

In The  
**Supreme Court of the United States**

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ABIGAIL NOEL FISHER,

*Petitioner,*

v.

UNIVERSITY OF TEXAS AT AUSTIN, et al.,

*Respondents.*

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**On Writ Of Certiorari To The  
United States Court Of Appeals  
For The Fifth Circuit**

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**BRIEF OF *AMICI CURIAE* COALITION OF  
BLACK MALE ACHIEVEMENT INITIATIVES  
IN SUPPORT OF RESPONDENTS**

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## **INTEREST OF *AMICI CURIAE***

*Amici* are a group of Black Male Achievement Initiatives and centers (BMIs) located in regions across the United States and individuals who have worked to advance diversity in higher education.<sup>1</sup> (Listed in App. A). *Amici* are deeply interested in the outcome of this case, which could dramatically narrow the pathways to college for Black males who are already underrepresented at selective universities. *Amici's* judgments are based on years of social science research and service working for the advancement of Black male youth.



## **SUMMARY OF ARGUMENT**

The meaningful inclusion of young men and women from a breadth of racial and ethnic backgrounds is critical to a university's ability to obtain the benefits of a diverse learning environment and to assist the nation in its preparation of students for future civic and leadership roles in a multicultural world. Banning holistic race-conscious review in

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<sup>1</sup> Pursuant to Rule 37.2(a), all parties have consented to the filing of this brief; letters reflecting this blanket consent have been filed with the Clerk of the Court. In accordance with Rule 37.6, *amici curiae* affirm that no counsel for either party has authored this brief in whole or in part, and no person or entity, other than *amici*, their members or their counsel, has made a monetary contribution to the preparation or submission of this brief.

college admissions will impede that inclusiveness, particularly as it relates to Black males. Studies rarely disaggregate racial and ethnic college admissions and enrollment data by gender, obscuring the fact that – even with the use of holistic race-conscious review – the numbers of African American males at selective universities are already abysmally low. The elimination of that tool will make this crisis even worse.

African Americans continue to be disproportionately isolated from educational, economic and social opportunity to a degree not experienced by any other racial or ethnic group. States have a compelling interest in reducing conditions that impair the equal opportunity for advancement of a cognizable group of their residents. Failure to improve these conditions imperils the well-being of all residents. These enduring patterns of social inequality will worsen if pathways to academic opportunity for African American students are narrowed, which they will be if holistic race-conscious college admission processes are terminated too soon. Holding open the doors to a college education for a state's most disadvantaged residents is a critical tool for reducing social disparity within its borders.



## **ARGUMENT**

The nation's leading colleges and universities, like the University of Texas at Austin (UT), must be

permitted to use every constitutionally available means to identify, admit and successfully integrate members of historically underrepresented minorities to their flagship and other campuses. Public colleges and universities have struggled to include meaningful numbers of Black and Latino students in their entering classes, particularly Black males. Holistic review of the files of applicants, including the consideration of race, has been one of the most potent tools for keeping the doors of our universities open to these students and attracting them inside. This Court should reaffirm once again the constitutionality of that essential tool.

**I. HOLISTIC RACE-CONSCIOUS REVIEW REMAINS NECESSARY FOR THE MEANINGFUL INCLUSION OF UNDERREPRESENTED MINORITIES IN COLLEGE STUDENT BODIES.**

Diversity is a critical component of excellence in higher education. The quality of the college learning environment is enriched for all when students from various racial and ethnic backgrounds have the chance to study and grow together. *See* Anthony Lising Antonio et al., *Effects of Racial Diversity on Complex Thinking in College Students*, 15 Psychol. Sci. 507, 509 (2004). Because many of our communities remain highly segregated by race, the provision of diverse educational settings is one of the most important roles played by public universities and colleges in our society. Student body diversity deepens



cross-racial understanding, breaks down harmful stereotypes, and prepares students for effective participation in a global marketplace. *See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Grutter v. Bollinger*, 539 U.S. 306 (2003). The inclusion of meaningful numbers of underrepresented minorities on our college campuses provides exposure to racial, ethnic and cultural difference that is necessary to prepare students of all races and ethnicities to assume leadership roles and to participate fully in the civic life of their state and local communities, activities that will grow in importance as the nation's demographics continue to shift. For these reasons and more, this Court has repeatedly held that student body diversity is a compelling state interest justifiably pursued through holistic race-conscious admissions policies. *See Grutter*, 539 U.S. at 330; *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

Although racial and ethnic heritage is not the only type of diversity important to a heterogeneous student body, it is a key ingredient of it. A racially and ethnically diverse learning environment contributes to more than the well-being and prosperity of its direct beneficiaries; integrated classrooms are fundamental to the nourishment of good citizenship and the health of our democracy. To that end, this Court has held that a university may constitutionally seek to admit a "critical mass" of underrepresented minority students, whose presence in meaningful numbers help it attain the benefits that only

integrated learning environments can produce. *Grutter*, 539 U.S. at 329-33.

More than 50 years after this Court's historic decision in *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), many Americans continue to live in communities profoundly segregated by race. Although suburban diversity is growing, this trend has only produced a slight decline in the rate of African American/White segregation, which now stands at 0.59 as measured by the dissimilarity index. See John R. Logan & Brian J. Stultz, Project US2010, *The Persistence of Segregation in the Metropolis: New Findings from the U.S. Census* (2011).<sup>2</sup> This means that a stunning 59% of African Americans would have to move from their current homes to be evenly distributed in communities across the country. Studies tracking more recent minority migration into inner suburban communities also suggest that these diversifying suburbs are experiencing greater fiscal stress and are at risk of re-segregation. See Sheryll Cashin, *THE FAILURES OF INTEGRATION* (2004); Myron Orfield & Thomas Luce, *America's Racially Diverse Suburbs: Opportunities and Challenges* (2012).<sup>3</sup> Segregation in our public school systems in recent decades is also on the rise.

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<sup>2</sup> Available online at <http://www.s4.brown.edu/us2010/Data/Report/report2.pdf>.

<sup>3</sup> Available online at [http://www.law.umn.edu/uploads/e0/65/e065d82a1c1da0bfef7d86172ec5391e/Diverse\\_Suburbs\\_FINAL.pdf](http://www.law.umn.edu/uploads/e0/65/e065d82a1c1da0bfef7d86172ec5391e/Diverse_Suburbs_FINAL.pdf)

See Gary Orfield, *Reviving the Goal of an Integrated Society: A 21st Century Challenge* (2009).<sup>4</sup>

These disappointing realities make the role played by the nation's leading institutions of higher learning in bringing students of all races and ethnicities together more important than ever before, particularly as we move toward the year the United States will become a "majority minority" nation. See Jennifer M. Ortman & Christine E. Guarneri, *United States Population Projections: 2000 to 2050* (2009).<sup>5</sup> Despite the country's growing minority populations, colleges offer many students their first real opportunity to interact with peers of other races. Without the benefit of first-hand interracial friendships and interactions, perceptions of minorities are often based on popular culture and distorted images in the media, which can reinforce harmful stereotypes and deepen racial misunderstanding. See Heinz Endowment's African American Men and Boys Task Force, *Portrayal and Perception: Two Audits of News Media Reporting on African American Men and Boys* (2011).<sup>6</sup>

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<sup>4</sup> Available online at <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/reviving-the-goal-of-an-integrated-society-a-21st-century-challenge/orfield-reviving-the-goal-mlk-2009.pdf>.

<sup>5</sup> Available online at <https://www.census.gov/population/www/projections/analytical-document09.pdf>.

<sup>6</sup> Available online at <http://www.soros.org/sites/default/files/portrayal-and-perception-20111101.pdf>.

Studies conducted by the nation's leading social psychologists have shown how automatic negative associations linked to race can unconsciously influence behavior, even in persons with deep egalitarian values. See Jerry Kang, *Trojan Horses of Race*, 118 Harv. L. Rev. 1489 (2005). Implicit biases operate without the full awareness of their holders, often to the detriment of minorities. Studies reveal that these implicit mental "short cuts" can be particularly harmful to Black males when people unconsciously associate Black men with danger and criminality. See Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. Personality & Soc. Psychol. 876, 876-77 (2004).

