems. A·P·L·U member campuses enroll more than 3.5 million undergraduate and 1.1 million graduate students, employ more than 645,000 faculty members, and conduct nearly two-thirds of all academic research, totaling more than \$34 billion annually. As the nation's oldest higher education association, A·P·L·U is dedicated to excellence in learning, discovery and engagement.

*The Association of Research Libraries (ARL)* is a non-profit organization of 124 research libraries in North America. Its mission is to influence the changing environment of scholarly communication and the public policies that affect research libraries and the diverse communities that they serve.

*The American Association of University Professors (AAUP)* represents approximately 48,000 faculty members and research scholars throughout the United States. The AAUP's Joint Statement on Rights and Freedoms of Students recognizes that the freedom to learn is dependent upon "appropriate opportunities and conditions in the classroom, on the campus, and in the larger community," and observes that "when colleges and universities determine that achieving diversity within the student body is relevant to their academic mission, their admissions offices may take an applicant's race into account as one factor among many in making an admission decision." AAUP, *Policy Documents and Reports*, 273-279 (10th ed. 2006). The AAUP has also recognized, in the context of faculty appointments, "the richness which a variety of intellectual perspectives and life experiences can bring" to higher education. "Affirmative Action in Higher Education: A Report by the Council Committee on Discrimination," AAUP, *Policy Documents and Reports*, 193-200 (9th ed. 2001).

*The Association of American Universities (AAU)* is an organization of leading research universities devoted to maintaining a strong system of academic research and education. It consists of 60 U.S. universities and two Canadian universities, divided almost evenly between public and private. AAU member universities are on the leading edge of innovation, scholarship, and problem-solving, contributing significant value to the nation's economy, security, and culture.

*The American Association of Community Colleges (AACC)* is the primary advocacy organization for the nation's community colleges, representing nearly 1,200 two-year, associate degree-granting institutions and more than 11 million students.

*The American College Personnel Association (ACPA)*, headquartered in Washington, D.C. at the National Center for Higher Education, is the leading comprehensive student affairs association that advances student affairs and engages students for a lifetime of learning and discovery. ACPA has nearly 8,500 members representing 1,500 private and public institutions from across the U.S. and around the world. Its members include organizations and companies that are engaged in the campus marketplace as well as graduate and undergraduate students enrolled in student affairs/higher education administration programs along with faculty, and

student affairs professionals. ACPA leads the student affairs profession and the higher education community in providing outreach, advocacy, research, and professional development to foster college student learning. It also supports and fosters college student learning through the generation and dissemination of knowledge, which informs policies, practices and programs for student affairs professionals and the higher education community. Its core values include supporting diversity, multicultural competence and human dignity, the free and open exchange of ideas in a context of mutual respect and outreach and advocacy on issues of concern to students, student affairs professionals and the higher education community, including affirmative action and other policy issues.

*The Association of American Medical Colleges ("AAMC")* is a nonprofit educational association whose members include all 131 accredited medical schools in the United States, approximately 400 major teaching hospitals and health systems, and nearly 90 scientific societies. AAMC's mission is to improve the nation's health by strengthening the quality of medical education and training, enhancing the search for biomedical knowledge, advancing health services research, and integrating education and research into the provision of effective health care. AAMC has a long history of commitment to the diversity of the student bodies and faculties of

member institutions and the profession of medicine in the United States. Examples of this commitment are its Aspiring Docs Campaign, its Holistic Review Project, and its Summer Medical and Dental Educational Program.<sup>1</sup>

*The Hispanic Association of Colleges and Universities (HACU)*, founded in 1986, represents more than 400 colleges and universities committed to Hispanic higher education success in the U.S. and Puerto Rico. Hispanics are the nation's youngest and fastest-growing population. HACU is the only national educational association that represents Hispanic-Serving Institutions (HSIs). Today HSIs represent less than 8% of all higher education institutions nationwide, but enroll more than fifty percent of all Hispanics in postsecondary education.

