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 *AMICUS CURIAE* SOCIETY OF AMERICAN LAW TEACHERS IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[1]

Founded in 1973, the Society of American Law Teachers ("SALT") is the largest independent membership organization of legal academics in the United States. SALT's 900+ members are law school professors, deans, librarians and administrators. Virtually all active SALT members hold full-time positions in legal education.

Central to SALT's mission is its commitment to "mak[ing] the legal profession more inclusive and reflective of the great diversity of this nation." SALT understands that the most effective way to make collegiate, graduate and professional academic programs more representative of our nation's diverse populations is to utilize holistic admissions processes which incorporate race-consciousness as one of many factors. Since the Court's recent decision in *Grutter v. Bollinger*,[2] positive steps toward diversity have been realized, but African Americans and Latinos, in particular, remain woefully underrepresented at all levels of higher education. Until this imbalance is corrected, race-conscious affirmative action programs remain a necessity.

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[1] This brief is filed with the consent of the parties. Blanket consents to the filing of briefs *amicus curiae* were filed with the Court by the parties on February 22, 2012 and May 1, 2012. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief.

[2] 539 U.S. 306 (2003).

SALT has supported race-conscious admission policies before this Court in two previous cases. In 1978, SALT filed a brief amicus curiae in support of the University in *Regents of the University of California v. Bakke*.[3] More recently, in 2003, SALT filed a brief amicus curiae in support of the University of Michigan Law School in *Grutter*.

SALT's support of diversity in legal education has not been limited to the filing of briefs amicus curiae. It has organized many scholarly conferences; supported studies of bias in standardized testing, including the LSAT and state bar exams; created programs to mentor diverse minorities, including young academics, law students and potential law students; and led efforts to assure financial support for low-income law students.

The issues raised in the present case are of particular concern to SALT and its membership. Although this case is focused on undergraduate admissions, SALT recognizes that each law school's ability to admit a strong and diverse entering class is directly tied to the pool of available college graduates. A ruling against UT will be followed by public universities across the nation. If universities throughout the country are forced to abandon race-conscious admission programs, the number of racially diverse undergraduate students will decrease dramatically. In turn, the pool of graduates entering the legal profession, government service, and positions of leadership in the private sector will not reflect the diverse talents, resources and capabilities of this nation.

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[3] 438 U.S. 265 (1978).

SUMMARY OF ARGUMENT

In the *Grutter* decision, this Court held that universities have "a compelling interest in obtaining the educational benefits that flow from a diverse student body."[4] Universities seek diversity of many kinds, including racial and ethnic diversity. Social science confirms that interactions with students of diverse racial and cultural backgrounds leads to diffusion of prejudice, increased depths and perspectives in classroom learning, and other educational benefits for all students. A diverse student body also creates a learning environment that better prepares students—both minorities and non-minorities—for the workforce. Diversity is and remains a compelling state interest.

UT's affirmative action policy is narrowly tailored to achieve the compelling state interest of a diverse student body. UT's process of considering race in admissions is holistic and individualized. The program does not utilize quotas and strictly adheres to the guidance set out in *Grutter*. This Court should defer to UT's good faith decision that a limited race-conscious admissions policy is necessary to achieve the educational benefits of diversity. Deference to school administrators is consistent with this Court's precedent.

The day has not yet arrived when "the use of racial preferences [is] no longer . . . necessary."[5] The Top Ten Percent Law in Texas and percentage plans in general are not sufficient race-neutral alternatives. The Top Ten Percent Law increases minority representation only because of racial iso-

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[4] *Grutter*, 539 U.S. at 343.

[5] *Id.* at 310.

lation in Texas. Diversity is a nuanced concept, and percentage plans are blunt tools which cannot alone accomplish the complex task of considering race in an individualized, holistic manner. Furthermore, the Court's decision in this case will have nationwide impact, potentially altering admissions criteria in states where percentage plans are politically unrealistic, minimally impacting on diversity given the state's demographics, or both.

The many schools at which the members of SALT teach have relied on the decision in *Grutter* to craft admissions policies for the past nine years. In light of the nationwide reliance by educational institutions on the guidelines set out in *Grutter*, the principles of stare decisis mandate upholding *Grutter*. SALT supports the affirmative action program at the University of Texas and respectfully requests that this Court affirm the judgment of the Fifth Circuit.

ARGUMENT

I. DIVERSITY IS AND REMAINS A COMPELLING STATE INTEREST

A. This Court has Consistently Recognized the Value of Diversity.

In the *Grutter* decision, this Court held that universities have "a compelling interest in obtaining the educational benefits that flow from a diverse student body."[6] In reaching this conclusion, Justice O'Connor relied heavily on the reasoning of

[6] *Id.* at 343.