Regular contact among the races helps to disrupt these harmful stereotypes and to promote cross-racial understanding. Integrated campuses of higher learning enable these contacts to occur and foster the development of leaders and citizens motivated to act in ways that promote a democratic, inclusive and just society. See Ximena Zúñiga et al., *Action-Oriented Democratic Outcomes: The Impact of Student Involvement with Campus Diversity*, 46 J. C. Student Dev. 660 (2005) (showing interaction with diverse peers and diversity-related curricular and co-curricular activities reduce student prejudice and promote inclusiveness).

**A. Black males are especially vulnerable to exclusion from postsecondary educational opportunities without the use of every available constitutional tool to include them.**

Although there is a compelling need for inclusion of students of many races and ethnicities on college campuses to fully secure the benefits of a diverse learning environment, we focus here on the national crisis currently affecting young Black men and boys that threatens the ability of UT and other selective universities to include them in meaningful numbers. Of all social groups, young African American males suffer some of the greatest impediments to college matriculation and degree attainment. Banning race-sensitive holistic review of applications will make this situation even worse.

Most of the research discussed in the briefs of the parties and *amici curiae* analyzes data of selective universities and colleges disaggregated by race and ethnicity, but not data disaggregated by race, ethnicity and gender. This obscures the reality that young Black males are currently grossly underrepresented in the student bodies of selective universities across the nation, even where race-conscious holistic admissions procedures are available to facilitate their inclusion in meaningful numbers. See Michael J. Cuyjet, *African American Men in College*, vii, 7-13 (2006) (discussing Black male underrepresentation and their resulting “invisibility” on college campuses); Shaun R. Harper, Dellums Commission, *Black Male*

*Students at Public Flagship Universities in the U.S.: Status, Trends, and Implications for Policy and Practice* (2006) (discussing 2-to-1 imbalance of Black women to Black men).<sup>7</sup> Mechanical, race-blind admissions will reduce their numbers even further.

Throughout the nation's history, the subordination and life experiences of Black males have been unique, and common stereotypical portrayals of African American men can only truly be dispelled through personal interaction. *See Harper, supra*, at 11-12. On campuses where many of the African American males are highly visible athletes, it can be particularly difficult to promote the perception of Black males as intellectuals and campus leaders in non-sport activities. *See id.* at 14-15. Black males must be included in numbers that extend beyond mere tokenism to underscore that students of all races have the intellectual capability to succeed.

**B. The barriers to educational opportunity affecting young Black males are severe.**

Two years after this Court's decision in *Grutter*, an article published in the *New York Times* described the deepening social and economic plight of young Black men in America. *See Erik Eckholm, Plight Deepens for Black Men, Studies Warn*, N.Y. Times,

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<sup>7</sup> Available online at <http://www.jointcenter.org/sites/default/files/upload/research/files/FullHarper%20-%2025%20pages.pdf>.

March 20, 2006, at A5. The studies on which the article relied showed that the status of African American males has been worsening on multiple metrics for decades at rates significantly greater than those affecting White and Hispanic males. *See also* BLACK MALES LEFT BEHIND (Ronald B. Mincy ed. 2006). Without access to higher education, these social inequities will worsen.

From birth, young Black males face complex systemic barriers to opportunity. They are more likely to live in the most disadvantaged environments in the nation, more likely to begin life under the most difficult circumstances (i.e., grow up in poverty, suffer disproportionate early childhood health disparities, be raised in single parent homes with reduced resources), more likely to lack successful same-race/gender role models, and more likely to be the victims of violence than any other group in the nation. *See* Erika Harrell, Bureau of Justice Statistics, BLACK VICTIMS OF VIOLENT CRIME (2007) (reporting that although Blacks account for 13% of the U.S. population in 2005, they were victims in nearly half of all homicides).<sup>8</sup>

These early life barriers to opportunity produce grave and disparate outcomes. Research shows that since the 1980s, the average life outcomes of Black men and boys in the United States have steadily

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<sup>8</sup> Available online at <http://bjs.ojp.usdoj.gov/content/pub/pdf/bvvc.pdf>.

declined as the probabilities of their academic failure, chronic unemployment and incarceration have grown at an alarming pace. They are increasingly isolated in segregated, high-poverty high schools, with less than half of all Black males graduating on time. In 2007-08, the national graduation rate for Black males was 47%; the corresponding rate for White males was 78%. See The Schott Foundation for Public Education, *Yes We Can: The Schott 50 State Report on Public Education and Black Males* (2010) [hereinafter “*Yes We Can*”].<sup>9</sup> In a number of urban centers, the numbers have been grimmer still: Milwaukee and Baltimore reported one year that fewer than one out of three of their Black male students made it to graduation. See The Schott Foundation for Public Education, *Given Half a Chance: The Schott 50 State Report on Public Education and Black Males* (2008) [hereinafter “*Half a Chance*”].<sup>10</sup>

The ripple effects of a failure to finish high school are severe for all dropouts, but they are especially punishing for young Black men. In 2004, while 34% of White high school dropouts were unable to find a job, 72% of Black male dropouts were jobless. See Eckholm, *supra*. Without reliable work, high school dropouts can turn to illicit activity and spend time in state or federal prison, a likelihood increased by expansive drug policy, targeted policing and

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<sup>9</sup> Available online at <http://blackboysreport.org/bbreport.pdf>.

<sup>10</sup> Available online at [http://www.soros.org/sites/default/files/schottreport\\_20080723.pdf](http://www.soros.org/sites/default/files/schottreport_20080723.pdf).



mandatory sentencing. Criminal conviction during early adulthood inflicts severe economic consequences on these youths for the remainder of their lives. See Harry J. Holzer et al., UCLA Center for the Study of Urban Poverty, *How do Crime and Incarceration Affect the Employment Prospects of Less Educated Young Black Men?* (2002); Andrew Sum et al., Northeastern University Center for Labor Market Studies, *The Educational Attainment of the Nation's Young Black Men and Their Recent Labor Experiences* (2008).<sup>11</sup>

Of equal concern, due to widely unequal early educational experiences, many young Black males who do push forward in school underachieve relative to their peers in grades and on standardized tests – a reality that, in the absence of adequate encouragement and support, can diminish their college aspirations and chances of admission, particularly if only traditional merit-based criteria are applied. See Sharon Lewis et al., The Council of the Great City Schools, *A Call for Change: The Social and Educational Factors Contributing to the Outcomes of Black Males in Urban Schools* (Oct. 2010).<sup>12</sup> The College Board reports that in 2011, four out of five African American high school students were either left out of an AP subject for which they had potential or

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<sup>11</sup> Available online at [http://iris.lib.neu.edu/cgi/viewcontent.cgi?article=1010&context=clms\\_pub](http://iris.lib.neu.edu/cgi/viewcontent.cgi?article=1010&context=clms_pub).

<sup>12</sup> Available online at <http://graphics8.nytimes.com/packages/pdf/opinion/A-Call-For-Change.pdf>.

attended a school that did not offer the subject. *See* The College Board, *The 8th Annual AP<sup>®</sup> Report to the Nation* (2012).<sup>13</sup>

A variety of in-school barriers appear to dampen Black male high school students' perceptions of themselves as "college material" as well. Nationwide, White males are more than twice as likely as Black males to be placed in Talented/Gifted classes, and Black males are more than twice as likely to be tracked as "special needs." *See* Schott, *Yes We Can*, *supra* at 35. African American males are also far more likely to be suspended or expelled for subjective acts (disrespect or unruliness) and punished more severely than White males for similar conduct. *See* American Psychological Association Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in the Schools? An Evidentiary Review and Recommendations*, 63 *Am. Psychologist* 852 (2008); Daniel J. Losen, The Civil Rights Project at UCLA, *Discipline Policies, Successful Schools, and Racial Justice* (2011).<sup>14</sup> These discretionary judgments heighten the danger that Black youth will not return to school.