*The National Association of Independent Colleges and Universities* ("NAICU") is an association of nearly 1,000 private colleges and universities. Members include traditional liberal arts colleges, major research universities, comprehensive universities, church- and faith-related institutions, historically black colleges, single-sex colleges, art

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<sup>1</sup> These Programs are described at the following websites:  
<http://www.aspiringdocs.org/site/c.luIUL9MUJtE/b.2011035/k.C6A4/WELCOME/apps/lk/content3.aspx>  
<http://www.aamc.org/opi/holisticreview/start.htm>  
<http://www.aamc.org/students/minorities>

institutions, two-year colleges, and schools of law, medicine, engineering, business, and other professions.

*The National Association of College and University Business Officers* (NACUBO) is a membership organization representing more than 2,500 colleges, universities, and higher education service providers across the country and around the world. NACUBO specifically represents chief business and financial officers through advocacy efforts, community service, and professional development activities. The association's mission is to advance the economic viability and business practices of higher education institutions in fulfillment of their academic missions.

*Amici* are familiar with the issues involved in this case and believe it raises issues of special significance to the educational missions of each. Moreover, because *Amici*'s are national organizations which have been dedicated over many years to the interests of American higher education, they believe that this brief will aid the Court in its analysis of the issues presented. *Amici* especially wish to underscore to the Court that this case implicates principles of academic freedom and the ability of an institution of higher education to assemble a student body which best serves its identity and mission. Many colleges and universities have decided that the admission of a racially and ethnically diverse student body will serve their



individual educational missions, just as various other admissions criteria and goals may assist other colleges and universities in achieving different educational missions.

*Amici* submit this brief to support the Appellees' argument that the University of Texas' admissions process meets constitutional requirements governing the manner in which that university may accomplish its goal of attaining a diverse student body.

*Amici's* authority to file this brief is based upon the consent of all parties to the filing of this brief.

## **II. SUMMARY OF ARGUMENT**

The United States Supreme Court recognizes a compelling state interest in the attaining of a diverse student body in higher education. To achieve diversity, a state supported university may consider ethnicity or race in its admissions process, so long as it utilizes a narrowly tailored program which does not unduly burden non-minority applicants. The institution must base its admissions process on a valid methodology and may consider race and ethnicity only in a "holistic" and "individualized" manner. *Grutter v. Bollinger*, 539 U.S. 306, 333-43 (2003).

The University of Texas admissions program falls squarely within the parameters of *Grutter*. The University has looked to its own mission in

deciding which racial and ethnic groups constitute underrepresented minorities on its campus. Race and ethnicity, if considered at all, are, in the words of the district court, “a factor of a factor of a factor.” *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587, 608 (W.D Tx 2009). Regardless of which factors are considered in each individual applicant’s case, only academically qualified students are admitted. Furthermore, the admissions plan is subject to routine evaluation, in part, to assess whether the institution has been successful in its efforts to reach a critical mass of underrepresented minorities, and thereby reap the benefits afforded by a diverse campus.

Nowhere is free speech and thought more essential than in higher education. A core element of this “academic freedom” is the right of the University to decide which individuals should be included in the campus community. *Grutter*, 539 U.S. at 324. Each institution should be permitted to develop and craft its own admissions criteria so that it may select a student body that best fits its mission. Diversity among types of institutions, including large numbers of private, public, and religiously affiliated institutions, and the respect shown by the courts for their differing missions and purposes, are critical parts of the American higher education system. In fact, they are its greatest strengths.

When this Court evaluates the challenges to the University of Texas admissions program, therefore, deference should be shown to the University's educational expertise in admitting students who, collectively, create a student body best aligned with the institution's goals and mission. In the exercise of its discretion, the University should be permitted to determine whether diversity aids its educational mission, whether certain minority groups are underrepresented, and whether a critical mass of underrepresented minority students has been admitted.

Despite Plaintiffs' arguments to the contrary, the University's determinations in these matters are entitled to deference. Because the University of Texas has implemented an admissions policy that considers race and ethnicity in a manner that complies with the constitutional requirements set forth in *Grutter*, this Court should affirm the District Court's rejection of Plaintiffs' challenge.

