No. 02-516

In The
Supreme Court of the United States

JENNIFER GRATZ AND PATRICK HAMACHER,
Petitioners,

v.

LEE BOLLINGER, et al.,
Respondents.

On Writ Of Certiorari To The
United States Court of Appeals For The Sixth Circuit

BRIEF OF THE AUTHORS OF THE TEXAS TEN PERCENT PLAN AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

The individuals responsible for drafting and devising the Texas Top Ten Percent Plan (H.B. 588) in the 1997 Texas Legislature submit this brief[1] as *Amici Curiae* in support of Respondents University of Michigan President Lee Bollinger, et al., urging the Court to affirm the Sixth Circuit's judgment that promoting racial diversity in public college admissions is a compelling governmental interest, one that permits the use of race as one factor in order to promote diversity. Many observers, including President George Bush, have urged the use of percentage plans as substitutes for racial consideration in admissions to public institutions of higher education. As the "authors" of the first such state plan, we do not agree that it is possible to use such plans as substitutes for racial considerations in admissions. These *amicus curiae* are:

1. Hon. Irma Rangel, Texas State Representative, legislative author of HB 588, The Texas Ten Percent Plan, and Vice Chair and former Chair, Higher Education Committee, Texas House of Representatives,
2. Dr. David Montejano, Associate Professor, Department of Ethnic Studies, The University of California at Berkeley, formerly Associate Professor of History, University of Texas at Austin,
3. Dr. Michael A. Olivas, Associate Dean and William B. Bates Distinguished Chair, University of Houston Law Center,

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[1] All parties have filed with the Court their written consent to the filing of all *amicus curiae* briefs in this case. Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* certifies that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than *amicus curiae,* their members, or their counsel has made a monetary contribution to the preparation or submission of this brief.

4. Dr. Jorge Chapa, Professor and Director, Latino Studies Program, Indiana University, Bloomington, Indiana, formerly Professor, LBJ School of Public Affairs, University of Texas at Austin,
5. Mr. Gerald Torres, H. O. Head Centennial Professor in Real Property Law, University of Texas School of Law,
6. Mr. Albert Kauffman, Senior Legal & Policy Advocate Associate, The Civil Rights Project, Harvard University, formerly Regional Counsel, Mexican American Legal Defense and Educational Fund, San Antonio, Texas.

SUMMARY OF ARGUMENT

The Sixth Circuit correctly held that furthering diversity in public college admissions is a compelling governmental interest and that considering race as a single factor among many is permissible in order to create such diversity. Percent plans such as the one developed for students in Texas do not provide a more efficacious means for ensuring racial diversity in higher education. In our experience, no percentage plan is a complete substitute for race sensitive admissions.

ARGUMENT

I. PERCENTAGE PLANS IN PUBLIC HIGHER EDUCATION ARE NOT EFFECTIVE ALTERNATIVES TO THE USE OF RACE AND NATIONAL ORIGIN AS FACTORS IN ADMISSIONS SYSTEMS.

A. Percentage Plans Are Not Substitutes for Race-Based Admissions.

In urging reversal of *Grutter*,[2] President Bush and Secretary of Education Rod Paige touted percentage plans as alternatives, arguing that racial admissions were unfair. Brief of the United States as *amicus curiae* at 14-15. They are wrong in urging that percentage plans are reasonable alternatives to race-based admissions. After nearly five years of operating under the Texas Percentage Plan, minority enrollments have not risen to pre-Hopwood levels, which were evidence of significant under-representation then. Of course, Texas minority populations continue to increase at high rates, both numerically and as a proportion of Texas population, high school graduates and college age population, increasing the gap between white and minority Texas university enrollments. That Texas universities have not climbed back to pre-*Hopwood* levels is evidence that the plans cannot substitute for race.

We believe that the Texas Ten Percent Plan, which we analyzed, wrote and supported, has had an effect only at the University of Texas at Austin. Based on our experience with Texas higher education as legislators, professors, students, scholars and advocates, we do not believe that the Ten Percent Plan will reverse the losses that the elimination of affirmative action occasioned or become the alternative that the President and others believe it has become.

B. Percentage Plans Require Certain Demographic Features Not Present in All States or in All Public University Systems.

In Texas, there are two first tier public systems of higher education (the University of Texas System (UT) and the Texas A&M University System (TAMU), as well as several other comprehensive public systems (such as

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[2] *Grutter v. Bollinger,* 288 F. 3d 732 (6th Cir. 2002)

the University of Houston with its five campuses and the multiple campuses of the Texas State College and University System) and single campus public institutions (such as Texas Tech University and Texas Southern University). In addition, there are dozens of multi-campus public community (two year) colleges and technical institutes, and four of the state's university systems have medical schools. The tier one UT and TAMU systems have highly competitive flagship campuses in Austin and College Station, respectively.

