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 *AMICI CURIAE* ON BEHALF OF THE COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN) AND UNITED FOR EQUALITY AND AFFIRMATIVE ACTION LEGAL DEFENSE FUND (UEAALDF) IN SUPPORT OF THE RESPONDENTS URGING AFFIRMANCE

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## INTEREST OF THE *AMICI CURIAE*

The Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by Any Means Necessary (BAMN) initiated, organized and led the demonstration of 50,000 persons, mostly young black and Latina/o students, outside this Court on the day that Grutter was argued.[1]

BAMN was founded in 1995 in the fight to defeat California's Proposition 209 and to defend affirmative action at the University of California in particular. BAMN's members are mostly black or Latina/o young people. For almost twenty years, BAMN has organized and led young people in defending affirmative action.

BAMN is now involved in campaigns to defend affirmative action and to increase the admissions of black and Latino students at the campuses of the University of California, at the University of Michigan, and at many other campuses and high schools in those and other regions of the country.

BAMN has always asserted that legal challenges have historically been and are today a crucial means for winning racial equality. BAMN and its legal arm, United for Equality and Affirmative Action Legal

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[1] The parties have consented to the filing of this brief. Pursuant to Rule 37.6 of this Court, *amici curiae* certifies that no counsel for any party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, and its counsel made such a monetary contribution to its preparation or submission.

Defense Fund (UEAALDF), organized the student intervenors in *Grutter v. Bollinger*, 539 U.S. 306 (2003) and presented much of the evidence that formed the record for this Court's decision in that case.

BAMN is now the lead plaintiff in the case challenging Michigan's version of Proposition 209 which is now pending before the en banc panel of the United States Court of Appeals for the Sixth Circuit. See *Coal. to Defend Aff. Action v. Regents of the Univ. of Michigan*, 652 F.3d 207 (6th Cir. 2011), en banc review granted. BAMN has also been a leading plaintiff in legal challenges to laws or proposed laws banning affirmative action in California, Arizona, Oklahoma, and Michigan.

## SUMMARY OF ARGUMENT

The Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary (BAMN) and United for Equality and Affirmative Action Legal Defense Fund (UEAALDF) defend, without reservations, the entire current University of Texas at Austin (UT Austin) admissions plan. Austin is the flagship campus of the University of Texas, which includes several other satellite campuses which do not utilize the same admissions system as the far more selective Austin campus.

UT Austin's admissions plan has two separate but complementary tracks. The first is essentially a race-neutral voluntary desegregation plan for higher education for Texas residents, known as the Ten Percent Plan. The vast majority of freshmen admitted enter through the Ten Percent Plan. The second

admissions track is modeled on the holistic admission system upheld by this Court in *Grutter v. Bollinger*, 539 U.S. 306 (2003). This second, special admissions system includes the affirmative action plan at issue in this case and is utilized primarily for the admission of out-of-state students, international students, and more privileged and wealthy Texas students who do not qualify for admission under the Ten Percent Plan. The two plans work in tandem and constitute a single overall admissions system which has made UT Austin the most integrated, diverse and dynamic flagship public university in the country.

From its inception, public education in Texas has been defined by the struggle to create a unified educational system that could move the state forward while accommodating what seemed like the insuperable, often counterposed interests of its white population on one side and its oppressed and discriminated-against Latina/o, black and Native American populations on the other. The struggles of its oppressed communities have always provided the motor force to the people of Texas to meld into a unified whole and have moved the state towards more equality and away from the segregation by race and class that the backlash against civil rights and basic democracy have always tried to reinstitute. None of the past experiments, from Jim Crow educational segregation, to halting initial forays into timid and partial affirmative action measures, to the more extensive affirmative action policies struck down in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), ever succeeded in desegregating UT. After one hundred years of failed experiments, UT Austin has finally found an admissions system that is making real gains in transforming the University into a diverse and

racially and socio-economically diverse campus and is wildly popular with the great majority of Texans.

The petitioners are asking the Court to derail this process and eviscerate all the gains towards integration, equality and academic greatness UT Austin has made in the last fifteen years. BAMN and UEAALDF ask the Court to stand with the progress and unity that have been achieved, instead of being the force that halts it and restores vestiges of the old Jim Crow. We ask the Court to resist the petitioner's invitation to follow the lead of the Court that issued *Plessy v. Ferguson,* 163 U.S. 537 (1896), and plunged this nation into the old Jim Crow and instead to restore *Brown v. Board of Education,* 347 U.S. 483 (1954), to the commanding role it must play again to halt the decline of America into the abyss of the new Jim Crow.