Justice Powell in another seminal university admissions case, *Regents of the University of California v. Bakke*.[7] In *Bakke*, Justice Powell asserted that "the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples."[8] He concluded that "the interest of diversity is compelling in the context of a university's admission program."[9] In *Grutter*, the Court upheld its conclusion in *Bakke* that diversity is a compelling state interest in the context of university admissions.[10] This finding remains as accurate and imperative today as it was nine years ago.

This Court has consistently respected the educational judgment of universities in finding that diversity is a compelling state interest. Educational professionals are the most knowledgeable regarding the meritorious effects of a heterogeneous student body on classroom discussions, the learning experience and future success of students.[11] Deference to universities' interest in attaining a diverse student body has been and continues to be supported by expert findings that diversity promotes learning outcomes, helps to break down racial stereotypes, and "better prepares students for an increasingly diverse workforce and society, and better prepares them as

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[7] 438 U.S. 265 (1978).

[8] *Id.* at 313 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

[9] *Bakke*, 438 U.S. at 314.

[10] *See Grutter*, 539 U.S. at 325.

[11] *See id.* at 328.

professionals."[12] "Given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment," universities have historically occupied "a special niche in our constitutional tradition."[13] Courts have respected the freedom of universities to make their "own judgments as to education" and to "select those students who will contribute the most to the 'robust exchange of ideas.'"[14]

B. Increased Perspectives as a Compelling State Interest.

In *Bakke*, Justice Powell affirmed that diverse classrooms promote an "atmosphere of 'speculation, experiment and creation'" which is "so essential to the quality of higher education."[15] Race, along with other social markers such as class and ethnicity, necessarily affects individuals' social and political opinions.[16] "Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experiences of being a racial minority in a society, like our own, in which race unfortunately still matters."[17] Col-

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[12] *Id.* at 330.

[13] *Id.* at 329.

[14] *See id.* (quoting *Keyishian*, 385 U.S. at 603).

[15] *Bakke*, 438 U.S. at 312 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957)).

[16] *See Easley v. Cromartie*, 532 U.S. 234, 257-58 (2001) (concluding that "race in this case correlates closely with political behavior").

[17] *Grutter*, 539 U.S. at 333.

lege is often the time when young adults explore their preconceived notions through classroom and individual discussions with peers. "Students come to universities at a critical stage of their development, a time during which they define themselves in relation to others and experiment with different social roles before making permanent commitments to occupations, social groups, and intimate personal relationships."[18] It is essential that during these formative years students have the opportunity to interact with individuals who will offer challenging views and unique perspectives. As Justice O'Connor asserted, and the Fifth Circuit in *Fisher v. University of Texas at Austin* affirmed,[19] in diverse classrooms the "discussion is livelier, more spirited, and simply more enlightening and interesting."[20]

Notably, legal scholarship supports the long-lasting benefits of ensuring that students experience a wide breadth of differing viewpoints and opinions that can only be achieved by maintaining a diverse student body.[21] Statistical data from University of Michigan Professor Patricia Gurin

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[18] *Grutter*, 288 F.3d 732, 760 (6th Cir. 2002).

[19] 631 F.3d 213, 219 (5th Cir. 2011).

[20] *Id.* (quoting *Grutter*, 539 U.S. at 330).

[21] *See* M.K.B. Darmer, *Teaching Whren to White Kids*, 15 Mich. J. Race & L. 109 (2009); Gary Orfield & Dean Whitla, *Diversity and Legal Education: Student Experiences in Leading Law Schools, in* Diversity Challenged: Evidence on the Impact of Affirmative Action 143 (Gary Orfield with Michael Kurlaender eds. 2001); Patricia Gurin, *Reports submitted on behalf of the University of Michigan: The Compelling Needs for Diversity in Higher Education*, 5 Mich. J. Race & Law 363 (1999).

indicate that "interaction with peers from diverse racial backgrounds," both in the university classroom and informally, lead to increased "learning outcomes."[22] "That is, [s]tudents who experienced the most racial and ethnic diversity in classroom settings and in informal interactions with peers showed the greatest engagement in active thinking processes, growth in intellectual engagement and motivation, and growth in intellectual and academic skills."[23]

The significance of diversity to a comprehensive education has been acknowledged by those most directly involved in the academic experience: the students.[24] Gary Orfield and Dean Whitla surveyed the student bodies at Harvard Law School and the University of Michigan Law School to determine the students' views on the importance of a diverse learning environment.[25] Over two-thirds of the students in each school found that diversity enhances how they thought about problems and solutions in their classes; almost two-

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[22] *Grutter*, 288 F.3d at 761; *see also* Patricia Gurin, *Reports submitted on behalf of the University of Michigan: The Compelling Needs for Diversity in Higher Education*, 5 Mich. J. Race & Law 363, 365 (1999)).