Most states do not have such extensive or decentralized governance structures. The Texas higher education system was carved out over the years from a combination of private and municipal colleges made into public state institutions, and even "public" programs contracted by the state from private institutions, such as the Baylor College of Medicine, which "rents" out medical school spots for resident Texans.

California's percent plan guarantees University of California (UC) admission for the state's top four percent students, but only for a place at one of the UC campuses, not necessarily at one of the most highly competitive campuses. Florida's plan is for all its campuses, but expanded to the top twenty percent, and does not guarantee admission to a particular campus and most pointedly not to flagship campuses that operate as gateways to other opportunities. In other words, these programs are not interchangeable, range widely in their reach, and cannot work in many states that have different racial patterns, college-going patterns, and urban/rural mixes. Urging all states to use such plans, even states without all the requisite ingredients, is chimerical and

not grounded in a realistic appraisal of each state's demography, higher education structure and history.[3]

C. The Texas Plan Has Not Increased Diversity in Texas Higher Education Back to Pre-*Hopwood* or Pre-Ten Percent Plan Levels, and the Gap Between the Pool of Qualified Students and Enrollment Has Increased.

By 2003, the fifth full year of the Texas Ten Percent Plan, it can only truly be said that the plan has, combined with many other changes in recruitment and scholarship processes, had modest success at the flagship campus of the University of Texas-Austin (UT-Austin). We attribute this modest success to policies that are racially neutral on their face, but have a strong and positive effect on African American and Latino students.

The other tier one flagship campus, TAMU-College Station, has been less successful in its implementation of the Texas Plan. For example, using the *Hopwood* case as a benchmark, TAMU-College Station's black undergraduate enrollments fell from 3.7% in 1992-96 to 2.4% in 1997-2000, and Hispanic undergraduate enrollment fell from 12.6% to 9.2% during the same period. As a result, the TAMU-College Station campus's white enrollments rose from 79.3% to 82.6%. At UT- Austin the African American enrollment went from 4.0 % to 3.3%, while Hispanics declined from 15.8% to 13.7%.[4] These significant minority enrollment decreases

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[3] Michael A. Olivas, *Constitutional Criteria: The Social Science and Common Law of Admissions*, 68 U. COLO. L. REV. 1065 (1997)

[4] Marta Tienda, et al., *Closing the Gap?: Admissions and Enrollments at the Texas Public Flagships Before and After Affirmative Action* (2003) at 49, *available at*

occurred during a period when the state's population and the public K-12 education enrollments were increasingly minority, both numerically and proportionally.[5] For example, the Houston Independent School District, Texas's largest district with 200,000 students was less than 10% white in 2002. In the decade of the 1990's, the state's Hispanic college-aged population increased ten percent.[6]

The gap between the African American and Latino proportions of the enrollment at TAMU-College Station and UT Austin and the African American and Latino proportions of Texas high school graduates has increased since the *Hopwood* decision.[7]

D. The Texas Ten Percent Plan Has Been Modestly Efficacious Only When Institutions Expend Considerable Resources Focused on Underserved High Schools.

It is clear that even modestly successful implementation can only occur with substantial resources and institutional commitment, focused on those high

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http://www.texastop10.princeton.edu/publications/tienda012103.pdf.

[5] Between 1990 and 2000, the Hispanic proportion of Texas's 15-19 year old population increased from 33% to 39%, blacks decreased slightly from 14% to 13% and Whites decreased from 51% to 44%. Between 1996 and 2001, Hispanics increased from 29% to 32% of high school graduates, blacks increased form 12% to 13% and Whites decreased from 55% to 51%. Catherine L. Horn & Stella M. Flores, *Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences*, *available at* http://www.civilrightsproject.harvard.edu, at 26-28

[6] Tienda, *supra* at 6-7.

[7] See ftnt 5, *supra.*

schools that have traditionally been underserved by the flagship institutions.

The Longhorn Opportunity Scholarships (LOS), a comprehensive four-year scholarship aimed specifically at students in schools that have traditionally sent few applicants to UT Austin, has been a major factor in reducing the precipitous decline in minority enrollment after *Hopwood*. A Longhorn Opportunity Scholarship school is one that is poor and one that traditionally sends few, if any, applicants to UT-Austin. These high schools are predominantly, but not exclusively, Latino and African American.[8]

This year, the university awarded 235 "Longhorn Scholarships," which provide $4000 per year to students from 64 schools that had sent few, if any, students, to UT Austin, as compared to other Texas high schools of similar enrollment. The money is not the only thing that comes with the scholarship, however. The LOS students are guaranteed housing, access to small classes and academic assistance if they need it. They are welcomed to the campus.