### **III. ARGUMENT**

Seven years ago, the Supreme Court recognized that state supported institutions of higher education have a compelling government interest in a diverse student body that permits them to consider race and ethnicity as a factor in admissions. *Grutter*, 539 U.S. at 328. It reiterated that determination three years ago in *Parents Involved In Community School v.*

*Seattle School District No. 1, et al.*, 551 U.S. 701, 722 (2007). Because American society continues to become more diverse, the University of Texas' goal of admitting a student body containing, among others, a critical mass of individuals from underrepresented ethnic and racial minorities is as valid today as it was when *Grutter* was decided in 2003. In fact, as set forth below, the research and information developed since 2003 continues to support the University's judgment that a diverse student body provides meaningful educational benefits to all students and prepares them for citizenship, leadership and employment in our increasingly global economy.

**A. Student Diversity May Serve A Compelling Interest Of Higher Education By Assisting Institutions In Their Mission.**

*1. Diversity helps prepare students for leadership and citizenship.*

The educational benefits that can flow from the admission of a diverse student body are especially important at an institution like the University of Texas, which serves the higher education needs of a large, heterogeneous state. Fulfilling one of the most important purposes of higher education, the University of Texas seeks to prepare its students to become engaged citizens and leaders, to become the "future educational, cultural, business, and sociopolitical leaders" of both Texas and the United States. *UT's Proposal*

*to Consider Race and Ethnicity in Admissions*, June 25, 2004 (quoted in *Fisher*, 645 F. Supp. 2d at 602).

An educated citizenry is the predicate of a thriving democracy, *Mueller v. Allen*, 463 U.S. 388, 395 (1983) (sustaining state tax deduction for any educational expenses paid by parents, regardless of whether the child attended public, private or parochial schools), and the foundation for each citizen's meaningful participation in our cultural and political life. *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (noting the "pivotal role of education in sustaining our cultural and political heritage" and striking down state laws denying educational funding for children who were illegal immigrants). As Justice O'Connor eloquently observed in *Grutter*, "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized." *Grutter*, 539 U.S. at 332.

The University of Texas has concluded that a diverse campus will assist in its goal of educating students to comprehend and reach informed views on issues of public import and to engage in the deliberative aspect of democracy. Each student's exposure to peers with differing backgrounds and experiences will result in better informed voters, jurors, and school

board and neighborhood association members, and more engaged participants in public affairs.

Research substantiates this view. For example, Sylvia Hurtado, PhD, currently a Professor of Education and the Director of the Higher Education Research Institute at the University of California, Los Angeles, conducted extensive research over a five year period at ten public universities on behalf of the United States Department of Education. She reported that those students who experienced positive informal interactions with diverse peers scored higher on tests designed to measure the complexity of their thinking about other people and the way in which other people behave. These students also scored higher on tests designed to measure their cultural and social awareness, and their ability to see things from someone else's perspective. Dr. Hurtado's study also found that these students had increased "democratic sensibilities, a greater pluralistic orientation, interest in poverty issues, and concern for the public good." Hurtado, S., *Linking Diversity with the Educational and Civic Missions of Higher Education*, The Review of Higher Education ,Vol. 30, No. 2, 185-196 (Winter 2007) (reporting on the results of her DOE research, published at Hurtado, *Preparing College Students for a Diverse Democracy: Final Report to the U.S. Department of Education* (2003)). The University of Texas seeks to

foster each of these characteristics in its students, the state's future leaders.

A diverse student body gives the University one way to reach that goal.

2. *Diversity enhances education for economic and scientific progress.*

The University of Texas concluded that increased diversity on campus is also important to prepare its students to contribute to the nation's economic, scientific, and social progress, and to face the challenges of an increasingly diverse workforce. *UT Proposal to Consider Race and Ethnicity in Admissions*, June 25, 2004 (quoted in *Fisher*, 645 F. Supp. 2d at 602). The Supreme Court has recognized that the preparation of students for success in the American workforce justifies the consideration of race and ethnicity in an admissions program. *Grutter*, 539 U.S. at 333. And, sociological studies validate this conclusion. Professor Scott Page, the Leonid Hurwicz Collegiate Professor of Complex Systems, Political Science and Economics at the University of Michigan, has spent most of his career evaluating the dynamics of group problem solving. His research shows that groups of people with diverse backgrounds and ways of viewing the world perform better than groups of people with like backgrounds and world views, *even when* the latter group consists of those deemed to be the best individual performers. Page, Scott E., *The Difference: How the Power of*

*Diversity Creates Better Groups, Firms, Schools, and Societies*, 14  
(Princeton University Press 2007).

