

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
(Austin Division)**

ABIGAIL NOEL FISHER; and
RACHEL MULTER MICHALEWICZ

Plaintiffs,

v.

STATE OF TEXAS; UNIVERSITY OF TEXAS AT AUSTIN; MARK G. YUDOF, CHANCELLOR OF THE UNIVERSITY OF TEXAS SYSTEM IN HIS OFFICIAL CAPACITY; DAVID B. PRYOR, EXECUTIVE VICE CHANCELLOR FOR ACADEMIC AFFAIRS IN HIS OFFICIAL CAPACITY; BARRY D. BURGDORF, VICE CHANCELLOR AND GENERAL COUNSEL IN HIS OFFICIAL CAPACITY; WILLIAM POWERS, JR., PRESIDENT OF THE UNIVERSITY OF TEXAS AT AUSTIN IN HIS OFFICIAL CAPACITY; BOARD OF REGENTS OF THE TEXAS STATE UNIVERSITY SYSTEM; JOHN W. BARNHILL, JR., H. SCOTT CAVEN, JR., JAMES R. HUFFINES, JANIECE LONGORIA, COLLEEN MCHUGH, ROBERT B. ROWLING, JAMES D. DANNENBAUM, PAUL FOSTER, PRINTICE L. GARY, AS MEMBERS OF THE BOARD OF REGENTS IN THEIR OFFICIAL CAPACITIES; BRUCE WALKER, VICE PROVOST AND DIRECTOR OF UNDERGRADUATE ADMISSIONS IN HIS OFFICIAL CAPACITY

Defendants.

Civil Action No. 1:08-cv-00263-SS

MOTION FOR PRELIMINARY
INJUNCTION

Plaintiffs, by and through their undersigned counsel and pursuant to Federal Rule of Civil Procedure 65, respectfully move this Court for a preliminary injunction for the reasons set forth in the accompanying Memorandum in Support of Motion for Preliminary Injunction and for such other and further reasons as may appear at any hearing on this motion.

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Dated: April __, 2008

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**PLAINTIFFS' MEMORANDUM
IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

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I. INTRODUCTION

Abigail Fisher and Rachel Michalewicz (“Plaintiffs”) have been rejected for admission into the freshman class at the University of Texas at Austin (“UT Austin”) under a system of racial preferences that denies them equal protection of the laws. Without preliminary relief from this Court, Plaintiffs’ constitutional injury will soon be irreparable. Because they were unconstitutionally denied admission to UT Austin, Plaintiffs are now forced to consider whether to attend other universities or to enroll in another component of the University of Texas System in the hope that they may qualify for admission to UT Austin next year. But, in order to secure a place in the incoming freshman class of any of these universities, Plaintiffs must select a school and make a non-refundable investment of money to the school of their choice, in some cases, by as early as May 1, 2008. In addition, Abigail Fisher’s non-refundable fall semester tuition payment is due to Baylor on July 31, 2008 and to LSU on August 7, 2008, and Rachel Michalewicz’s non-refundable fall semester tuition is due to Texas State on August 26, 2008. A preliminary injunction thus is needed to ensure that this Court may grant Plaintiffs meaningful relief after the merits of this constitutional challenge have been fully litigated.

Plaintiffs are likely to prevail once the important legal issue at stake in this case is fully addressed. In 1997, the Texas legislature enacted a law that grants automatic admission to UT Austin to all Texas public high school seniors ranked in the Top 10% of their graduating class. Tex. Educ. Code § 51.803 (1997) (“Top 10% Law”). This law was designed to “ensure a highly qualified pool of students each year in the state’s higher educational system” and to promote diversity by ensuring “that a large, well qualified pool of minority students [is] admitted to Texas universities.” HB 588, House Research Organization Digest, at 4-5 (1997) (Exhibit “Ex.” A). The Top 10% Law succeeded in its diversity mission. Indeed, UT Austin proudly announced in 2003 that this race-neutral law “effectively compensated for the loss of affirmative action.” *The*

University of Texas at Austin's Experience with the "Top 10 Percent" Law, The Univ. of Tex. at Austin, Jan. 16, 2003, available at http://www.utexas.edu/news/2003/01/16/nr_toptenpercent/. (Ex. B).