[23] *Grutter*, 288 F.3d at 761 (quotation marks and citation omitted).

[24] *See Sweatt v. Painter*, 339 U.S. 629, 634 (1950) ("Few students . . . would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views. . . .").

[25] Gary Orfield & Dean Whitla, *Diversity and Legal Education: Student Experiences in Leading Law Schools, in* Diversity Challenged: Evidence on the Impact of Affirmative Action 143 (Gary Orfield with Michael Kurlaender eds. 2001).

thirds of students in each school reported that diversity enhances the way topics have been discussed in a majority of their classes; 68% of Harvard students and 74% of Michigan students reported that diversity enhances the way topics are discussed informally at meals, over coffee, or at other similar occasions; and 89% of Harvard students and 91% of Michigan students reported that having students of different races and ethnicities is a positive element of their educational experiences.[26]

Studies conducted since the Court's decision in *Grutter* confirm that racial diversity remains a critical component to a quality education for all students.[27] The Education Diversity Project (EDP), an empirical study that followed over 6000 law students enrolled in 50 randomly selected ABA schools, found what the Court in *Grutter* and law professors understood intuitively—that racial diversity positively affects the educational experience of all law students.[28] Ninety percent of the students interviewed agreed or strongly agreed that a racially diverse student body enhanced their education by encouraging them to think

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[26] *Id.* at 158-61.

[27] Two recent reports deserve careful study. William Kidder, *Misshaping the River: Proposition 209 and Lessons for Fisher* (August 3, 2012) *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2123653 (hereinafter the Kidder Report). The Kidder Report is a comprehensive empirical study on the effect of California's affirmative action ban. Charles E. Daye et al., *Does Race Matter in Educational Diversity: A Legal and Empirical Analysis*, 13 Rutgers Race & L. Rev. (Issue 2 *forthcoming* 2012) (hereinafter the Daye Report).

[28] Daye Report, 13 Rutgers Race & L. Rev. at 44-45.

more critically, exposing them to new perspectives and improving their ability to work in heterogeneous groups.[29] Over 80% agreed or strongly agreed that these benefits extended into their professional lives.[30]

In short, classrooms of all sorts, at the undergraduate and graduate level, where boundaries are pushed and assumptions are both confounded and confirmed, are enhanced by the racial heterogeneity of those participating in the discussion.

C. Professionalism and Civic Engagement as a Compelling State Interest.

In addition to the complex benefits to learning outcomes that derive from students' exposure to increased perspectives, the professionalism and civic engagement that results from a diverse student body is a compelling state interest. This Court has "repeatedly acknowledged the overriding importance of preparing students for work and citizenship."[31] Universities are the training ground for our nation's future professionals and leaders, and students must learn the necessary skills to thrive in their subsequent roles while in attendance.

Students who are educated in a diverse educational environment are better prepared to become successful professionals as well as active partici-

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[29] *Id.*

[30] *Id.*

[31] *Grutter*, 539 U.S. at 331 (quoting *Plyler v. Doe*, 457 U.S. 202, 221 (1982)).

pants in society.[32] "[M]ajor American businesses have made it clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."[33] Businesses depend upon higher education to "provide the training and education necessary to succeed in America."[34] If American businesses are to achieve a highly qualified and diverse workforce with individuals who have been exposed to different perspectives, individuals of various races and ethnicities must be granted access to higher education.[35] American businesses fully appreciate the importance of educational diversity. Over 65 corporations filed amicus briefs supporting affirmative action in the Michigan cases; in *Fisher* businesses are once again supporting UT Austin's efforts, while zero corporations or chambers of commerce are filing briefs on behalf of Petitioner.

In addition to improving our nation's workforce, a diverse student body also fosters civic engagement. "In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity."[36] Consequently, universities must

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[32] *See id.* at 330 (citation omitted).

[33] *Id.*

[34] *Id.* at 332-33.

[35] David B. Wilkins, *From "Separate is Inherently Unequal" to "Diversity is Good for Business": The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 Harv. L. Rev. 1548, 1552 (2004).