The University's determination that campus diversity will assist it in preparing students for employment in today's global economy is shared by the leaders of America's businesses, who look to our colleges and universities for their future employees, managers and leaders. Business leaders are acutely aware of the way in which our shrinking global economy impacts their organizations. They have communicated to the higher education community that maintaining America's competitive edge requires colleges and universities to educate students from all racial, ethnic, religious and socio-economic backgrounds. Recently, for example, the Chief Diversity Officer of the General Electric Company ("GE Corporation") noted that

[W]hen companies recruit and retain individuals with diverse backgrounds, it drives innovation in their processes, products and solutions. Diversity brings invaluable thought leadership and innovative approaches to a company, while positively influencing the way the company makes decisions and how it interacts with customers and stakeholders.

GE Citizenship: *Diversity from the Classroom to the Workplace* (2008)  
(quoting Deborah Elam, Chief Diversity Officer ).<sup>2</sup>

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<sup>2</sup> [http://www.ge.com/citizenship/news\\_features/features\\_diversity.jsp](http://www.ge.com/citizenship/news_features/features_diversity.jsp).



The commitment to diversity by leading American corporations goes well beyond public statements. It includes extraordinary financial commitments designed to encourage increased matriculation and graduation among minorities, thereby increasing the pool of available talent. GE Corporation believes that the incongruity between the numbers of U.S. students from diverse backgrounds and the level of financial support provided for their educational pursuits has endangered its ability to remain competitive in today's global marketplace. To address this issue, GE Corporation has invested millions of dollars in its Developing Futures™ in Education program to ensure college readiness among inner-city populations so "that the United States will remain globally competitive and aligned with future growth opportunities by focusing on high quality education for all students." GE Citizenship: *Diversity from the Classroom to the Workplace* (2008).<sup>3</sup>

The GE Corporation is not alone in this endeavor. In 2009, the chairman of Wells Fargo, John Stumpf, announced that "Diversity is not only good policy, it's good business."<sup>4</sup> Hewlett Packard says that it "believe(s) that diversity and inclusion are key drivers of creativity, innovation and invention." Like the GE Corporation, Hewlett Packard

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<sup>3</sup> [http://www.ge.com/citizenship/news\\_features/features\\_diversity.jsp](http://www.ge.com/citizenship/news_features/features_diversity.jsp),

<sup>4</sup> <https://www.wellsfargo.com/about/diversity>.

Corporation has invested in programs to encourage those in underserved communities to obtain the education and develop the skills to allow them to obtain employment at companies like Hewlett Packard.<sup>5</sup>

In 2005, Merck & Co. renewed and replenished a ten year, \$20 million scholarship fund administered jointly with the United Negro College Fund, with an additional \$13 million. The fund was established to provide scholarships and internships to biomedical research students in order to expand the pool of world-class African-American biomedical scientists. Merck has also developed similar initiatives to provide Hispanics and Latino Americans with greater access to higher education and to encourage them to pursue careers in science, technology, engineering and mathematics. *Merck: Promoting Diversity and Inclusion* (2009).<sup>6</sup>

The financial commitments made by these corporations clearly demonstrate the importance they place on the education of a diverse population which will ultimately bring innovation and leadership to their organizations. And, the University of Texas has properly identified its interest in educating students to meet these needs.