UT Austin nevertheless re-introduced racial preferences for those students not admitted through the Top 10% Law only hours after the Supreme Court's decision in *Grutter v. Bollinger*, 539 U.S. 306 (2003). The Supreme Court has made clear that because all government classifications on the basis of race are subject to strict scrutiny, racial preferences are not "narrowly tailored" if viable race-neutral means can meet the relevant government interest. Here, UT Austin has basically conceded—and the statistical data verifies—that the university is able to meet its legitimate interest in "student body diversity," *id.* at 325, without resort to race-based decision-making. The re-introduction of race into the admissions process therefore is unconstitutional. For these reasons, and to vindicate the public's interest in ensuring that government officials obey the Constitution, Plaintiffs respectfully request that this Court grant a preliminary injunction requiring UT Austin to reconsider their applications for admission under race-neutral criteria.

II. FACTS

In *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), the Fifth Circuit declared unconstitutional the use of race-based criteria in the admissions decisions of the University of Texas Law School. Shortly thereafter, the Texas Attorney General issued a written opinion stating that undergraduate and graduate programs at Texas state universities could no longer employ race as a factor in their admissions decisions. See Office of the Attorney General, Letter Opinion No. 97-001 (Feb. 5, 1997) (Ex. C). UT Austin employed race to achieve these minority enrollment levels because, in the university's view, an admissions plan that did not include race as a factor "would have produced classes with unacceptably low diversity levels."

Implementation and Results of the Texas Automatic Admissions Law (HB 588) at The University of Texas at Austin, The Univ. of Tex. at Austin, Dec. 6, 2007, at 2, available at <http://www.utexas.edu/student/admissions/research/HB588-Report-VolumeI.pdf> (Ex. D). Under its pre-*Hopwood* race-based admissions plan, 4.4% of UT Austin's admitted class were African-American students, and 15.4% were Hispanic students. In turn, 4.1% of UT Austin's enrolled freshman class were African-American students, and 14.5% were Hispanic students. See *Implementation and Results of the Texas Automatic Admissions Law (HB 588) at The University of Texas at Austin*, The Univ. of Tex. at Austin, Dec. 6, 2006, at Table 1, available at <http://www.utexas.edu/student/admissions/research/HB588-Report9.pdf> (Ex. E).

After *Hopwood*, UT Austin implemented a new admissions plan that did not take into account the applicant's race. Under this plan, UT Austin computed an Academic Index ("AI") and a Personal Achievement Index ("PAI") for each applicant. See *Implementation and Results of the Texas Automatic Admissions Law (HB 588) at The University of Texas at Austin*, The Univ. of Tex. at Austin, Oct. 28, 2007, at 2, available at <http://www.utexas.edu/student/admissions/research/HB588-Report10.pdf> (Ex. F). The AI reflects the student's high school academic performance and SAT/ACT score; the PAI takes into account the applicant's scores on two essays, leadership, extracurricular activities, awards/honors, work experience, service to school or community, and other special circumstances. See *id.* Under this plan, in 1996, 3.4% of UT Austin's admitted class were African-American students, and 13.0% were Hispanic students. In turn, 2.7% of UT Austin's enrolled freshman class were African-American students, and 12.6% were Hispanic students. Ex. F, Table 1.

The Texas legislature passed House Bill 588 on September 1, 1997. Tex. Educ. Code § 51.803 (1997) (Ex. G). This statute, commonly referred to as the "Top 10% Law," guarantees

admission to UT Austin for all Texas public high school students who graduate in the top 10% of their class. *Id.* The goal of the Top 10% Law is two-fold. It will “ensure a highly qualified pool of students each year in the state’s higher educational system” and, at the same time, promote diversity by ensuring “that a large, well qualified pool of minority students [is] admitted to Texas universities.” Ex. A. Beginning with the 1998 admissions cycle, UT Austin adjusted its admissions plan to account for this legislation. Under its new admissions plan, UT Austin admitted all students that qualified under the Top 10% law and filled the remainder of its incoming freshman class using the race-neutral AI/PAI criteria (the “Top 10-AI/PAI Plan”). Ex. F, at 2-3.

The Top 10-AI/PAI Plan was successful in promoting diversity in UT Austin’s undergraduate student body. As then-UT Austin President Larry Faulkner explained in 2000, “the Top 10 percent law has enabled us to diversify enrollment at UT Austin with talented students who succeed. Our 1999 enrollment levels for African-Americans and Hispanic freshman have returned to those of 1996, the year before the *Hopwood* decision prohibited the consideration of race in admissions policies.” *The “Top 10 Percent Law” is Working for Texas*, The Univ. of Tex. at Austin, Oct. 19, 2000, available at <http://www.utexas.edu/student/admissions/research/faulknerstatement.html> (Ex. H). According to President Faulkner, under the Top 10% Law, “minority students earned higher grade point averages last year [in 1999] than in 1996 and have higher retention rates. An impressive 94.9 percent of 1998 African American [sic] freshmen returned to enroll for their sophomore year in 1999. For Hispanics, 85.8 percent returned for their second year. So, the law is helping to create a more representative student body and enroll students who perform well academically.” *Id.*