[36] *Fisher*, 631 F.3d at 257.

be able to consider all of an applicant's characteristics, race included. And when race cannot be considered, the results are dramatic. A recent study of the effect of Proposition 209 on the educational diversity in California's public universities discovered that the number of African Americans entering California public law schools was cut in half following the affirmative action ban despite the increase in qualified African Americans applying to law schools across the country.[37] California business schools have seen a three-fifths decline in enrollment of African Americans, Latinos and American Indians since the ban was instated.[38] These dismal numbers prompted the UC Regent-led Study on Diversity to conclude that the universities were limited in their ability "to contribute to the diverse leadership cadre of California."[39]

With unwavering resolve, the Court in *Grutter* mandated that the "path to leadership be visibly open to talented and qualified individuals of every race and ethnicity . . . so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America."[40] Likewise, the EDP study concluded, "Educational diversity is needed to further our highest national interests to educate workers for an increasingly

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[37] Kidder Report at 57.

[38] *Id.* at 55.

[39] *Id.* at 55, n.185 (quoting UC Study Group on University Diversity, Overview Report to the Board of Regents, p. 5 (Sept. 2007), *available at* http://www.universityofcalifornia.edu/diversity/documents/diversityreport0907.pdf.)

[40] *Grutter*, 539 U.S. at 308, 332-33.

diverse domestic workforce, to prepare qualified professionals for an increasingly diverse domestic society, to compete effectively in a global business world, to enable our military to carry out its mission of national security, to sustain our political and cultural heritage and thereby maintain our society, and to work toward achieving our highest aspiration—our 'dream of one Nation, indivisible.' "[41]

II. UT'S POLICY IS NARROWLY TAILORED TO ACHIEVE THE COMPELLING STATE INTEREST OF DIVERSITY

A. UT's Policy is Narrowly Tailored to Achieve a Diverse Student Body.

In *Grutter*, this Court held that the University of Michigan Law School's race-conscious admissions policy was narrowly tailored because the law school was not using racial quotas, but was instead using a qualitative race-conscious admissions process to achieve the permissible compelling interest of educational diversity. The key to achieving a narrowly tailored policy was the school's individualistic, holistic review of the admissions applications that considered race as only one among many factors that might contribute to a diverse educational environment. This Court explained that "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative," and that a "serious, good faith

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[41] Daye Report, 13 Rutgers Race and L. Rev. at 87.

[42] *Grutter*, 539 U.S. at 339.

consideration" of race-neutral alternatives satisfies the narrow tailoring requirement.[42] This standard defers to the school's ultimate determination of how best to achieve the compelling interest of educational diversity.

Following (and as a result of) the Supreme Court's decision in *Grutter*, UT did an extensive study of campus diversity and determined that it did not have a "critical mass" of diversity needed at both the institutional and classroom levels. UT therefore revised its admissions policy to reintroduce race as a "factor of a factor of a factor of a factor."[43] In fact, "the weight given to race in UT undergraduate admissions is less than that upheld in *Grutter*."[44] Under UT's policy, race is only one of seven special circumstances that compose one factor of some applicants' personal achievement score, which is one of three factors that makes up the Personal Achievement Index (PAI), which is one of the two elements that determine admission for applicants who are Texas residents but are not admitted automatically under the Top Ten Percent Law.[45] When evaluating a student's PAI, UT undertakes the individualized and holistic approach as directed by *Grutter*. Evaluators may factor in all kinds of circumstances that contribute to diversity other than race, such as socio-economic status, high school environment, and family environment and responsibilities. This approach respects *Grutter*'s insis-

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[43] *Fisher*, 645 F. Supp. 2d at 608.

[44] Vinay Harpalani, *Diversity Within Racial Groups and the Constitutionality of Race Conscious Admissions*, U. Pa. J. Const. L. (forthcoming Fall 2012).

[45] *Fisher*, 645 F. Supp. 2d at 608.

tence that "the importance of . . . individualized consideration in the context of a race-conscious admissions program is paramount."[46] UT does not consider the racial or ethnic composition of the group of admitted students during the admissions decision making process.

An especially noteworthy aspect of UT's race-conscious admissions policy is that applicants of all races can gain admission.