Early academic experiences such as these dramatically reduce the pool of Black male high school

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<sup>13</sup> Available online at <http://media.collegeboard.com/digitalServices/public/pdf/ap/rtn/AP-Report-to-the-Nation.pdf>

<sup>14</sup> Available online at [http://civilrightsproject.ucla.edu/research/k-12-education/school-discipline/discipline-policies-successful-schools-and-racial-justice/NEPC-SchoolDiscipline-Losen-1-PB\\_FINAL.pdf](http://civilrightsproject.ucla.edu/research/k-12-education/school-discipline/discipline-policies-successful-schools-and-racial-justice/NEPC-SchoolDiscipline-Losen-1-PB_FINAL.pdf).

graduates who will even be eligible for consideration for college admission. As these sobering numbers reflect, Black males who persist to complete high school and apply for college admission are the exception, not the rule.

While scholars have advanced a number of theories about the possible causes of academic underachievement by underrepresented minorities, consensus eludes. See Jack Greenberg, *Affirmative Action in Higher Education: Confronting the Condition and Theory*, 43 B.C. L. Rev. 521, 531-33 (2002) [hereinafter “Confronting the Condition”] (discussing theories and arguing that *regardless* of the causes, states must be able constitutionally to include Black students in the classes of the nation’s best schools); Shaun R. Harper & Charles H. F. Davis III, *They (Don’t) Care About Education: A Counternarrative on Black Male Students’ Responses to Inequitable Schooling*, 26 Educ. Found. 103 (2012) (discussing several theories). Although we take the view in Part II of this brief that historical and structural forces explain today’s achievement gaps, regardless of the underlying cause or causes, selective colleges and universities must be able to include African Americans in their student bodies while the country continues to work to reduce these gaps.

**C. Admissions officers properly consider myriad qualities when calculating the value Black male applicants can add to an entering class.**

More fundamentally, universities rightly reject the notion that test proficiency and GPAs provide an adequate picture of a prospective student's ability to succeed in college and add value to an entering class. Admissions officers search for students who exhibit many valuable traits, including empathy, engagement, commitment, drive, perseverance, emotional intelligence, maturity and creativity. These and other desired qualities reveal themselves not through SATs and GPAs, but through personal essays, letters of recommendations, job histories, and more – and universities must be permitted to search for them. See The Kirwan Institute for the Study of Race & Ethnicity, *A Common Guide to Understanding Democratic Merit*, <http://kirwaninstitute.osu.edu/docs/Applied%20Democratic%20Merit.pdf> (last visited Aug. 6, 2012).

Universities also strive to admit students who are able to communicate with others different from themselves and who can build bridges across those differences for the common good. Research has shown that academic biographies convey more about the social advantages or disadvantages applicants enjoyed as children than their “diversity fluency” or future participatory or leadership potential. See Lani Guinier & Gerald Torres, *The Miner's Canary* (2002). Universities rightly weigh perseverance, communication and

leadership skills, alongside pedigree. Despite the discouraging messages that Black male students frequently receive, many exhibit what education scholars label “resilience.” See, e.g., Caren Floyd, *Achieving Despite the Odds: A Study of Resilience Among a Group of African American High School Seniors*, 65 *J. Negro Educ.* 181 (1996). While aware that educational inequities have impacted their prospects (inexperienced or detached teachers, low expectations of their performance, under-resourced facilities, a shortage of same-race male teachers, efforts to misplace them in special education programs, discouraging advice from college counselors), these students possess a strong belief in college as “the great equalizer” and a “hope in degrees unseen.” *Id.*

In 1903, Dr. W.E.B. Du Bois cautioned the nation: “Throughout history, the powers of single black men flash here and there like falling stars, and die sometimes before the world has rightly gauged their brightness.” *The Souls of Black Folk*, in *Writings* 357, 365 (The Library of America 1986) (1903). Today, admissions officials comb through files searching for signs of that brightness, gauging the potential of aspiring Black male collegians who, despite lagging standardized test scores and GPAs, can add immeasurable value to their college campuses. Through holistic race-conscious admissions practices, a small percentage of these applicants earn entry to some of the nation’s leading universities each year, based on the belief that their academic preparation and life

experiences will enable them to succeed at college level work and enable them to enrich the learning environment for all. Carefully conducted admissions decisions such as these are worthy of this Court's deference and support. *See Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (noting that the attainment of a diverse student body sits at the heart of a university's proper institutional mission).

**D. Without flexible race-conscious review many young Black males will be shut out of the nation's most selective colleges and universities where their numbers are already disturbingly small.**

Petitioner suggests that race-conscious holistic admissions procedures are no longer necessary and that race-blind procedures will suffice to secure adequate numbers of Black and Latino students on college campuses. Pet. Br. at 20-21. This claim is belied by data revealing that selective universities and colleges have in fact labored to enroll meaningful numbers of underrepresented minorities in their freshman classes when prevented from considering the race of applicants along with multiple other factors. *See* Marta Tienda et al., *Closing the Gap?: Admissions and Enrollments at the Texas Public Flagships Before and After Affirmative Action*, 40-44 (2003) (documenting a decline in the enrollment of African American and Latino students after *Hopwood*

*v. Texas*, 78 F.3d 932 (5th Cir. 1996), at Texas’s two most selective universities).<sup>15</sup>

For Black males in particular, the picture on the ground is dramatically different from that painted by Petitioner: data show disturbingly low enrollments of Black males on the campuses of selective universities. While the rates of college admissions by other groups have risen over the years, Black male admission rates have not. In 2002, Black males comprised 4.3% of the total of all students enrolled in all institutions of higher education in the U.S., the same percentage that they accounted for in 1976. *See Harper, supra*, at 2 (documenting that Black men remain “strikingly underrepresented” among collegians, enrolled in numbers now essentially the same as 30 years ago).

As a percentage of the student bodies at *selective* flagship universities – among the nation’s largest campuses – the figures are even lower. A 2006 study surveying the percentage of Black males at the nation’s 50 public flagship universities discovered that “the average black male enrollment rate at these institutions was a stunning 2.8%. *Id.* at 3-4. *See also* BLACK AMERICAN MALES IN HIGHER EDUCATION: DIMINISHING PROPORTIONS (Henry T. Frierson et al. eds. 2009); *What Would Happen If the Nation’s Most Selective Private Universities Were Required to Abandon Affirmative Action Admissions*, J. Blacks Higher

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<sup>15</sup> Available online at [http://theop.princeton.edu/reports/wp/closing\\_the\\_gap.pdf](http://theop.princeton.edu/reports/wp/closing_the_gap.pdf).

Educ., July 31, 2000, at 6, 7 (noting that if grades and standardized tests were the sole admissions criterion, black enrollment would fall *below 2%*). The same year, White males earned ten times the number of degrees awarded to their Black male counterparts, at every degree level. *Id.*

Indeed, even with the use of holistic race-conscious admissions processes, the percentages of Black males in the entering classes of leading colleges and universities like UT have been distressingly low. Unfortunately, data made available by public colleges and universities rarely disaggregate the numbers of Black male applicants and enrollees, from those of Black female applicants and enrollees, or others. *See id.* at 1 (“black students have long been treated as a monolithic group and data are not disaggregated by gender in most published research”). This practice has hidden the extraordinary depth of the educational crisis young Black males face today. *See id.* at 2 (reporting that across all racial/ethnic groups the college enrollment gender gap is widest among Black students, with young Black women outnumbering their Black male peers nearly two to one); *see also* Cuyjet, *supra*, at 7.