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<sup>5</sup> <http://www.hp.com/hpinfo/grants/>

<sup>6</sup> <http://merck.com/corporate-responsibility/basics/employees/employees-diversity/major-initiative.html>

3. *The University has the right to select students who it believes will contribute to the robust exchange of ideas on campus and improve the quality of education.*

The University of Texas seeks to admit a student body that is diverse in a number of ways: economic advantage, artistic, academic or scientific interests, geographic location, life experiences, and racial and ethnic heritage. It does so in order to enrich students' educational experience by seeking to ensure a varied range of ideas on campus, a goal "that is of paramount importance in the fulfillment of its mission" and one which can be accomplished only if it is allowed to admit "those students who will most contribute to the 'robust exchange of ideas.'" *Grutter*, 539 U.S. at 329 (quoting *Bakke*, 428 U.S. at 312 (Powell, J.)).<sup>7</sup> Of course, race and ethnicity do not dictate a student's viewpoint any more than, say, economic advantage

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<sup>7</sup> The value of a diverse student body on campus is widely recognized in academia. In March 2004, for example, the Carnegie Mellon University's Presidential Diversity Advisory Council concluded that a diverse university community broadened the educational experience of all its students. Among other things, the Report reviewed sociological and psychological data suggesting that college-age students undergo a distinct phase of development where they are greatly influenced by his peers. Students exposed to a more diverse peer group during the college years are more likely to develop a "more genuine and authentic self" and students not so exposed tend to default to "an automatic adoption of the perspective, values and social roles from which the student came." Ambrose, *et al.*, *The Benefits of Diversity for Education at Carnegie Mellon* at 3 (March 2004). The Report concluded, after a review of empirical studies, that students exposed to a diverse peer group at college are better able to move efficiently and effectively in the increasingly complex social and occupational life they face after graduation. *Id.*

and artistic interests. But they do not dictate viewpoint any less either. As a result, the University's goal of assembling a student body with a varied range of perspectives will be impeded significantly if the Court limits its ability to consider two diversifying factors which lead to the "robust exchange of ideas." *Id.*

Moreover, as the *Grutter* court noted, many institutions of higher learning, supported by expert studies and reports, have concluded that a racially and ethnically diverse student body can further the goal of providing a high quality education. *Grutter*, 539 U.S. at 330 (citing, *inter alia*, W. Bowen & D. Bok, *The Shape of the River* (1998); *Diversity Challenged: Evidence on the Impact of Affirmative Action* (G. Orfield & M. Kurlaender eds. 2001); *Compelling Interest: Examining the Evidence on Racial Dynamics in Colleges and Universities* (M. Chang, D. Witt, J. Jones, & K. Hakuta eds. 2003)). The University of Texas has reached the same conclusion.

In fact, the research done since *Grutter* continues to illustrate that campus diversity can provide many benefits to a university's educational mission. See E.T. Pascarella, How College Affects Students: Ten Directions for Future Research, *Journal of College Student Development*, 42, 257-271 (2006) (reviewing empirical research to date and noting that the increase in

diversity on campus, particularly in terms of racial diversity, positively affects students' academic and social experiences); I.M. Landreman, C.J. Rasmussen, P.M. King & C.X. Jiang, A Phenomenological Study of the Development of University Educators' Critical Consciousness, *Journal of College Student Development*, 48, 275-295 (2007) (increased diversity on campus, especially when coupled with initiatives that encourage discussion of different and opposing points of view, contributes significantly to the learning process). Accord Hurtado, S. *Linking Diversity with the Educational and Civic Missions of Higher Education*, *The Review of Higher Education*, Vol. 30, No. 2, 185-196 (Winter 2007) (emphasizing that the admission of a diverse student population should be followed by the creation of a campus environment that encourages student interaction). And, the Supreme Court has recognized that providing students with a diverse environment producing a variety of viewpoints may justify the consideration of race and ethnicity in admissions. *Grutter*, 539 U.S. at 329.

The University of Texas thus had ample reason to conclude that campus diversity helps to achieve this goal, along with the goals of educating effective citizens and leaders and preparing students for successful careers.

**B. Colleges And Universities Have A First Amendment Right To Determine Who Should Study On Campus And Their**

## **Determinations Regarding How Best To Assemble A Student Body Are Entitled To Deference.**

In *Grutter*, the Supreme Court noted that “given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.” 539 U.S. at 329 (citing *Wieman v. Updegraff*, 344 U. S. 183, 195 (1952) (Frankfurter, J., concurring); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957); *Shelton v. Tucker*, 364 U. S. 479, 487 (1960); *Keyishian*, 385 U. S. at 603).