> [R]ace can enhance the personal achievement score of a student from any racial background, including whites and Asian-Americans. For example, a white student who has demonstrated substantial community involvement at a predominantly Hispanic high school may contribute a unique perspective that produces a greater personal achievement score than a similarly situated Hispanic student from the same school. This possibility is the point of *Grutter*'s holistic and individualized assessments, which must be flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant. Indeed, just as in *Grutter*, UT applicants of every race may submit supplemental information to highlight their potential diversity contributions, which allows students who are diverse in unconventional ways to describe their unique attributes.[47]

UT's admissions program, put into place after thorough study and consideration of the specific educational environment and needs of UT follow-

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[46] *Grutter*, 539 U.S. at 337.

[47] *Fisher*, 631 F.3d at 236.

ing years of experimentation with a race-neutral alternative that was not entirely successful, comports with the narrow tailoring standard set in *Grutter*. The District Court below found that "UT's admissions policy shares many of the same features as the Law School's policy in *Grutter*, which is not surprising considering the parties agree UT's policy was based on the Law School's policy."[48]

B. Deference to the Judgments of University Administrators is Consistent With Strict Scrutiny.

Just as this Court should defer to educators' determination that diversity is a compelling educational interest, this Court should also respect UT's expert academic judgment that the admissions program is narrowly tailored to fit this compelling interest. Context is relevant to strict scrutiny of race-based decision making and "a university's educational judgment in developing diversity policies is due deference."[49] Deference is warranted because university administrators have expertise in making relevant educational judgments about their academic programs. The Court's focus is on the decision making process, not on the substantive content of the decision itself.[50]

In *Bakke*, the Supreme Court first evaluated race-conscious admissions under the Equal Protection Clause of the Fourteenth Amendment and determined that strict scrutiny was applicable to

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[48] *Fisher*, 645 F. Supp. 2d at 609.

[49] *Fisher*, 631 F.3d at 231.

[50] *Id.*

evaluate admissions decisions based on race and ethnicity aimed at achieving educational diversity. Applying strict scrutiny, this Court determined that the use of racial quotas was not narrowly tailored to satisfy strict scrutiny.[51] The Court reaffirmed the applicability of strict scrutiny in this context in *Grutter* and announced that, even within the context of strict scrutiny, it would defer to the school's determination of the best means to achieve the compelling interest of educational diversity, holding that narrow tailoring requires good faith consideration of race-neutral alternatives, not exhaustion of all possible race-neutral alternatives.[52] The Court scrutinized the process of deciding to adopt a race-conscious admissions policy, not the policy itself, and presumed that the university acted in good faith in implementing that policy.[53]

Thus, scrutiny remains strict, but in light of the deference prescribed by *Grutter*, it is scrutiny of the *process* of a decision rather than of the *result* of the decision.[54] As long as race is considered in a holistic and individualized manner (as UT's policy does), and not as part of a quota system (as the *Parents Involved* and *Bakke* programs did), the Court should defer to UT's good-faith decision that its limited race-conscious admissions policy is necessary to achieve the educational benefits of diversity.[55] The narrow tailoring element of strict scrutiny of race-conscious admissions programs

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51 *Bakke*, 438 U.S. at 319-20.

52 *Grutter*, 539 U.S. at 339.

53 *See Id.*

54 *See Fisher*, 631 F.3d at 231.

defers to schools' judgments as to whether existing race-neutral alternatives are tailored to their educational goals. Narrow tailoring requires only that UT consider, rather than adopt, race-neutral alternatives.[56]

Deference to educators' judgments and the presumption of good faith are the only rational applications of strict scrutiny in this context. University professors and administrators are experts in education. These professionals spend their entire careers developing expertise, and their daily work involves implementing various educational methods and observing their results. As a result, they are best suited to determine whether race-neutral alternatives have been or will be adequate as a means to fulfill the compelling interest in educational diversity.

Professors and administrators in institutions of higher education are experts not only in the field of education, but also experts with regard to their own schools and their own students. Every student is different, every class is different, and every school is different. Each school needs an admissions program that suits its unique circumstances, including financial resources, diversity needs and political climate. The specific educational diversity objectives particular to UT are especially important because of UT's "mission and flagship role" to prepare future leaders in the state of Texas.[57] A compelling interest at UT may

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55 *Id.* at 234.

56 *See Grutter*, 539 U.S. at 339-40.

57 As the Kidder report notes, "[t]hose with a sense of history can appreciate how far UT Austin has come in striving to overcome its ignoble past of segregation, discrimina-

not be applicable at other schools, just as what constitutes "critical mass" at UT may not in another school.[58] This Court has repeatedly decided that courts are not the appropriate entity to create educational policy and that the judicial process is too slow and inflexible to evaluate the substance of educational decisions.