The issue here is that, as Texas becomes an increasingly majority-minority state, whether (1) Texas may continue the kind of experimentation this Court urged in *Grutter* and provide a model for the nation of how to foster diversity and integration through a university admissions system that combines a race-neutral desegregation plan and a modest, constitutional affirmative action plan, contained in a holistic admissions system, or whether (2) Texas will restore a separate and unequal education system, wherein white privilege is the highest priority and the Fourteenth Amendment once again becomes the opposite of what it was intended to be.

## ARGUMENT

### I. The Current UT Austin Admissions System

Currently, the vast majority of students at UT Austin are admitted under the Ten Percent Plan. This plan guarantees a seat at UT's flagship university to every Texas high school graduate who graduates in the top ten percent of their high school class. The Ten Percent Plan is by far and away the most democratic, equal, fair and transparent admissions system of any elite university in the country. Factors considered in every holistic plan, factors over which the students themselves have no control, factors which capture institutionalized racial and class inequities in educational opportunities, do not enter into consideration in the Ten Percent Plan. These factors, most importantly heavy reliance on standardized test scores,[2] always give applicants who attend privileged

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[2] In 2011 on the SAT, white college-bound seniors scored an average of 1579, black college-bound seniors scored an average of 1272 , and Mexican American college-bound seniors scored an average of 1362. Data from College Board, *2011 College-Bound Seniors Total Group Profile Report.*

A university study of student college performance observed: "Compared to high-school grade-point average (HSGPA), scores on standardized admissions tests such as the SAT I are much more closely correlated with students' socioeconomic status... Rank-ordering students by test scores produces much sharper racial/ethnic stratification than when the same students are ranked by HSGPA." University of California, Berkeley's Center for Studies in Higher Education, *Validity of High-School Grades in Predicting Student Success Beyond the Freshman Year: High-School Record vs. Standardized Tests as Indicators of Four-Year College Outcomes,* p. 2. http://cshe.berkeley.edu/publications/docs/ROPS.GEISER._SAT_6.12.07.pdf

majority-white high schools a huge unearned advantage in a competitive admissions system. (Other factors that are taken into consideration in the special holistic admissions system include alumnae preference, access to advanced placement courses, state-wide ranking of applicants' high schools, and extra-curricular activities offered and taken advantage of by these applicants.)

Large numbers of gifted and hard-working students from not only poor and Latina/o, black, Native American and immigrant communities, but also from poor white communities,[3] who never even would have applied, let alone gained admission to UT Austin under a conventional admissions system, even one with affirmative action, have been able to utilize the educational opportunities UT Austin provides, to develop themselves, to let their talents shine and to uplift the dignity and pride of their embattled and struggling communities.

The second admissions pipeline, which currently accounts for about twenty-five percent of the student body, is a special holistic system which takes into account a variety of factors, including those listed above which disadvantage poor students of all races,

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[3] Between 1996 and 2004 (the Ten Percent Plan began in 1998), the number of high schools represented in UT Austin's freshman class increased from 616 to 815. The number of urban schools increased from 77 to 115 and rural schools increased from 26 to 47. University of Texas at Austin Office of Admissions, *An Investigation into Rural High School Representation in Entering Freshman Classes at the University of Texas at Austin – Summer/Fall Classes of 1996-2007.* http://www.utexas.edu/student/admissions/research/RuralSchoolStudy-96-07.pdf

especially Latina/o, black and Native American students. The Ten Percent Plan was created by the Texas legislature in 1997 and took effect in 1998. In 2009 the Legislature capped the number of students who could be admitted through the Ten Percent Plan at 75%. The cap took effect in 2011. The extremely modest affirmative action plan being challenged here is incorporated within this special smaller admissions track. This plan has allowed highly-qualified Latina/o, black, Native American, and some immigrant students to attain some opportunity to gain admission to UT Austin. These minority students attend majority-white Texas high schools where almost no underrepresented minority students are placed in upper-echelon college track or Advanced Placement classes. This affirmative action plan provides a small number of out-of-state, non-athlete, underrepresented minority students access to UT Austin. Specific undergraduate colleges at UT Austin, especially those that require students to enter the University with a great deal of proficiency in math and science, and which currently have only tiny numbers of underrepresented students, would be completely resegregated, if the affirmative action component of the special admissions system is struck down.

An important gain for diversity and integration achieved through the special admissions track is the increase in the number of Asian-American students who attend UT Austin. It has also provided a pathway for international students and out-of-state students of all races to attend the University.