Consequently, the strict scrutiny this Court applies to the University’s consideration of race and ethnicity in admissions should “tak[e] into account the [University’s] complex educational judgments in an area that lies primarily within the expertise of the university.” *Grutter*, 539 U.S. at 332.

Because of the Court’s concern about interfering with the “expansive freedoms of speech and thought associated with the university,” *Grutter* emphasized that its strict scrutiny review of the Law School admissions program would respect the core First Amendment principles of academic freedom, including the freedom of a university to make its own judgments as to “the selection of its student body.” *Id.* at 329. More recently, the Supreme Court reiterated that academic freedom is a major reason the Court has allowed state supported institutions of higher learning to consider race or

ethnicity in admissions. *Parents Involved in Community School* 551 U.S. at 724-25. Accordingly, academic freedom principles justify deference to the educational expertise of those involved in the university admissions process.

The Supreme Court's forbearance to the judgments of the University of Michigan Law School in *Grutter* followed a long tradition of showing deference to the decisions of a university that relate to one of its core functions. The Court has deferred to academic judgments even when those judgments may intersect with a countervailing constitutional right. *Grutter*, 539 U.S. at 328 (citing *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985); *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 96, n. 6 (1978); *Bakke*, 438 U.S. at 319, n. 53 (Powell, J.)). The Court has declined to overrule a public university's determination to require military training, *Hamilton v. Regents of Univ. of Cal.*, 293 U.S. 245 (1934), sustained the decision of a university lecturer not to answer a state attorney general's questions about the content of his lectures, *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957), and refused to hold that due process requires a pre-dismissal hearing when a university dismissed a student on academic grounds. *Bd. of Curators of the Univ. of Missouri v. Horowitz*, 435 U.S. 78, 87 (1978). This deference has helped maintain the vigorous level of

academic freedom in this country, which in turn has made American higher education the finest in the world.

University decisions regarding admissions are at the very heart of academic freedom, which protects not only “[t]eachers and students [who] must always remain free to inquire, to study and to evaluate,” *Keyishian v. Bd. of Regents of Univ. of N.Y.*, 385 U.S. 589, 603 (1967) (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957)), but also “autonomous decisionmaking by the academy itself.” *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n.12 (1985). Academic freedom includes all those matters intended to maintain the independence of the academy “to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.” *Bakke*, 438 U.S. at 312 (opinion of Powell, J.) (quoting *Sweezy*, 354 U.S. at 263 (Frankfurter, J., joined by Harlan, J., concurring in the result)). Any judicial review of a University admissions program involves the examination of educators’ decisions regarding “who may be admitted to study.” *Id.* This, of course, is a paradigmatic academic judgment made in the exercise of academic freedom.

As applied in *Grutter*, the Supreme Court concluded that although it would strictly scrutinize the University of Michigan Law School’s admission



program, that strict scrutiny would occur in the context of the school's academic freedom to decide who should make up its student body. The deference included the Court's refusal to look behind the University's contentions regarding the educational importance of a diverse student body to a high quality legal education. It assumed that, absent clear evidence to the contrary, the University's conclusions had been reached in a good faith exercise of its educational judgment. It is precisely this deference that *Amici* submit must be shown to the University of Texas.

**C. The University of Texas' Admissions Plan Is Narrowly Tailored To Further Its Compelling State Interest In Achieving Student Diversity.**

- 1. The University's Plan uses narrowly tailored methods to achieve the interests it identified as compelling.*

The University of Texas' admissions program is constitutionally appropriate. As outlined in Part A, *supra*, the University has made an educational judgment -- after a careful and deliberate study was made -- that campus diversity would further its mission to educate Texas' future leaders and citizens, to meet America's economic and scientific needs, and to remain one of the premier public universities in the country. It further concluded that, in order to attain meaningful campus diversity, some consideration of race and ethnicity in its admissions process was necessary. Though the Supreme Court has identified the attainment of campus diversity as a compelling state interest, the use of racial and ethnic classifications must be "narrowly tailored" to achieve this interest. Even under this stringent standard, the admissions policy at the University of Texas passes constitutional muster.