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tion and a hostile campus climate toward African American and Latino students." Kidder Report at 12. Until 1969, the Texas Constitution mandated racially segregated schools and colleges, and the record in *Sweatt v. Painter*, 339 U.S. 629 (1950), revealed the egregious and heartbreaking conditions of the times. In 1993, the Fifth Circuit observed, with wry understatement, that "Texas' long history of discrimination against its black and Hispanic citizens in all areas of public life is not the subject of dispute." *League of United Latin Am. Citizens, Council No 4434 v. Clements*, 999 F.2d 831, 866 (5th Cir. 1993). A year later, the District Court in *Hopwood v. Texas*, 861 F. Supp. 551 (W.D. Tex. 1994) recalled that "during the 1950s, and into the 1960s, the University of Texas continued to implement discriminatory policies against both black and Mexican American students. Mexican American students were segregated in on-campus housing and assigned to a dormitory known as the 'barracks', as well as excluded from membership in most university-sponsored organizations. Additionally, until the mid 1960s, the Board of Regents policy prohibited blacks from living in or visiting white dormitories." (at 555). More recently, as Kidder and other scholars have noted, Texas universities suffered through the devastating repercussions of the Fifth Circuit's decision in *Hopwood*—otherwise known as the "Hopwood Chill"—which "severely undermined these universities' efforts to create diverse multiracial campuses." Kidder Report at 11-12, n.26 (and authorities cited therein).

[58] *Id.* at 243.

C. Petitioner's Reliance on Parents Involved is Misplaced

Petitioners argue that UT's policy is not narrowly tailored because it produces minimal gains in diversity, relying on this Court's decision in *Parents Involved in Community Schools v. Seattle School District No. 1*.[59] This argument mischaracterizes and misapplies the language of *Parents Involved*.[60] First, UT's current policy has, in fact, produced concrete results.[61] *Parents Involved* did not state or imply that strict scrutiny of race-conscious admissions policies requires more than "minimal effects" on a compelling interest; instead it reaffirmed *Grutter's* standard for narrow tailoring—"serious, good faith consideration" of race-neutral alternatives.

Parents Involved considered a program using race as a factor in determining student placements in public high schools. The Supreme Court determined that that program was not narrowly tailored because (1) it used quotas, requiring the racial composition of each school to fall within ten percentage points of the District's overall racial balance, and (2) the District did not exercise the required good faith consideration of race-neutral alternatives necessary for narrow tailoring set forth by the Supreme Court in *Grutter*.[62] The *Parents Involved* decision also emphasized the dis-

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[59] Br. of Pet'r at 38.

[60] 551 U.S. 701 (2007).

[61] *Fisher*, 631 F.3d at 226 ("The current policy has produced noticeable results.")

[62] *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 712, 735 (2007).

tinction between the contexts of higher education and public secondary schools and stated that the *Grutter* considerations were "unique to institutions of higher education" and that universities have a "special niche" in constitutional tradition.[63] The Court in *Parents Involved* confirmed *Grutter*'s standard of "serious, good faith consideration" of race-neutral alternatives, but found the facts of the two cases distinguishable—that is, the Seattle case contained explicit racial balancing and did not involve, of course, the unique considerations in higher education. Any comparison between UT's program and the program at issue in *Parents Involved* are inapposite.

D. Percentage Plans Are Not Sufficient Race-Neutral Alternatives and Should Not Preclude Narrowly Tailored Race-Conscious Admissions Policies.

1. *Texas' Top Ten Percent Law is Insufficient*

In *Grutter*, the Court required good faith consideration of viable race-neutral alternatives to achieve the educational benefits of diversity. It explicitly held, however, that the narrow tailoring prong of strict scrutiny does *not* require exhaustion of any such alternatives.[64] *Grutter* did not consider what effect a moderate level of statistical success of race-neutral alternatives would have on deference to a university's decision to implement race-conscious admissions policies to supplement

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[63] *Id.* at 724.

[64] *Grutter*, 539 U.S. at 339; *Fisher* 631 F.3d at 239-40.

such alternatives in order to achieve educational diversity goals.