A small group of education scholars, however, have begun to investigate the low admissions, enrollments and degree attainment of Black males. *See, e.g.,* Shaun Harper, *supra*, at 7; Ronald Roach, *Where are the Black Men on Campus?*, Black Issues in Higher Educ., May 10, 2001, at 18. *See also* The Schott Foundation for Public Education, *Yes We Can*,



*supra*; The Schott Foundation for Public Education, *Half a Chance, supra*; The Schott Foundation for Public Education, *Public Education and Black Male Students: The 2006 Report Card* (2006).<sup>16</sup> Their reports help illuminate the difficulties selective universities have experienced (but not broadcast) including and retaining African American males in meaningful numbers in undergraduate student bodies.

It is only when the numbers of enrolled Black males are separated from those of enrolled Black females that the distressingly low numbers of Black males included in UT's entering classes are revealed.

The U.S. Department of Education Integrated Postsecondary Education Data System (IPEDS) appears to be the only site where disaggregated data is made publicly available. In our review of this data, *see* App. B, we focused on full-time (rather than part-time) students who were enrolled in UT's entering freshman classes (rather than the entire student body totals so often used). Freshman students are often housed in dormitories separated from upper-class students and frequently take introductory-level classes with other freshmen during their first year of study. A sharper focus on entering class data helps to reveal the paltry number of Black males being included in that group.

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<sup>16</sup> Available online at [http://www.schottfoundation.org/drupal/publications/Schott\\_06\\_report\\_final.pdf](http://www.schottfoundation.org/drupal/publications/Schott_06_report_final.pdf).

Based on IPEDS data, at UT-Austin, Black females have outnumbered their Black male counterparts every year from 1994 to 2009, with the more recent years showing larger gender gaps, reflecting increased barriers to opportunity for young Black males in the United States.<sup>17</sup>

The data also shows that the Top 10% system only partly succeeded in including Black males in UT's freshman classes after the devastating impact of the 1996 *Hopwood* ban. See *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996). In the two years prior to *Hopwood*, UT enrolled 125 Black males in its entering class (1994 and 1995). After *Hopwood* banned the consideration of race in 1996, this number fell by more than 50 students: in Fall 1997, UT enrolled only 73 Black males among the first-time full-time students in its freshman classes (of 6,945), and only 81 Black males in its Fall 1998 freshman class (of 6,598). With the help of the Top Ten Percent admissions beginning in 1998, Black male freshman numbers increased somewhat, but they never reached pre-*Hopwood* high of 125. After *Grutter*, however, and UT's return to holistic review, the enrolled number of Black males in the entering classes began to rebound. The 114 enrolled in Fall 2004, was followed by 122 in

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<sup>17</sup> While the trend of female freshman outnumbering male freshman is true across all racial groups, nationally, the gap is greatest for Black men and Black women. See Harper, *supra*, at 2.

Fall 2005, 144 in Fall 2006, and 164 the following year. (Fall 2008 and 2009 brought another drop, but this drop corresponded to a notable decrease in overall full-time undergraduates admitted at UT those same years.)

In percentages, the IPEDS data show that enrollment of Black male first-time freshmen was higher in the post-*Grutter* years (varying from 1.69% to 2.21% between Fall 2004 to Fall 2009) than it was in the seven years preceding *Grutter* (Fall 1997 to Fall 2003), even dipping as low as 1.05% in the Fall of 1997 (before getting some assistance from the Top 10% law that took effect the next year). *See* App. B.

As this disaggregated data shows, even with holistic race-conscious review procedures, UT has labored to enroll meaningful numbers of Black males in its freshman classes. Looking at the most recent year for which IPEDS data is available – Fall 2009 – only 1.79% of UT’s full-time first-time undergraduates were Black males (129 Black male freshmen out of 7,199 enrolled full-time freshmen). That UT managed to include only 129 Black male freshmen in a class that size is stunning. The inclusion of so few Black males in the entering class hinders opportunities for interracial interaction and stereotype dismantling and limits the likelihood that Black male freshmen will cross paths with each other in the classroom as well, which introduces the risk of tokenism and feelings of isolation. A larger peer group for Black males would create a broader support system

to encourage their academic endeavors and sustain other facets of their overall well-being.

Moreover, the pattern of small Black male enrollments is not confined to UT; it is repeated in the entering classes of other large public flagships as well. (Appendix B includes IPEDS data for Black male freshmen enrollments at The Ohio State University, one of the nation's largest campuses). Without the help of holistic race-conscious procedures, these dismal numbers will be reduced even further.

**E. Low Black male undergraduate enrollments lead to low graduate and professional school enrollments.**

Unsurprisingly, small numbers of underrepresented minorities at the undergraduate level compound the diversity challenges experienced by leading universities and colleges at the graduate and professional degree level. See Liliana M. Garces, The Civil Rights Project at UCLA, *The Impact of Affirmative Action Bans in Graduate Education* (2012) (showing that bans on race conscious admissions procedures in states adopting Top Percent plans resulted in marked diversity declines in graduate programs).<sup>18</sup> Graduate study is essential for students to develop proficiency

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<sup>18</sup> Available online at <http://civilrightsproject.ucla.edu/research/college-access/affirmative-action/the-impact-of-affirmative-action-bans-in-graduate-education/garces-impact-affirmative-action-graduate-2012.pdf>.

in a specific discipline, and the graduate learning environment is greatly enriched for all by the diversity of its student body through whom the robust exchange of ideas and exposure to differing perspectives takes place. The use of race-conscious admissions procedures is a critical tool to identify and nurture the talents of members of groups traditionally excluded from graduate level study.

Perhaps there is no greater cause for concern than that generated by the profoundly limited numbers of Black male teachers being produced by graduate schools of education. Since this Court's 1954 decision in *Brown v. Board of Education*, the number of African American teachers in the United States has declined by 66 percent. In 2009, only 7 percent of all American teachers were African American, despite the fact that Blacks comprised approximately 17 percent of the nation's student body. Moreover, of that teaching force, African American males accounted for only 1 percent, with the majority in junior and senior high schools. This means that an African American boy can attend school from kindergarten to sixth grade with a very high chance of never encountering a Black male teacher. See Jawanza Kunjufu, *Black Boys and Special Education – Change is Needed!*, Tchrs. of Color (last visited Aug. 6, 2012), <http://www.teachersofcolor.com/2009/04/Black-boys-and-special-education-change-is-needed/>. A study of Black male faculty (at all ranks) at the nation's 50 public flagship universities in 2004 revealed similar scarcity: they

comprised only 1.1 percent of full-time faculty. *See Harper, supra*, at 6.

Flexible race-conscious admissions procedures following this Court's detailed guidelines in *Grutter* and *Parents Involved* have not been a total solution to these challenges, but admissions officials at universities like UT report that they have helped include Black males and others in their undergraduate and graduate programs. Without this tool, these distressingly small numbers will plummet even further.

**F. Top Percent systems prevent experienced admissions officials from identifying many students who are capable of succeeding and who will add value to an entering class.**

Given the difficulty higher education institutions have had including Black males in meaningful numbers in their entering classes, admissions processes that are *more* individualized and less mechanical are preferable because they enable admissions officers to consider the special qualities exhibited by some of the Black male applicants who defeat the odds described above. *See Parents Involved*, 551 U.S. at 797 (Kennedy, J.) (stressing that individualized, non-mechanical assessments of applicants are preferable to group-level automated decisions).

Admissions officials at UT have described at length what led them to conclude that only by supplementing its Top 10 Percent process with the

holistic review procedures approved in *Grutter* can they reach their diversity goals. See University of Texas at Austin, *Proposal to Consider Race and Ethnicity in Admissions* 23-25 (2004) [hereafter “UT Rep.”].<sup>19</sup> After years of experience with the Top 10 Percent admission system and after conducting a careful review of how its students perceived the diversity of the learning environment created under that system, UT concluded that minority students felt racially isolated on campus and that majority students also thought that there were insufficient minority students within the student body to achieve the benefits that a diverse learning environment could yield. *Id.* at 21-22.

The experiences of UT’s students comport with that of students elsewhere and refute Petitioner’s confidence that underrepresented minorities at UT have reached a “critical mass.” See Harper, *supra*, at 1 (documenting that many Black students report being the only non-White person, or one of few, in most of their classes, particularly at large flagship universities). Given the especially small numbers of Black males currently enrolled even with the use of *Grutter*-narrowly tailored procedures, this sense of racial isolation is readily understood.