In 2003, UT Austin announced that “[t]he summer/fall 2002 semester report shows that first-time freshman enrollment” for African-American and Hispanic students had “increased to a level above the 1996 pre-Hopwood figures” and that “[m]ore recent enrollment figures show a more encouraging trend.” *Enrollment of First-Time Freshman Minority Students Now Higher than Before Hopwood Court Decision*, The Univ. of Tex. at Austin, Jan. 29, 2003, available at http://www.utexas.edu/news/2003/01/29/nr_diversity/ (Ex. I). Thus, according to UT Austin, the Top 10% Law “has effectively compensated for the loss of affirmative action.” Ex. B. Indeed, in 2004, the last year UT Austin employed a race-neutral admissions plan, 4.8% of UT Austin’s admitted class were African-American students, and 16.2% were Hispanic students. In turn, 4.5% of UT Austin’s enrolled freshman class were African-American students, and 16.9% were Hispanic students. Ex. F, Table 1.

On June 23, 2003, the Supreme Court abrogated the Fifth Circuit’s *Hopwood* decision. *Grutter v. Bollinger*, 539 U.S. 306 (2003). In particular, the Supreme Court found that universities have a compelling government interest in “student body diversity,” *Grutter*, 539 U.S. at 328, 333, and therefore may use racial preferences in certain narrow circumstances to meet that interest so long as they first engage in “serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks,” *id.* at 339. On the same day *Grutter* was decided, UT Austin announced that it would resume using race as a factor in undergraduate and graduate admission decisions. *See The University of Texas at Austin Reacts to the Supreme Court’s Affirmative Action Decisions*, The Univ. of Tex. at Austin, June 23, 2003, available at http://www.utexas.edu/news/2003/06/23/nr_affirmativeaction/ (Ex. J). President Faulkner declared race-based admissions in the graduate schools a “priority” because there is not “a good substitute for affirmative action in those programs.” *Id.* (internal quotation

marks omitted). With respect to undergraduate admission, President Faulkner announced that the re-introduction of race into the admissions process would place UT Austin “on the same competitive basis as educational institutions throughout the United States.” *Id.* (internal quotation marks omitted). Thus, going forward, the portion of the freshman class not filled through the operation of the Top 10% Law would be filled under a race-based admissions plan. (the “Top 10-Race-Based Plan”). *Id.*

In 2007, the most recent year for which admissions statistics are publicly available, 5.1% of UT Austin’s admitted class were African-American students, and 19.1% were Hispanic students. In turn, 5.8% of UT Austin’s enrolled freshman class were African-American students, and 19.7% were Hispanic students. Ex. F, Table 1. Comparing the number of non-Top 10% minority students that enrolled in UT Austin in 2004 to the number of non-Top 10% minority students that enrolled in 2007 shows that the decision to re-introduce race into the admissions process yielded 63 more African-American students and 101 more Hispanic students for the 2007 incoming freshman class. Ex. F, Table 1a. These “additional” 164 minority students constitute less than 2.2% of the enrolled freshman class of 2007. *Id.*

Both Plaintiffs timely applied for admission into UT Austin’s 2008 incoming freshman class. Declaration of Abigail Noel Fisher ¶ 3 (Ex. K); Declaration of Rachel Multer Michalewicz ¶ 3 (Ex. L). At the time of her application, Ms. Fisher maintained a 5.1111 grade point average on a weighted 6.0 scale and/or a 3.5926 grade point average on a 4.0 scale at Stephen F. Austin High School, placing her in approximately the top 12% of her graduating class. Ex. K ¶ 4. Ms. Fisher took the SAT and scored 1180, placing her within the 25/75 percentile of enrolled UT Austin freshman according to the most recent publicly available enrollment statistics. *Id.* ¶ 6. In addition, Ms. Fisher participated in a number of extra-curricular

activities, including serving as co-president of the Stephen F. Austin orchestra due to her accomplishments as a cellist, participation in academic and athletic team competition, and volunteer and community service for organizations such as Habitat for Humanity. *Id.* ¶ 8. Ms. Fisher's application for admission was considered under the race-based criteria because she was not in the top 10% of her graduating class. *Id.* ¶ 5.