In 1997, after a sharp decrease in diversity following the prohibition of race-conscious admissions by *Hopwood v. Texas*, the Texas legislature enacted the Top Ten Percent Law, mandating that high school seniors in the top ten percent of their class be admitted to any Texas state university.[65] While this mandate successfully increased the statistical percentage of minority students at UT, in many ways it frustrates the University's efforts to achieve classroom diversity.[66] Although the Top Ten Percent Law, when implemented alone, increased statistical racial and ethnic diversity, the University, after comprehensive good-faith consideration, determined that such statistical increases did not fulfill the educational diversity objectives necessary for its educational mission. As UT has realized, simply increasing the number of minorities enrolled in an institution is not sufficient to achieve diversity. In fact, "[i]t is possible that a race conscious policy that admits only a small number of minority students can have a meaningful, unique impact, if those students add to the diversity of viewpoints and experiences in a manner beyond the race neutral policy."[67] In addition to the fact that diversity of viewpoint is not even a consideration under the Top Ten Percent Law, the minority students admitted to UT under

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[65] 78 F.3d 932 (5th Cir. 1996) (holding that the University of Texas School of Law could not use race as a factor in deciding which applicants to admit in order to achieve a diverse student body).

[66] *Fisher*, 631 F.3d at 239-42.

[67] Harpalani, *supra* note 44.

this policy remain clustered in certain programs in effect minimizing classroom diversity.[68]

The Top Ten Percent Law's success in increasing minority enrollment "comes at a high cost and is at best a blunt tool for securing the educational benefits diversity is intended to achieve."[69] Because it focuses on geographic diversity as a proxy for race and ethnicity, the Top Ten Percent Law is far more limited than race-conscious admissions to achieve not just diversity itself at the institutional level, but the actual educational benefits of diversity which are the compelling interests. Those minority students who attended more competitive high schools but did not finish in the top 10 percent of their graduating classes, and who could contribute to diversity in various ways, are precluded from automatic admission to UT by the Top Ten Percent Law.[70] Further, the Top Ten Percent Law challenges the very foundation of *Grutter* as it is a policy that increases minority representation only because of racial isolation in Texas public high schools.[71]

Petitioner argues that because the Top Ten Percent Law has achieved statistical racial and ethnic diversity at UT as a whole, the race-conscious program at UT is unconstitutional because it has

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[68] *Fisher*, 631 F.3d at 241.

[69] *Id.* at 242.

[70] Harpalani, *supra* note 44; *see also Gratz v. Bollinger*, 539 U.S. 244, 303 n.10 (2003) (Percentage plans "encourage parents to keep their children in low-performing segregated schools, and discourage students from taking challenging classes that might lower their grade point averages.").

[71] Harpalani, *supra* note 44.

minimal impact on the racial composition of the students admitted and is, therefore, not narrowly tailored. If anything, however, the fact that the race-conscious program at UT is only applied to a small portion of applicants makes the policy more narrowly tailored rather than less. For the vast majority of UT applicants, race is entirely irrelevant.

2. *Percentage Plans are Ineffective Nationwide*

If this Court rules in favor of the Petitioner, it will mandate a dramatic change to the admissions process for colleges and universities nationwide, institutions where a Top Ten Percent Law is not in place, where such a plan may be either politically unrealistic, or have minimal impact on diversity given the state's demographics, or both. In many states, race-conscious admissions may be the only possible or practical method of working towards educational diversity. Overruling UT's use of race-conscious admissions will discourage other schools from continuing or implementing race-conscious admissions policies, even if those policies are needed to meet the compelling interest of educational diversity.

Different universities in different states must be free to tailor their admissions programs to meet their own demographics, political realities, financial resources and educational needs. Courts are not equipped to fashion these policies, and the judicial process is certainly not nimble enough to evaluate such policies on an ongoing basis, as universities can and must. For example, the specific educational diversity objectives described in UT's 2004 Proposal to Consider Race and Ethnicity in

Admissions are particular to UT and are especially important to UT specifically because of its "mission" and "flagship role" to "prepare its students to be the leaders of the state of Texas."[72]

Educational objectives must be tailored to each specific institution.[73] Since critical mass is defined not in terms of numbers or percentages, but instead in terms of educational objectives of a particular school, what constitutes "critical mass" in one state may not in another state. At any given school, critical mass today may be different from critical mass ten years ago, and again different from critical mass five years from now.[74] For this

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[72] *Fisher*, 645 F. Supp. 2d at 602.

[73] Important lessons are being learned from the California experience in the wake of Proposition 209, which prohibited, *inter alia*, the use of race as a factor in university admissions. The University of California has been, for generations, our nation's largest and most highly regarded public university system. With an economically and racially diverse population, the state has served as an invaluable laboratory for evaluating the effectiveness of class-based, race-neutral admission policies. The results have been indisputable: class-based affirmative action programs cannot substitute for race-conscious policies. *See* Kidder Report at 53, n.177 (citing Mark C. Long, *Affirmative Action and Its Alternatives in Public Universities: What Do We Know?*, 67 Public Admin. Rev. 315 (2007); Alan Krueger et al., *Race, Income and College in 25 Years: The Continuing Legacy of Segregation and Discrimination*, NBER Working Paper 11445 (June 2005) *available at* http://www.nber.org/papers/w11445.pdf; Thomas J. Kane, *Misconceptions in the Debate Over Affirmative Action in College Admissions, in* Chilling Admissions: The Affirmative Action Crisis And The Search For Alternatives 17, 28 (Gary Orfield & Edward Miller eds., 1998).).