Top percent admissions strategies prevent flexible review of how an applicant’s unique body of

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<sup>19</sup> Available online at [http://www.utexas.edu/student/admissions/about/admission\\_proposal.pdf](http://www.utexas.edu/student/admissions/about/admission_proposal.pdf).

experiences and talents might contribute to the intellectual and social life of an academic institution. As UT's experience shows, carefully conducted holistic race-conscious review remains an essential tool for attaining meaningful student body diversity.

This Court should defer to that judgment.

**II. THE DEGREE OF RACIAL ISOLATION THAT CONTINUES TO IMPEDE BLACK ACCESS TO OPPORTUNITY CONSTITUTES A SEPARATE COMPELLING STATE INTEREST TO WHICH STATES ARE EMPOWERED TO RESPOND THROUGH NARROWLY TAILORED RACE-CONSCIOUS MEANS.**

Although the argument was not advanced by the university or *amici* in *Grutter*, language in Justice O'Connor's opinion suggests that a compelling governmental interest beyond student body diversity might have been identified to justify Michigan Law School's holistic race-conscious admissions process. *See Grutter*, 539 U.S. at 328 (“[R]espondents assert *only one* justification for their use of race in the admissions process: obtaining the educational benefits that flow from a diverse student body. . . .”) (emphasis added) (internal citation and quotation marks omitted). Columbia Law professor Jack Greenberg has written about a different state interest under a framework he refers to as “social conditions.” *See Greenberg, Confronting the Condition, supra*, at 522, 556-80 (arguing that when faced with an extremely



harmful social condition, a state may act to reduce it, in the interest of all of its residents). We advance a similar argument here in supplemental defense of UT's holistic review process, by regarding those procedures as an example of state action that can be taken to avoid the social harms that result from the extreme racial isolation Justice Kennedy wrote about in *Parents Involved*, 551 U.S. at 797-98.

This compelling state interest justifies the narrow consideration of race *not*, as this Court has rejected in the past, "to remedy the disadvantages cast on minorities by past racial discrimination." *Bakke*, 438 U.S. at 310 (opinion of Powell, J.); *id.* at 325 (opinion of Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part). Rather, it addresses a present condition suffered by a cognizable part of a state's population that leave members of that group racially isolated, undermining the well-being of the state's entire populace. See Greenberg, *Confronting the Condition*, *supra*, at 556-72; see also *Parents Involved*, 551 U.S. at 797-98 (opinion of Kennedy, J.).

Race-conscious actions that address such a compelling state interest violate no equal protection guarantee, provided the means used to pursue the interest are sufficiently narrowly tailored. UT's careful holistic admissions process meets this standard. *Grutter*, at 327 (observing that although all government considerations of race are subject to strict scrutiny, "not all are invalidated by it").

**A. Limitations on opportunity in the nation are deeply structural and remain highly racialized.**

Educational opportunity and economic prosperity have a geography in the United States, and that geography is uneven. Segregated neighborhoods across the nation provide widely variant opportunities critical to the promotion of healthy child development and life success. See Douglas S. Massey & Nancy A. Denton, *American Apartheid: Segregation and the Making of the Underclass* (1993). Some neighborhoods are the sites of high performing schools, safe streets, robust job centers, strong healthcare facilities, well-resourced libraries, and stable and affordable housing. These are the neighborhoods in which children thrive, where the incomes and wealth of the next generation tend to build upon and surpass that of their parents. In sharp contrast, other neighborhoods are the sites of failing schools, scarce job opportunities, high crime rates, distant healthcare facilities, vacant property, and poor and unstable housing. In these neighborhoods generations of young Americans and their families languish, and the odds of children moving up the economic ladder are significantly reduced. See Camille Zubrinsky Charles, *The Dynamics of Racial Residential Segregation*, 29 *Am. Rev. Soc.* 167, 197-99 (2003).

Although poor children of all races suffer when exposed to such negative neighborhood conditions, research shows that Black and Hispanic children are far more likely to live in areas of “high poverty” or

“concentrated poverty” (20 or 40 percent or more of the residents live below the poverty line, respectively) than White children. Sixty-six percent of Black children born between 1985 and 2000 grew up in high poverty neighborhoods, compared to only 6 percent of White children. See Patrick Sharkey, The Pew Charitable Trusts, *Neighborhoods and the Black-White Mobility Gap* (2009).<sup>20</sup> A study in 2008 showed that Black and Latino children were more than twelve times as likely as White children to be both poor and living in neighborhoods where poverty was the norm. See Dolores Acevedo-Garcia et al., *Toward a Policy-Relevant Analysis of Geographic and Racial/Ethnic Disparities in Child Health*, 27 *Health Affairs* 321, 327 (2008).

Isolation in low-opportunity neighborhoods diminishes positive health outcomes, educational achievements and economic prosperity to the detriment of entire communities and regions, making such isolation the proper subject of targeted state action.

Research has shown, for example, that the isolation of underrepresented minorities in neighborhoods of concentrated poverty correlates highly with their disproportionately poor health outcomes and helps explain enduring racial and ethnic health disparities. See David R. Williams & Chiquita Collins, *Racial*

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<sup>20</sup> Available online at [http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Economic\\_Mobility/PEW\\_SHARKEY\\_v12.pdf](http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Economic_Mobility/PEW_SHARKEY_v12.pdf).

*Residential Segregation: A Fundamental Cause of Racial Disparities in Health*, 116 Pub. Health Rep. 404 (2001); Thomas A. LaVeist et al., Joint Center for Political & Economic Studies, *Segregated Spaces, Risky Places: The Effects of Racial Segregation on Health Inequalities* (2011).<sup>21</sup> Racial and socioeconomic isolation frequently distance marginalized populations from community healthcare resources and high-quality health care providers. See Williams & Collins, *supra*, at 411.

Residents of marginalized neighborhoods also frequently possess limited access to healthy food options, which can lead to meals with unbalanced nutrition, which is related to increased chance of obesity, and in turn, chronic health conditions, such as diabetes, hypertension, heart disease, and stroke. A recent study of community conditions and health outcomes in Cook County, Illinois, for example, found the life expectancy of its residents varied by as many as 18 years, depending on the census tract in which they had the advantage or disadvantage to live. The tracts with the lowest life expectancies were home to a higher percentage of people of color and low-income residents. See Joint Center for Political & Economic Studies, *Place Matters for Health in Cook County: Ensuring Opportunities for Good Health for All*

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<sup>21</sup> Available online at <http://www.jointcenter.org/sites/default/files/upload/research/files/Segregated%20Spaces-web.pdf>.

(2012).<sup>22</sup> These and other research findings suggest that social disadvantage in the United States today is largely structural. That is, community-level, place-based risk factors, such as limited access to healthcare and healthy, fresh foods and the supermarkets that stock them, are predictive of dramatic health inequalities. All of the residents of a state end up paying for the costs of these disparities.

**B. Severe racial isolation continues to impede the access of Black Americans to opportunity.**

Although the prospects of all children are diminished by the negative effects of distressed neighborhoods, we focus in this section on the crisis that affects Black populations, particularly Black men and boys.

Over the last two decades, the nation's leading philanthropic foundations have launched Black male achievement studies and campaigns in response to worsening statistics about the extreme isolation and negative life outcomes of Black men and boys. Consider, for example, 21st Century Foundation's Black Men & Boys Initiative; Project 2025 Network for Black Men & Boys; Kellogg Foundation's National Task Force on African-American Males; Open Society

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<sup>22</sup> Available online at <http://www.jointcenter.org/sites/default/files/upload/research/files/Place%20Matters%20for%20Health%20in%20Cook%20County.pdf>.