The University uses no quotas and provides no automatic scores to those applicants who are members of minority groups. *Fisher*, 645 F. Supp. 2d at 598. The University uses race-neutral numerical criteria to admit the

vast majority of each class. Before admitting the balance of the class, it undertakes an individualized and holistic review of the remaining applicants. These students are thoroughly evaluated to ensure that they are academically qualified to attend the University and to determine whether their personal characteristics lend themselves to the creation of a diverse student body, in the broadest sense of the word. *Id.*

The University's limited consideration of an applicant's race or ethnicity is likewise proof that its plan is narrowly tailored to achieve diversity on campus. An applicant's race or ethnicity might increase an applicant's "special characteristics" score, which is then considered along with scores given for academic honors, work and community service, quality of the two personal essays and several other race-neutral considerations. Moreover, the "special characteristics" consideration involves matters that may increase the scores of non-minority applicants. *Id.* at 539. Thus, of the numerous factors that are used by the University to assess an applicant's score for admission, race or ethnicity is one component which may be used to calculate one factor.

The breadth of factors which University admissions officials consider during the individualized reviews of applications establish that the University has chosen a methodology to achieve diversity that extends

beyond race or ethnicity. The myriad of considerations that might increase an applicant's score include all the characteristics which help create a broadly diverse student body, including socio-economic status, life experiences, languages spoken and job and community experiences. Indeed, the University's method of achieving diversity fits its "goal so closely that there is little or no possibility that the motive for the classification [i]s illegitimate racial prejudice or stereotype." *Grutter*, 539 U.S. at 333 (citing *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989)).

Furthermore, the University uses its admissions plan in conjunction with multiple other race-neutral scholarship and recruiting programs intended to increase campus diversity. These programs are designed to increase minority enrollment by encouraging members of under-represented minority groups who would enjoy automatic admission to the University under the 10 Percent Law,<sup>8</sup> for example, to both apply to and attend the University. The University adopted the admissions program under review here only after it determined that these race-neutral programs were not resulting in the enrollment of a critical mass of under-represented minorities.

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<sup>8</sup> TX. Edu. Code §51.803, which required the University offer admission to any applicant who graduates in the top ten percent of a Texas high school class. The statute has since been amended and now requires the University to select at least 75% of such applicants.

The University's admission plan is also subjected to review every five years, both to assess its efficacy in increasing campus diversity and to measure the plan's impact. In this way, the University routinely evaluates whether changed circumstances or unforeseen consequences render its admission program ineffective or create an undue burden on non-minority applicants.

2. *Plaintiffs challenge decisions vested in the University and invite the kind of second-guessing which impedes Academic Freedom.*

Plaintiffs' challenges to the University's plan are nothing more than an invitation to the Court to involve itself in matters which are best left to the expertise and discretion of educators. Such educators, generally, and the University in particular, have expertise regarding how best to achieve its educational missions and how best to select the mix of students that will offer the most potential for a robust university community, improve classroom dynamics and cognitive processes, and expand student horizons.

Plaintiffs contend that the University's previous admissions program, which was facially race-neutral, had successfully achieved greater minority enrollment at the University and thus rendered unnecessary the University's implementation of its current program. This contention appears to be contradicted by the factual findings of the trial court. *See Fisher*, 645 F.

Supp. 2d at 549. In any event, however, Plaintiffs' opinion about the success of the previous admissions program is not controlling. The University must have the ability to determine whether its pre-2005 admissions program had been effective in furthering the institution's educational mission, just as it must have the ability in the future to determine whether its current admissions program (which did not go into full effect until 2009) furthers its mission. The University must have the discretion to decide whether the student body was sufficiently diverse to achieve the many compelling benefits that diversity offers. The Court may substitute its own decisions for the discretionary choices of the University on these issues only upon a showing by Plaintiffs that the University reached its conclusions in bad faith and in manner that is contrary to the principles set forth in *Grutter*. The record below does not support such a conclusion.