[74] *Fisher*, 631 F.3d at Black's Law Dictionary 1537 (9th ed. 2009).

reason the Fifth Circuit appropriately refused to "bless the university's race-conscious admission program in perpetuity,"[75] As the court explained "it is more a process than a fixed structure that we review."[76]

In addition to the difficulty of applying percentage plans such as the Top Ten Percent Law to undergraduate institutions around the nation, such plans are, of course, not relevant or useful to law schools or other graduate and professional schools, even though the need for diversity is equally compelling. Graduate and professional schools need race-conscious admissions programs to achieve their institution-specific missions and goals, and a legislatively-imposed percentage plan cannot meet this need.

The consequences of prohibiting race-conscious admission at UT following the implementation of the Top Ten Percent Law are harsh. Requiring UT to disband the minimal portion of their admissions process that is race-conscious would discourage other schools from ever implementing any race-neutral alternatives in the future. Deeming the Top Ten Percent Law sufficient to meet UT's diversity needs would send the message to other schools that if a race-neutral alternative meets with some success, they will no longer be permitted to use race-conscious admissions going forward. Such a message defeats the vision of the narrow tailoring requirement of considering facially neutral alternatives because it discourages experimentation with those alternatives and, from the perspective of school administrators try-

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[75] *Id.* at 246.

[76] *Id.*

ing to achieve diversity, potentially punishes administrators for even partial success by precluding a tool that they would otherwise have. Universities must be allowed to experiment flexibly with various tools to increase diversity without fear that some amount of success with a facially neutral alternative might preclude future efforts to increase diversity.

III. STARE DECISIS REQUIRES FIDELITY TO THE GRUTTER DECISION

The basic legal principle of stare decisis provides that "a court must follow earlier judicial decisions when the same points arise again in litigation."[77] In *Grutter*, this Court addressed and decided the question of "[w]hether diversity is a compelling interest that can justify the narrowly tailored use of race in selecting applicants for admission to public universities."[78] This Court answered in the affirmative, and universities around the country have relied on the guidance of *Grutter* to plan their admissions policies ever since. In fact, the Court's analysis has been consistent since *Bakke* that universities may consider, in limited ways, an applicant's race without violating the Constitution. Lower courts have applied *Grutter's* holdings and upheld challenged admissions programs when they complied with *Grutter's* reasoning.

Furthermore, in *Parents Involved*, this Court reaffirmed that diversity is a compelling state interest, declining to overrule *Grutter*. Universi-

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[77] Black's Law Dictionary 1537 (9th ed. 2009).

[78] *Grutter*, 539 U.S. at 322.

ties across the nation, already relying on *Grutter*, viewed *Parents Involved* as confirmation of those principles and continued to build their admissions policies around the principles established in *Grutter*.

It is undisputed that the affirmative action program at UT is modeled after the *Grutter* plan and is reviewed frequently to ensure compliance with the principles set out in that case and affirmed by this Court. To overrule *Grutter*, just nine years after that seminal decision, would overhaul university admissions policies across the nation. Educational institutions, including undergraduate colleges, law schools, and other graduate and professional schools - public and private - will be forced to immediately revamp their admissions polices and procedures. Schools across the country have studied, developed, and modified their admissions procedures based on the guidance of this Court in 2003. A dramatic change in the affirmative action jurisprudence will have real consequences for the institutions attempting to comply with the mandates of this Court. Such a change will necessitate the redevelopment of policies, training of staff, and education of the university communities. In this context, the principle of stare decisis requires *Grutter*'s reaffirmation.

[79] *Grutter*, 539 U.S. at 310.

CONCLUSION

In *Grutter*, Justice O'Connor expressed the hope that "25 years from now, the use of racial preferences will no longer be necessary" to further the interests of diversity.[79] Those in the business of higher education, including the members of SALT, are keenly aware that such a day has not yet arrived. Diversity of student body remains a compelling state interest which has not yet been achieved and therefore, the decision of the Fifth Circuit should be affirmed.

Respectfully submitted,

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August 13, 2012