Foundation's Campaign for Black Male Achievement; Mitchell Kapor Foundation's Black Boys College Bound Initiative; Association of Black Foundation Executives' Black Men and Boys Initiative; Knight Foundation's Black Male Engagement; the Heinz Endowments African American Men and Boys Initiative. The Schott Foundation for Public Education began to issue its "State Report Cards" after concluding that the educational experiences of Black males in the United States constituted a national crisis.

During roughly the same period, state and federal authorities established commissions and task forces to study the economic, political, social and educational exclusion of Black men and boys from the American mainstream. Examples include the Report of the Task Force on the Education of Maryland's Black Males (2007), the Task Force on the Condition of African American Men in Illinois (2009), the Indiana Commission on the Social Status of Black Males (2009-2010), and the Ohio Commission on African American Males (1989).

Each of these philanthropic and state investigations acknowledged that many young Americans other than Black male youth face serious life course obstacles in need of attention, but all recognized as well that the depth and breadth of the negative life outcomes experienced by Black males were sufficiently grave to warrant independent investigation and policy prescription.

During the nation's early history, inequalities between White and Black Americans emanated primarily from overt discrimination backed by law and social practice. The lingering effects of that shameful history, however, provide only a partial explanation for the stubborn persistence of African American disadvantage today. Other sources of racial inequality flow from a complex system of structures that perpetuate disadvantage, often unintentionally and without sign of racial animosity. See John A. Powell, *Structural Racism: Building Upon the Insights of John Calmore*, 86 N.C. L. Rev. 791, 794-806 (2008).

These structures include neighborhoods: African Americans reside in poor, low-opportunity neighborhoods at significantly higher rates than Whites; neighborhoods characterized by inferior housing, low-performing schools, and inadequate numbers of recreation centers, grocery stores and health care facilities. Social science research shows that the isolation of African Americans in poorly-resourced neighborhoods has contributed to the White/Black health gaps of great concern to state and federal governments. National morbidity and mortality data reveal that African Americans have had consistently higher rates of illness and lower survival rates across multiple health areas, including chronic disease, communicable disease, injury, maternal health, and child health. See *CDC Health Disparities and Inequalities Report – United States, 2011*, Centers for Disease Control & Prevention, Morbidity & Mortality

Weekly Rep., Jan 14, 2011. Residential isolation influences these health disparities both directly and indirectly. For example, African Americans segregated in communities with the lowest opportunities and resources are disproportionately exposed to unhealthy environmental conditions, such as higher pollution, which is associated with higher rates of asthma among Black children. See Williams & Collins, *supra*, at 409.

Social and behavioral scientists have also found that prolonged exposure to extremely disadvantaged neighborhoods during childhood negatively impacts cognitive ability and primary and secondary educational outcomes, impeding access to college and economic mobility. See Patrick Sharkey & Felix Elwert, *The Legacy of Disadvantage: Multigenerational Neighborhood Effects on Cognitive Ability*, 116 Am. J. Soc. 1934, 1935-36 (2011) (reviewing the literature). The depths of this crisis, particularly for Black youth, are perhaps best revealed by 2010 finding that the average African American male had performed below the basic level in every grade and every subject on the National Assessment of Education Progress for the past 20 years. See Marlon C. James, *Never Quit: The Complexities of Promoting Social and Academic Excellence at a Single-Gender School for Urban American [sic] American Males*, 1 J. African Am. Males Educ. 167, 168 (2010). And as noted in Part I, in 2007-08, fewer than half of all Black males graduated with their high school cohort.



States are rightly motivated to address these low proficiency ratings and high dropout rates for many reasons, including that boys who fail to complete high school often resurface in the justice system. Data from the National Council on Crime and Delinquency (NCCD) show that while Black youth make up about 16 percent of the nation's youth population, they account for 30 percent of juvenile court referrals, 38 percent of youth in juvenile facilities, and 58 percent of youth in adult prison. The Sentencing Project, which calculated state rates of incarceration by race and ethnicity, found that Black youth are incarcerated at six times the rate of White youth, while Latino youth are incarcerated at double the rate of White youth. See Marc Mauer & Ryan S. King, *The Sentencing Project, Uneven Justice: State Rates of Incarceration by Race and Ethnicity* (2007).<sup>23</sup> In the absence of effective policy interventions to disrupt these patterns, the Bureau of Justice Statistics estimated in 1997 that one in every four Black men could expect to spend some time in prison during his lifetime. By 2005, the estimate was one in three. See Christopher J. Lyons & Becky Pettit, *Compounded Disadvantage: Race, Incarceration, and Wage Growth*, 58 Soc. Probs. 257, 257 (2011).

Targeted, ameliorative state steps designed to disrupt these patterns are preferable to harsh “zero tolerance” policies which disproportionately impact

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<sup>23</sup> Available online at [http://www.sentencingproject.org/doc/publications/rd\\_stateratesofinbyraceandethnicity.pdf](http://www.sentencingproject.org/doc/publications/rd_stateratesofinbyraceandethnicity.pdf).

minority youth and provide the entry point to the “school-to-prison pipeline.” Studies show that youth who are expelled, suspended or drop out of high school are far more likely to become incarcerated later in life, an enormous drain on state resources and waste of human productivity. See Devah Pager, *The Mark of a Criminal Record*, 108 Am. J. Soc. 937, 939 (2003).

A college degree is a proven pathway away from the “school-to-prison pipeline.” In 2008, adult Black males represented only 5% of the total college student population, but 36% of our nation’s prison population. See William J. Wilson, *Being Poor, Black and American*, Am. Educator, Spring 2011, at 10, 17. Although the chance of incarceration is higher for all young men who fail to complete high school, the rate for Black male high school dropouts, of 18.2%, was 300% higher than all male high school dropouts (at 6.2%). By contrast, Black male college graduates had institutionalization rates virtually identical to all American males (0.3% for Black male college graduates and 0.2% for all male college graduates). See Sum et al., *supra*.

The nation’s expanded reliance on the justice system to respond to bad decision making by the young has exposed large numbers of Blacks and Hispanics to harmful long-term employment consequences. Incarceration severely depresses the job prospects and wage trajectories of all ex-inmates irrespective of race, but research shows that Black men are hurt the most. One study found that a

criminal conviction erected an all but insurmountable obstacle for Black men searching for work: while 17% of White ex-offenders received call back interviews, only 5% of Blacks did. Pager, *supra*, at 955. Another study showed that the wages of Black ex-inmates who managed to find work grew at a rate 21% slower than those of White ex-inmates. Lyons & Pettit, *supra*, at 263.

Research also shows that race continues to affect employment opportunities in the United States even absent the complicating effect of a criminal record. According to Bureau of Labor Statistics, in May 2012, the nation's unemployment rate was 8.2%. The jobless rate for Whites was below the national average, however, at 7.4%, while the rate for African Americans was nearly twice that, at 13.6%. Disaggregated by gender, the picture for Black males was even bleaker, at 15%. Teenagers between 16 and 19 experienced the highest levels of joblessness of all, particularly youth of color: the jobless rate for White teens was 23.5 percent, but for Latino youths it was 31 percent, and for Black teens, 44.2 percent. Researchers have documented that identically qualified White and Black "testers" for real entry-level jobs experience strikingly different call-back rates. In audit studies, only 14% of the Black testers with no criminal record received call-back interviews, compared to 34% of the White testers with no criminal record. Even more disturbing, White testers *with* a criminal record fared better than Black testers without one. Devah Pager et al.,

*Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, 623 *Annals Am. Acad. Political & Soc. Sci.* 195 (2009).

Social science also suggests why these patterns of inequality are so formidable: the negative impact of growing up in a highly disadvantaged neighborhood may be more than life-long: research suggests it may significantly diminish the prospects of economic mobility for multiple generations. More than 70% of Black children who grow up in the poorest quarter of America's neighborhoods remain in those neighborhoods as adults. See Sharkey & Elwert, *supra*, at 1935-36 (arguing that to fully understand inequality we must understand the history of disadvantages experienced by families over generations).