To the contrary, the record below establishes that the University proceeded with the adoption of its admissions program with great care and after soliciting the views of a wide variety of experts, educators, students and others. It has implemented the program carefully, with special training for the admissions officers, and intends to review the program on a routine basis to ensure continued compliance with constitutional requirements. *Id.* at 563.

Likewise, the Court should reject Plaintiffs' invitation to second guess the University's good faith determinations regarding whether certain minority groups are underrepresented on campus. The Court should also dismiss Plaintiffs' argument that minority applicants should be counted as a collective group in order to determine whether a "critical mass" of students has been admitted. It is the responsibility, and the right, of the University to determine its educational mission, and to identify the individuals it decides are best able to help it achieve that mission.

In *Grutter*, the Supreme Court stated that consideration of race and ethnicity in the admissions process is permitted to ensure a critical mass of under-represented minority groups. It did not require that a specific value be assigned to "critical mass," nor did it mandate that the achievement of "critical mass" requires the admission of the same number of all minorities. In fact, Plaintiffs' suggestions to the contrary likely would constitute the impermissible quotas described in *Grutter*,<sup>9</sup> *Bakke*,<sup>10</sup> and *Parents Involved in Community School*<sup>11</sup> Ultimately, Plaintiffs' objections and skepticism regarding the concept of "critical mass" reflect their fundamental disagreement with the *Grutter* decision. But as noted by the District Court,

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<sup>9</sup> 539 U.S. at 329.

<sup>10</sup> 438 U.S. 312 (Powell, J. concurring).

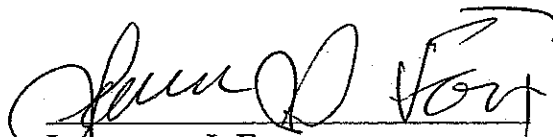
<sup>11</sup> 551 U.S. at 722-25.

the University's admissions program can fail constitutional scrutiny only if this Court concludes that *Grutter* is wrong. However, *Grutter* is Supreme Court precedent, and as such, remains the law of the land.



#### IV. CONCLUSION

For the very same reasons that the University of Texas has conscientiously pursued this goal, *Amici Curiae* are deeply committed to concept that educators and institutions of higher learning must be free to decide whether diversity in their student bodies serves their educational mission. *Amici Curiae* also recognize that in seeking to accomplish this vital component of many successful academic and social environments, there are important constitutional principles that must be observed, principles that, in the view of *Amici Curiae*, have clearly been fulfilled by the plan of the University of Texas. Accordingly, *Amici Curiae* respectfully urge this Honorable Court to affirm the judgment of the Court below. In doing so, this Court will provide an additional important precedent that *Amici Curiae* believe will provide further guidance to those institutions that choose to pursue this goal.



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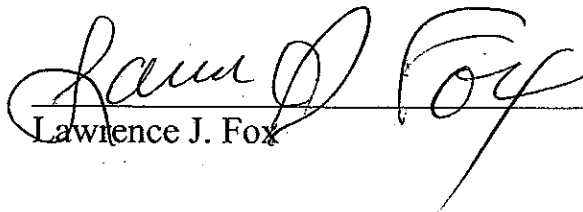
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Lawrence J. Fox

Dated: March 12, 2010

## CERTIFICATE OF SERVICE

I hereby certify that on this 12<sup>th</sup> day of March, 2010, I served this *Amicus Curiae* Brief by placing two (2) true and correct paper copies of same in the U.S. Mail, first class and postage pre-paid, together with a PDF version of same on a CD-ROM, and addressed to counsel of record as follows:

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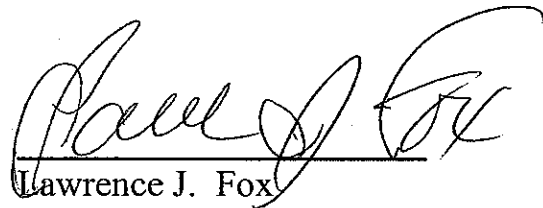
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