Working in tandem, the two complementary admission tracks have made the undergraduate student body at UT Austin a majority-minority

campus. And while the two admissions systems have not yet made the UT student body representative of the racial composition of Texas,[4] they have gone farther in admitting, retaining and graduating more underrepresented minority students than many other flagship public universities.

Under its current admissions system, UT Austin has raised the academic quality of the University and created a learning environment that provides minority students with the critical mass needed to flourish academically and to lift their confidence and self-worth. It has, by example challenged and proven wrong all the degrading and false stereotypes of black and brown inferiority still far too prevalent in this society. The pervasive wrong and false assumption that students who attend more academically rigorous or better-resourced schools are *a priori* more gifted, talented or meritorious than the top-performing students who go to poor, overcrowded, and dangerous segregated inner-city high schools in Dallas-Fort Worth, Houston or San Antonio or their largely white rural equivalents is being stripped of legitimacy every day in a multitude of classrooms at UT Austin.

Unlike any other elite public university in America, UT Austin is acting on the principle that it is the responsibility of the University, not of each individual

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[4] The Fifth Circuit observed: "The percentage of Hispanics at UT is less than two-thirds the percentage of Hispanics in Texas, and the percentage of African-Americans at UT is half the percentage of Texas's African-American population, while Asian-American enrollment is more than five times the percentage of Texan Asian-Americans." *Fisher v. Univ. of Texas*, 631 F.3d 213, 235 (5th Cir. 2011).

student, to overcome and correct the gaping inequalities in educational opportunity that are created by racial segregation and the vast differences in family income and social status which exist in every state in the nation. By treating as peers and equals students of every race and socio-economic background, UT Austin is actually breaking down the pervasive prejudices against and stereotyping of under-represented minority students and fostering the kind of diversity and integration that every elite university seeks, but cannot accomplish because they lack the courage to institute the kind of admissions system UT utilizes.

## II. The History of Racial Segregation in Higher Education in Texas

In 1946, black World War II veteran Herman Marion Sweatt was rejected from admission to the UT Austin School of Law because he was black. After a four-year legal struggle, *Sweatt v. Painter*, 339 U.S. 629 (1950), was decided by this Court, which forced UT Austin to admit black students for the first time since it was founded in 1883.

*Sweatt* did not, however, open the gates of equal educational opportunity to black and Latina/o Texas students. Even though *Brown v Board of Education*, perhaps the greatest decision in this Court's history, held in 1954 that separate never could be equal, in practice, UT Austin maintained *de facto* segregation for the next twenty years. From 1950 to 1956, UT Austin continued to reject black students from its undergraduate programs, stating that those programs were also offered at segregated black universities. Black students only could enter UT Austin's law

school. In 1956, just months before Autherine Lucy enrolled at the University of Alabama and the US Supreme Court voided portions of the Texas constitution outlining segregation, UT Austin decided to integrate.

But southern universities used standardized tests as proxies for white-only segregation. In the wake of *Sweatt,* UT Austin began requiring "aptitude tests" in 1951, and after *Brown* it incorporated the SAT into its admissions system in 1956,[5] the year it formally desegregated its undergraduate admissions.[6] Even after the end of legal segregation, standardized tests acted as gatekeepers to keep out Latina/o and black students until affirmative action programs were finally instituted in the 1970s: in 1971, UT Austin's law school had zero entering black students.[7]

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[5] Julian Vasquez Heilig & Laurel Dietz & Michael Volonnino, *From Jim Crow to the Top 10% Plan: A Historical Analysis of Latina/o Access to a Selective Flagship University,* Enrollment Management Journal: Student Access, Finance, and Success in Higher Education, 5(3), 83-109.

[6] Julian Vasquez Heilig & Richard J. Reddick & Choquette Hamilton & Laurel Dietz , *Actuating Equity?: Historical and Contemporary Analyses of African American Access to Selective Higher Education from* Sweatt *to the Top 10 Percent Law,* Harvard Journal of African American Public Policy, 27(1), 11-27.

[7] William C. Kidder, *The Struggle for Access from* Sweatt *to* Grutter: *A History of African American, Latino, and American Indian Law School Admissions, 1950-2000,* 19 Harvard BlackLetter Law Journal 1-42, 1-3 (Spring, 2003).