Decades of racial isolation in the nation's most disadvantaged communities have fueled White/Black income and wealth gaps as well, erecting further impediments to better lives. Studies show that the wealth gap between Whites and African Americans has more than quadrupled over the course of a generation. See Thomas M. Shapiro et al., Institute on Assets & Social Policy, *The Racial Wealth Gap Increases Fourfold* (2010).<sup>24</sup> Census Bureau figures show that in 2010 the median household net worth for

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<sup>24</sup> Available online at <http://iasp.brandeis.edu/pdfs/Racial-Wealth-Gap-Brief.pdf>.

White Americans was \$110,729; for African Americans it was \$4,995.

In summary, the racial and economic isolation of Black citizens present enormous challenges to the states and the nation. These enduring patterns of social inequality will worsen if pathways to academic opportunity for Black youth are blocked, which they will be if holistic race-conscious college admission processes are terminated too soon. Holding open the doors to a college education for a state's most disadvantaged residents is a critical tool for reducing social disparity within a state's borders.

**C. States may take steps to reduce the effects of racial isolation by addressing the social conditions of their most disadvantaged residents.**

Given the large and persistent educational, health, and economic disparities between White and African Americans, providing access to college can be a transformative step to change the life trajectories of Black youth who pursue higher education. Perhaps because they must overcome some of the greatest employment impediments, the economic impact of a college degree for Black males is substantial. An analysis of the earnings for Black male college graduates by the Center for Labor Market Studies at Northeastern University, found that earnings for young Black men with a bachelor's degree are 250% higher than earnings for Black males with only a

high school education. In fact, among all racial groups, Black males experience the largest increase in earnings from a college degree: college completion is projected to double the total income a Black male will earn over the course of his life. *See* Sum et al., *supra*, at 8. States are rightly interested in such an outsized return on investment.

Leading institutions of higher education may constitutionally respond to the realities of disadvantaged neighborhoods and unequal K-12 school experiences in the United States – realities that disproportionately disadvantage underrepresented minorities – by looking for more than just test scores and GPAs. In addition to these traditional indicia, admissions officers may look for the myriad qualities that can signal an applicant’s potential to perform college level and add value to a class. Included among these is the resilience needed to persist through hardship in the pursuit of a “degree unseen.” Through these admission decisions, states may also constitutionally seek to reduce the social conditions and levels of racial isolation that give life to the academic achievement gaps that their youth continue to experience.

In 2003, this Court dared to imagine a time when the nation might no longer need race-conscious admissions to ensure sufficient racial and ethnic diversity on its college campuses, *Grutter*, 539 U.S. at 343 (opinion of O’Connor, J.), but it grounded its decision upholding race-conscious admissions practices in the actual world in which we live. *Id.* at 330-31 (noting

that race-sensitive admissions in higher education kept pathways open for underrepresented minorities to move into the military, politics, business, medicine, the legal profession, and other callings); *see also* Jack Greenberg, *Diversity, the University, and the World Outside*, 103 Colum. L. Rev. 1610, 1619 (2003) (arguing that a university may constitutionally take steps needed to prepare the racially diverse future graduates that the nation and world will need).

The need for holistic race-conscious admissions in higher education will not vanish on its own in the absence of determined state action that addresses the social conditions from which academic achievement gaps spring. As expressed by Justices Ginsburg and Breyer: “[O]ne may hope, but not firmly forecast, that over the next generation’s span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action.” *Grutter*, 539 U.S. at 346 (Ginsburg, J., concurring). There can come a time when concerted state actions reduce the social conditions that today unequally prepare America’s children to compete for college admission under traditional criteria of merit such as standardized tests. But until that day, states must be empowered to devise other ways to ensure that their public institutions of higher learning do not become racially isolated enclaves of the privileged.

Decades ago, Dr. Martin Luther King, Jr. had a dream for the nation. He envisioned the United States as an integrated society in which all of its members would be full participants aware of their

deep human interdependency. To keep the nation moving toward that future, states must be permitted to keep the doors of their flagship universities open to meaningful numbers of youth of color who will then help the nation reduce existing impediments to opportunity. Without flexible race-conscious review of the qualities and strengths of applicants such as these, many capable youth will be excluded, and their numbers on college campuses and in medical, law, business and graduate schools will decline even further. The loss of the potential contributions these students might make to their families, communities and the nation is incalculable.





**CONCLUSION**

The judgment of the Fifth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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*Counsel for Amici Curiae*

August 13, 2012

**APPENDIX A**

**List and Identity of *Amici Curiae***

I. Signatories of the National 2025 Network for Black Men & Boys

Shawn Mooring, Network Manager/Member  
2025 Network for Black Men and Boys

Susan Taylor Batten, President & CEO  
Association of Black Foundation Executives  
New York, NY

Trupania ‘Trap’ Bonner, Executive Director  
Moving Forward Gulf Coast  
Slidell, LA

Kelly Brown, Coalition Director  
D5 Coalition  
Chicago, IL

Alan W. Houseman, Executive Director  
Center for Law and Social Policy  
Washington, DC

Bryan Echols  
Chicago, IL

George Garrow, President & CEO  
Concerned Black Men, Inc.  
Washington, DC

Gregory Hodge, Principal  
KHEPERA Consulting  
Oakland, CA

David Payne, Executive Director  
Atlanta Community Action Team  
Atlanta, GA

App. 2

Jonathan Peck, President & CEO  
Tucson Urban League  
Tucson, AZ

Cheo Tyehimba Taylor, Principal  
Forwardever Media, Inc.  
Oakland, CA

Marcus Walton, Program Director  
Association of Blacks in Philanthropy  
New York, NY

Pete White, Executive Director  
Los Angeles Community Action Network  
Los Angeles, CA

Fraternities and Sororities/2025 Network BMB

Membership:

Jomar Jenkins  
Alpha Foundation Inc.  
Huntsville, AL

Faith-Based Institutions/2025 Network BMB Mem-  
bership:

Anita Smith Etheridge, Social Justice Director  
Rev. Grady Scott, Pastor  
Grace Temple Baptist Church  
Tucson, AZ

Local Non Profit Organizations/2025 Network BMB Membership:

Ricardo Jasso, Executive Director  
Amistades, Inc.

Cesar Lopez, Executive Director  
Tierra Y Libertad Organizations

Academic-Based Member Organizations/2025 Network BMB Membership:

University/College:

Daisy Jenkins, Chairperson  
Univ. of Arizona President's African American  
Advisory Council

Maria Moore, Director  
African American Student Affairs  
University of Arizona

High School/Vocational:

Jimmy Hart  
Tucson Unified School District  
African American Studies Department

National and State-Based Organizing and Policy-Based  
Organizations/2025 Network BMB Membership:

James Bell, Executive Director  
Tshaka Barrows, Deputy Director  
Malachi Garza, Community Justice for Youth  
Network Director  
The Burns Institute  
San Francisco, CA

Jeremy Lahoud, Executive Director  
Californians For Justice

Civil and Human Rights Organizations/2025 Net-  
work BMB Membership:

Diane Allen Phillips,  
President and CEO  
Urban League of Pikes Peak  
Colorado Springs, CO

Landri Taylor, President and CEO  
Urban League of Metropolitan Denver

Lavonne Lewis, Interim President and CEO  
Las Vegas-Clark County Urban League

Donna Liggins, President  
Tucson NAACP

Clarence Boykins, Executive Director  
Tucson Southern Arizona Black Chamber  
of Commerce

II. BMI Signatories

Prof. Shaun R. Harper, Director  
Center for the Study of Race & Equity  
in Education  
University of Pennsylvania  
Philadelphia, PA

Christopher P. Chatmon, Executive Director  
African American Male Achievement  
Oakland Unified School District  
Oakland, California

III. Bar Association Signatories

Jennifer Anne Adair, President  
John Mercer Langston Bar Association  
Affiliate Chapter of the National Bar Association  
Columbus, Ohio  
(signing for Board of 15 members)