Skyline High School in Dallas is a good example of how the Longhorn Opportunity Scholarship program opens UT-Austin to students from diverse backgrounds who previously would not have aspired to the flagship university. Skyline is predominantly African-American. In the entering class of 1998-99, Skyline sent nine students to UT-Austin. The Longhorn Opportunity Scholarships have led to an increased enrollment last fall to 21 students. Highlands High School, a predominantly Latino high school in San Antonio, is another example. Before the Longhorn Opportunity Scholarship program,

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[8] University of Texas press release, available at http://www.utexas.edu/admin/opa/news/03newsreleases/nr_200301/nr_toptenpercent030116.html

Highlands High School had sent one student to UT-Austin. In last year's entering class, 14 Highlands graduates enrolled at UT. This is a phenomenon that is being seen across the 64 Longhorn Opportunity Scholarship Schools.

Under the Texas Ten Percent Plan, students are admitted regardless of their SAT/ACT scores. This tends to neutralize the adverse impact these standardized test scores have upon African American and Latino students, even when the effects of family income are controlled for.[9]

As scholars, legislators, and attorneys who have actively fought for more inclusive admissions processes, we are dismayed by the *Hopwood* decision and other anti-affirmative action measures -- including efforts to use percentage plans as a rationale for discarding affirmative action. As Texas has shown, properly designed and implemented percentage plans, coupled with a narrowly tailored plan of affirmative action, have inherent value beyond increased racial and geographic diversity. Percent plans can be used *together with* affirmative action, giving colleges and universities the considerable benefits of both strategies. The Texas Ten Percent Plan will, we believe, help in the struggle to defend affirmative action.

E. Percentage Plans Cannot Work in Graduate or Post-baccalaureate Admissions, Such as Law, Medical, Dental, Business, or Masters or Doctoral Programs.

We were addressing undergraduate admissions when we drafted HB 588, not graduate or professional programs. Given all the problems we have identified with undergraduate admissions in a post-*Hopwood* world, we

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[9] See ,e.g. The Journal of Blacks in Higher Education, *The Expanding Racial Scoring Gap Between Black and White SAT Test Takers*, January 23, 2003.

simply have no confidence that these plans can or should be extended to law schools or similar graduate programs.

II. IF WE WISH TO INCREASE THE DIVERSITY OF OUR MOST COMPETITIVE UNIVERSITIES, NO OTHER CRITERION CAN SUBSTITUTE FOR THE USE OF RACE.

Because our contribution is to improve understanding of the value and limitations of Percentage Plans, we only wish to state what has been an article of faith in our deliberations: *Bakke*[10] is the law of the land, and is good law.

We believe that the Supreme Court got it right in *Bakke*, and urge its affirmance here. The Sixth Circuit also got it right in *Grutter.*[11] In Part V-C of *Bakke*, in which Justices Brennan, Blackmun, Marshall, and White joined, thus constituting a five-Justice majority, Justice Powell wrote:

> In enjoining [UC-D] from ever considering the race of any applicant, . . the courts below failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin. For this reason, so much of the California court's judgment as enjoins [UC-D] from any consideration of the race of any applicant must be reversed.

In Part V-A, which no other Justice joined, Justice Powell explained that the "substantial interest" was

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[10] *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978)
[11] *Grutter v. Bollinger*, 288 F. 3d 732 (6th Cir. 2002)

diversity; in Part IV-D, he wrote that admitting a "diverse student body. . . .clearly is a constitutionally permissible goal for an institution of higher education. . . . [I]t is not too much to say that the nation's future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples."

Although the two-judge panel in Hopwood treated the *Bakke* holding (what they termed Justice Powell's "lonely opinion") as questionable precedent, this Court has neither overturned *Bakke* nor accepted until now for review any higher education affirmative action case since its 1978 decision in *Bakke*. Justice O'Connor, in her concurring opinion in *Wygant,*[12] noted that "although its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest."

In the Fifth Circuit *Hopwood* opinion, Judges Smith and DeMoss simply omit mention of Part V-C, the authentic, five-member central opinion, and ignore its "substantial interest" holding. Further, by declaring *Bakke* dead, they ignore *Rodriguez de Quijas v. Shearson/American Express, Inc.*,[13] a recent Supreme Court holding that reserves to this Court "the prerogative of overruling its own decisions." Moreover, in *Adarand*,[14] Justice O'Connor held, "When race-based action is necessary to further a compelling interest, such action is within the Constitutional constraints if it satisfies the 'narrow tailoring' test this Court has set out in previous

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[12] *Wygant v. Jackson Board of Education,* 476 U.S. 267 (1986)

[13] *Rodriquez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989)

[14] *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995)

cases." This hardly sounds like the death knell for well-crafted admissions programs, which we believe to be compelling.

We, the authors of the Texas Ten Percent Plan urge the affirmance of *Bakke* and *Gratz*.

CONCLUSION

For the foregoing reasons, the judgment of the district court upholding the constitutionality of the University of Michigan's undergraduate admissions policies should be affirmed.

Respectfully submitted,

/s/

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