Under pressure from the Civil Rights movement, UT Austin instituted a Provisional Admissions Program in 1962, which allowed students to enroll in a summer session, and prove their ability to perform well by taking twelve college credits of classes and earning good grades. This program actually helped wealthier students who could not qualify for admission but who could afford to take college classes without financial aid, which was not offered, and without working, which was discouraged because of the heavy course load for a summer session.[8]

In 1968 UT Austin offered a Program for Equal Opportunity which offered admission to twelve black students and thirteen Latina/o students who were chosen based on recommendations and interviews, as "educationally, culturally and financially disadvantaged" students who could succeed at UT Austin but who had not done well on the standardized tests. Twelve students successfully returned for their sophomore year, but the program was defunded by 1969.

In the 1970s, UT Austin implemented effective affirmative action programs for the first time, which admitted Latina/o and black students with lower standardized test scores, thereby overcoming the race and class bias inherent in those tests. But in 1996, *Hopwood* outlawed the consideration of race, and Latina/o and black attendance plunged: between 1995 and 1997, the number of enrolled black freshmen fell from 309 (5%) to 190 (3%), and enrolled Hispanic freshmen fell from 935 (15%) to 892 (13%).

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[8] *Supra* at note 5.

In response to the specter of resegregation posed by *Hopwood,* the Texas legislature adopted the Ten Percent Law in 1997, granting automatic admission to UT Austin and other Texas public universities to Texas students who finished in the top ten percent of their high-school graduating class, according to grade-point average and without regard to standardized test scores. This new admissions system existed side by side with the old admissions system which now had no affirmative action component. Initially the Texas state legislature and the UT administration set as a goal to create incoming freshman classes fifty percent of which were admitted through the Ten Percent Plan and fifty percent of which were admitted through the conventional admissions system. No one was certain about how the students admitted through the Ten Percent Plan would perform academically and what the impact of the whole new admissions system would have on the life of the campus and the relationship of the people of Texas to UT.

This new admissions plan broadened access and opportunity throughout Texas, both to majority-minority student populations in Texas' under-funded urban districts and also to students in Texas' rural, majority-white and poor districts. The Ten Percent Plan took effect in 1998, and by 2004, two conclusions about the new admissions system were drawn. First, that the students admitted under the Ten Percent Plan were performing as well as students who had test scores which were 200 to 300 points higher.[9] In fact,

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[9] "[A]t the mid-ranges [of SAT scores] where most students are located, top 10% students performed as well as non-top 10% students scoring 200-300 points higher on the SAT scale." This

since the inception of the new admissions plan, UT rankings as an academic institution have been on the rise.

Second, the Ten Percent Plan led to an increase in Latina/o and black student enrollment: by 2004, black freshman enrollment had increased to 309 (5%) and Hispanic freshman enrollment had increased to 1,149 (17%).[10] It also meant that schools that had sent no students to UT Austin before could be represented: between 1996 and 2004, the number of high schools represented in UT Austin's freshman class increased from 616 to 815, the number of urban districts increasing from 77 to 115 and rural districts increased from 26 to 47.[11]

An unforeseen gain of the new admissions system is that for the first time in the history of Texas, East Texas, infamous for its Ku Klux Klan activities into the 1980s, formed an alliance with the black and Latina/o communities of Texas to defend the continued use and expansion of the Ten Percent Plan.

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study was in 2003, when the SAT was on a 1600 scale and not today's 2400 scale. University of Texas at Austin Office of Admissions, *Implementation and Results of the Texas Automatic Admissions Law (HB 588 – Report 6, part 1*, p. 9. http://www.utexas.edu/student/admissions/research/HB588-Report6-part1.pdf

[10] University of Texas at Austin Office of Admissions, *"Implementation and Results of the Texas Automatic Admissions Law (HB 588) – Volume I, part 1.* p. 4. http://www.utexas.edu/student/admissions/research/HB588-Report-VolumeI.pdf

[11] *Supra* at note 3.

When this Court upheld affirmative action in *Grutter v. Bollinger* in 2003, UT Austin reevaluated its admissions policies and instituted an affirmative action plan in 2005 that was based on the constitutionally-approved *Grutter* plan. This affirmative action plan applied to applications of students who were not automatically admitted under the Ten Percent Plan. The enrollment of underrepresented minority students increased significantly: between 2004 and 2006, the number of black enrolled freshmen increased from 309 (5%) to 387 (5%) and the number of Hispanic enrolled freshmen increased from 1,149 (17%) to 1,389 (19%).[12]

Although the Ten Percent Plan was capped to account for a maximum of 75 percent of UT Austin's admissions, it, together with UT Austin's *Grutter*-style affirmative action plan, remains an effective and popular desegregation plan that diminishes the role of privilege in UT admissions and expands educational opportunity for the vast majority of Texans.