At the time of her application, Ms. Michalewicz maintained a 3.867 grade point average on a 4.0 scale at Jack C. Hays High School, placing her in approximately the top 10.1% of her graduating class according to UT Austin. Ex. L ¶ 4-5.¹ Ms. Michalewicz took the SAT and scored 1290, placing her within the 25/75 percentile of enrolled UT Austin freshman according to the most recent publicly available enrollment statistics. *Id.* ¶ 6. In addition, Ms. Michalewicz participated in a number of extra-curricular activities, including Marching Band, Jazz Band/Concert Band, the Math Club and, during her freshman and sophomore years, Junior ROTC. *Id.* ¶ 8. Ms. Michalewicz volunteered with the St. Vincent DePaul Food Bank and participated in Cast Event for Kids, a fishing event for handicapped children. *Id.* In addition, Ms. Michalewicz worked 20 hours per week at HEB Grocery Store in Kyle, Texas. *Id.* Ms. Michalewicz's application for admission was considered under the race-based criteria because she was not in the top 10% of her graduating class. *Id.* ¶ 5.

Each plaintiff received identical rejection letters from UT Austin. Ex. M; Ex. N. In the rejection letters, UT Austin offered Plaintiffs admission to UT Austin's Coordinated Admission

¹ On March 28, 2008, Ms. Michalewicz appealed her denial of admission to UT Austin on the ground that she is considered by Jack C. Hays High School to fall within the Top 10% of her high school class. *Id.* ¶ 12. Ms. Michalewicz received an informal response from UT Austin explaining that UT Austin disagreed with, and was therefore rejecting, the method of calculating class rank employed by Jack C. Hays High School. *Id.* According to UT Austin, Ms. Michalewicz falls within the Top 11% of her high school class. *Id.* Subsequently, Ms. Michalewicz's appeal was formally rejected by UT Austin. *Id.*

Program (“CAP”). Students who choose CAP may enroll in a participating University of Texas System campus; students who fulfill the requirements of CAP may then enroll at UT Austin after their freshman year, but are guaranteed admission into only the College of Liberal Arts or the College of Natural Sciences. The requirements of CAP include the completion of at least 30 transferable semester credit hours and a minimum 3.2 GPA on all hours attempted while enrolled in CAP. Ex. M; Ex. N. Students who wish to enroll in CAP must complete an online acceptance agreement on UT Austin’s website by May 1, 2008. Under the procedures for admission, students who are admitted to UT Austin’s 2008 incoming freshman class must make payment to the university in the amount of \$200 in order to secure a place. This \$200 enrollment deposit becomes nonrefundable after May 1, 2008. Ex. M; Ex. N.

Plaintiffs have been accepted for admission into other universities. Ms. Fisher has been accepted to Louisiana State University (“LSU”) and Baylor University (“Baylor”). Ex. K ¶¶ 11-12. Ms. Fisher has received a Tigers Scholar Award, entitling her to a partial scholarship in the amount of \$2,075 to LSU. The deadline to accept her offer of admission and the Tigers Scholar Award is May 1, 2008. If Ms. Fisher elects to enroll at LSU, all tuition and fees for the 2008 Fall semester are due by August 7, 2008. *Id.* ¶ 11. Baylor also awarded Ms. Fisher a partial scholarship in the amount of \$3,500. In order to secure a place in the 2008 incoming freshman class at Baylor, Ms. Fisher must make an enrollment deposit in the amount of \$300 by May 1, 2008. If Ms. Fisher elects to enroll at Baylor, all tuition and fees for the 2008 Fall semester are due by July 31, 2008. *Id.* ¶ 12. Ms. Michalewicz has been accepted to Texas State University (“Texas State”). Ex. L ¶ 11. In order to secure a place in the 2008 incoming freshman class at Texas State, Ms. Michalewicz must tender payment for full tuition and fees for the 2008 Fall semester by August 26, 2008.

III. ARGUMENT

Four equitable factors govern a request for preliminary injunction: (1) whether there is a substantial likelihood that plaintiff will prevail on the merits; (2) whether there is a substantial threat that plaintiff will suffer irreparable injury if an injunction is not granted; (3) whether the threatened injury to plaintiff outweighs the threatened harm of an injunction to the defendant; and (4) whether the preliminary injunction will serve the public interest. *See Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 363 (5th Cir. 2003). Under this standard, “a sliding scale is utilized, which takes into account the intensity of each [factor] in a given calculus.” *Texas v. Seatrain Int’l, S.A.*, 518 F.2d 175, 180 (5th Cir. 1975) (citation omitted). Because all four factors weigh in Plaintiffs’ favor, this Court should grant the Motion for Preliminary Injunction.