IV. Individual Signatories

- a. Elliott Dawes  
University Director  
The City University of New York Black Male  
Initiative (CUNY BMI)  
(CUNY affiliation listed for identification  
purposes only)
- b. Dr. James L. Moore III (signing as a private  
citizen and a nationally- and internationally-  
recognized researcher on black male achievement  
in elementary, secondary, and postsecondary edu-  
cation)

App. 6

- c. Arlethia Perry-Johnson (signing as private citizen with 25 years of experience in the field of higher education, and 10 years of experience in the Black male educational achievement field)
  - d. Robert L. Solomon, President Emeritus  
100 Black Men of Central Ohio
  - e. Floyd Weatherspoon  
Professor of Law, Capital University Law  
School  
Columbus, Ohio  
(Capital University affiliation listed for  
identification purposes only)
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**APPENDIX B**

**Data from the Integrated Postsecondary  
Education Data System (IPEDS)  
Prepared by Cheryl Staats, Research  
Associate, Kirwan Institute**

Figure 1: Number of Black non-Hispanic First-Time Degree/Certificate-Seeking Undergraduates at the University of Texas-Austin by Sex, 1994-2009

Figure 2: Number of White non-Hispanic First-Time Degree/Certificate-Seeking Undergraduates at the University of Texas-Austin by Sex, Fall 1994-2009

Figure 3: Total number of Full-Time, First-Time Degree/Certificate-Seeking Undergraduates at the University of Texas-Austin by Sex, Fall 1994-2010

Figure 4: Percentage of all Full-Time, First-Time Degree/Certificate-Seeking Undergraduates at the University of Texas-Austin that were Black Male Freshmen, Fall 1994-2009

Figure 5: Number of Black non-Hispanic First-Time Degree/Certificate-Seeking Undergraduates at the Ohio State University – Main Campus by Sex, 1994-2009

Figure 6: Number of White non-Hispanic First-Time Degree/Certificate-Seeking Undergraduates at the Ohio State University – Main Campus by Sex, 1994-2009

Figure 7: Total number of Full-Time, First-Time Degree/Certificate-Seeking Undergraduates at the Ohio State University – Main Campus by Sex, Fall 1994-2010



Figure 8: Percentage of all Full-Time, First-Time Degree/Certificate-Seeking Undergraduates at the Ohio State University – Main Campus that were Black Male Freshmen, Fall 1994-2009

**Figure 1: Number of Black non-Hispanic First-Time Degree/Certificate-Seeking Undergraduates at the University of Texas-Austin by Sex, 1994-2009**

<b>Year (Fall)</b>	<b>Men</b>	<b>Women</b>	<b>Total</b>
1994	125	198	323
1995	125	184	309
1996	108	158	266
1997	73	117	190
1998	81	118	199
1999	114	172	286
2000	121	175	296
2001	93	149	242
2002	106	166	272
2003	109	158	267
2004	114	195	309
2005	122	225	347
2006	144	243	387
2007	164	267	431
2008	121	255	376
2009	129	225	354

**Figure 2: Number of White non-Hispanic First-Time Degree/Certificate-Seeking Undergraduates at the University of Texas-Austin by Sex, Fall 1994-2009**

<b>Year (Fall)</b>	<b>Men</b>	<b>Women</b>	<b>Total</b>
1994	1980	1913	3893
1995	2031	2050	4081
1996	2103	2056	4159
1997	2281	2449	4730
1998	2139	2260	4399
1999	2176	2271	4447
2000	2304	2497	4801
2001	2124	2323	4447
2002	2288	2594	4882
2003	1762	2104	3866
2004	1758	2143	3901
2005	1758	2032	3790
2006	1816	2212	4028
2007	1777	2062	3839
2008	1597	1918	3515
2009	1736	1964	3700

**Figure 3: Total number of Full-Time, First-Time Degree/Certificate-Seeking Undergraduates at the University of Texas-Austin by Sex, Fall 1994-2010**

<b>Year (Fall)</b>	<b>Men</b>	<b>Women</b>	<b>Total</b>
1994	3008	2951	5959
1995	3073	3139	6212
1996	3194	3087	6281
1997	3377	3568	6945
1998	3210	3388	6598
1999	3417	3508	6925
2000	3701	3859	7560
2001	3462	3746	7208
2002	3733	4112	7845
2003	2943	3542	6485
2004	3055	3695	6750
2005	3158	3633	6791
2006	3361	4008	7369
2007	3447	3973	7420
2008	3000	3679	6679
2009	3346	3853	7199
2010	3363	3870	7233

**Figure 4: Percentage of all Full-Time, First-Time Degree/Certificate-Seeking Undergraduates at the University of Texas-Austin that were Black Male Freshmen, Fall 1994-2009**

<b>Year (Fall)</b>	<b>Percentage of Undergraduate Student Body that were Black Male Freshmen</b>
1994	2.10
1995	2.01
1996	1.72
1997	1.05
1998	1.23
1999	1.65
2000	1.60
2001	1.29
2002	1.35
2003	1.68
2004	1.69
2005	1.80
2006	1.95
2007	2.21
2008	1.81
2009	1.79

**Figure 5: Number of Black non-Hispanic First-Time Degree/Certificate-Seeking Undergraduates at the Ohio State University – Main Campus by Sex, Fall 1994-2009**

<b>Year (Fall)</b>	<b>Men</b>	<b>Women</b>	<b>Total</b>
1994	181	314	495
1995	176	315	491
1996	192	322	514
1997	211	367	578
1998	206	354	560
1999	219	371	590
2000	220	339	559
2001	231	365	596
2002	212	367	579
2003	213	350	563
2004	160	244	404
2005	163	267	430
2006	141	259	400
2007	154	267	421
2008	137	227	364
2009	159	220	379

**Figure 6: Number of White non-Hispanic First-Time Degree/Certificate-Seeking Undergraduates at the Ohio State University – Main Campus by Sex, Fall 1994-2009**

<b>Year (Fall)</b>	<b>Men</b>	<b>Women</b>	<b>Total</b>
1994	2496	2415	4911
1995	2365	2354	4719
1996	2479	2412	4891
1997	2312	2411	4723
1998	2478	2526	5004
1999	2476	2364	4840
2000	2268	2340	4608
2001	2389	2204	4593
2002	2382	2258	4640
2003	2610	2491	5101
2004	2614	2323	4937
2005	2426	2372	4798
2006	2608	2468	5076
2007	2570	2415	4985
2008	2488	2433	4921
2009	2796	2509	5305

**Figure 7: Total number of Full-Time, First-Time Degree/Certificate-Seeking Undergraduates at the Ohio State University – Main Campus by Sex, Fall 1994-2010**

<b>Year (Fall)</b>	<b>Men</b>	<b>Women</b>	<b>Total</b>
1994	2930	2912	5742
1995	2796	2920	5716
1996	2947	2970	5917
1997	2816	3081	5897
1998	2991	3180	6171
1999	3043	3033	6076
2000	2827	3010	5837
2001	3029	2935	5964
2002	2994	2946	5940
2003	3150	3204	6354
2004	3144	2893	6037
2005	2933	3007	5940
2006	3161	3105	6266
2007	3119	3041	6160
2008	3084	3069	6153
2009	3488	3239	6727
2010	3335	3319	6654

**Figure 8: Percentage of all Full-Time, First-Time Degree/Certificate-Seeking Undergraduates at the Ohio State University – Main Campus that were Black Male Freshmen, Fall 1994-2009\***

<b>Year (Fall)</b>	<b>Percentage of Undergraduate Student Body that were Black Male Freshmen</b>
1994	3.10
1995	3.08
1996	3.24
1997	3.58
1998	3.34
1999	3.60
2000	3.77
2001	3.87
2002	3.57
2003	3.35
2004	2.65
2005	2.74
2006	2.25
2007	2.50
2008	2.23
2009	2.63

\*After *Gratz v. Bollinger* struck down the University of Michigan's undergraduate admissions system for relying too heavily on point indices, Ohio State revised its undergraduate admissions criteria to align with those approved in *Grutter v. Bollinger*.

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