## III. Striking down UT Austin's affirmative action plan would convert its holistic admissions track into a blatant separate, unequal, and discriminatory white-privilege track for Texas' wealthy, white students

The Ten Percent Plan is UT Austin's primary admissions system, accounting for 75 percent of its admissions. For its remaining admits, UT Austin employs a holistic admissions system encompassing a

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[12] *Supra* at note 10.

variety of criteria. On the one hand, this special admissions track has the benefit of providing a means to admit out-of-state, non-athlete underrepresented minority students and international students to UT Austin who cannot benefit from the Ten Percent Plan (which only benefits Texas residents). As part of the Big Twelve, UT Austin also offers in-state tuition to residents of other states that are part of the Big Twelve system. This holistic special-admissions track has also increased the number of Asian-American students. BAMN and UEAALDF favor giving the greatest possible number of students access to the selection of high-quality public universities.

But at the same time, this special admissions track, in the context of UT Austin's *primary* admissions system (the Ten Percent Plan), sets aside twenty-five percent of UT Austin's seats to students who come from Texas' privileged majority-white schools. It incorporates factors—such as standardized test scores, alumni preference, access to Advanced Placement courses, high school rank, and extracurricular activities—that give a huge unearned advantage to wealthy, white students and those from privileged schools. In this context, the affirmative-action plan challenged by the petitioner is the only measure barring this special-admissions track from becoming a blatant white-privilege track for those wealthy, white Texas students who expressly do not qualify under UT Austin's predominant admissions system.

The holistic system ratified by this Court in *Grutter* provides a small but important number of underrepresented minority students with access to UT Austin, many of whom attend majority-white Texas schools where almost no underrepresented minority

students are placed in college-track or Advanced Placement classes and given an equal opportunity to compete to be in their school's top ten percent.

Even as the affirmative-action plan currently stands, UT Austin, in conjunction with the Ten Percent Plan, has not yet attained a student body representative of the racial composition of Texas.[13] Still, UT Austin has gone farther in admitting, retaining and graduating more underrepresented minority students than many other flagship public universities.

## IV. The Benefits of the *Grutter*-Like Admissions Plan

This admissions system is a holistic full-file review, which is based on an Academic Index, which includes standardized test scores as well as high school rank, and on a Personal Achievement Index, which includes the mean score of two essays, and an array of personal experiences and special circumstances, which also includes race. This system has facilitated growth in admission of Asian American students, which BAMN and UEAALDF support.

The *Grutter*-like plan has also established a standardized method for out-of-state applicants to gain

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[13] The Fifth Circuit observed: "The percentage of Hispanics at UT is less than two-thirds the percentage of Hispanics in Texas, and the percentage of African-Americans at UT is half the percentage of Texas' African-American population, while Asian-American enrollment enrollment is more than five times the percentage of Texan Asian-Americans." *Fisher v. Univ. of Texas*, 631 F.3d 213, 235 (5th Cir. 2011).

admission to UT Austin. In the Big Twelve, any student who lives in a state that is part of the Big Twelve system is entitled to pay in-state tuition at any Big Twelve university, including those not in the student's state of residence. No other Big Twelve university has a Ten Percent program, and by law the Ten Percent admissions guarantee only applies to Texas residents. The *Grutter*-like admissions plan creates a uniform system of consideration for out-of-state students that is consistent. BAMN and UEAALDF favor giving the greatest possible number of students access to the selection of high-quality public universities.

Ending the affirmative action component in the context of the UT Austin admissions system would set aside a portion of the twenty-five percent of UT Austin seats to students from Texas and other states who come from privileged majority-white schools. By incorporating factors such as standardized test scores, alumni preference, access to advanced placement courses, high school rank and extra-curricular activities—that give a huge unearned advantage to wealthy white students and those from privileged schools. In this context the affirmative action plan challenged by the petitioner is the only measure barring this special admissions track from becoming a blatant white-privilege track for those wealthy, white Texas and out-of-state students who expressly do not qualify under UT Austin's predominant Ten Percent admissions track.

Even under the current admissions system, which includes the affirmative action plan within the special admissions track, UT Austin has not yet attained a student body representative of the racial composition

of Texas. This challenge is the challenge for the future. Nonetheless, dismantling the current admissions system only makes the possibility of success more remote.

## CONCLUSION

For the reasons stated above, this Court should affirm the Fifth Circuit's decision to uphold UT's *Grutter*-like admissions plan as constitutional.

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