A. Plaintiffs Are Likely to Prevail on the Merits.

The Constitution guarantees that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1. The “core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race.” *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984). Accordingly, “all racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized” without regard to “the race of those burdened or benefited by a particular classification.” *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 224 (1995). To withstand strict scrutiny, UT Austin must prove that “the University’s use of race in its current admissions program employs narrowly tailored measures that further compelling governmental interests.” *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) (citations and quotations omitted); *see also Parents Involved in Cmty. Schools v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2752 (2007) (“R]acial classifications are simply too pernicious to permit any but the most exact connection between

justification and classification.”).² As explained below, UT Austin cannot bear its “narrow tailoring” burden, *see Johnson v. California*, 543 U.S. 499, 505-06 (2005), for at least two reasons.³

1. UT Austin Can Meet Its Interest in Student Body Diversity Without Resorting to Racial Preferences.

UT Austin failed to undertake “serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.” *Grutter*, 539 U.S. at 339. Although “[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative,” *id.*, racial classifications “may be considered legitimate only if they are a last resort to achieve a compelling interest,” *Parents Involved*, 127 S. Ct. at 2792 (Kennedy, J., concurring); *see also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 519 (1989) (Kennedy, J., concurring) (explaining that “the strict scrutiny standard . . . forbids the use even of narrowly drawn racial classifications except as a last resort”); *United States v. Paradise*, 480 U.S. 149, 171 (1987) (“In determining whether race-conscious remedies are appropriate, we look to several

² The Supreme Court has found that a “government interest in student body diversity in the context of higher education is compelling” so long as it is “not focused on race alone but encompass[es] all factors that may contribute to student body diversity.” *Parents Involve*, 127 S. Ct. at 2742; *see also Grutter*, 539 U.S. at 325 (“[T]oday we endorse Justice Powell’s view that student body diversity is a compelling state interest that can justify the use of race in university admissions.”). Plaintiffs do not challenge UT Austin’s goal of “student body diversity” only to the extent that it is this interest, and not some other, that serves as the university’s justification for re-introducing race into the undergraduate admissions process.

³ Because the Top 10-Race-Based Plan is unconstitutional it violates other federal laws as well. Discriminatory policies that violate the Equal Protection Clause of the Fourteenth Amendment promulgated by an institution that accepts federal funds also violate Title VI of the Civil Rights Act. *See Alexander v. Sandoval*, 532 U.S. 275, 281 (2001). Likewise, with respect to 42 U.S.C. § 1981, the Supreme Court explained that the provision was “meant, by its broad terms, to proscribe discrimination in the making or enforcement of contracts against, or in favor of, any race,” *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 295-296 (1976), and that a contract for educational services is a “contract” for purposes of Section 1981. *See Runyon v. McCrary*, 427 U.S. 160, 172 (1976). Purposeful discrimination that violates the Equal Protection Clause therefore also violates Section 1981. *See General Building Contractors Ass’n, Inc. v. Pennsylvania*, 458 U.S. 375, 389-390 (1982).

factors, including the efficacy of alternative remedies.”). Thus, “arriving at an exact fit between harm and remedy requires consideration of whether a race-neutral or less restrictive remedy could be used. This is because a race-conscious remedy should be the remedy of last resort.” *Walker v. City of Mesquite*, 169 F.3d 973, 982-83 (5th Cir. 1999). A “race-conscious remedy will not be deemed narrowly tailored until less sweeping alternatives—particularly race-neutral ones—have been considered and tried.” *Id.*⁴

Narrow tailoring therefore requires “particularly intense scrutiny to whether a nonracial approach . . . could promote the substantial interest about as well and at tolerable administrative expense.” *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1986); *see, e.g., J.A. Croson Co.*, 488 U.S. at 509-10 (plurality opinion) (striking down race-based government program for failing to take advantage of a “whole array of race-neutral devices” that “would have little detrimental effect on the city’s interests and would serve to increase the opportunities available to minority business without classifying individuals on the basis of race”); *Viridi v. DeKalb County Sch. Dist.*, 135 Fed. Appx. 262, 268 (11th Cir. 2005) (unpublished) (“Because the state’s proffered interest could be served equally well by race-neutral measures, the adoption of a racial classification is not narrowly tailored to achieving that interest.”). The Supreme Court’s narrow tailoring standard draws a common-sense line; government need not test “every conceivable” race-neutral alternative through trial and error, *Grutter*, 539 U.S. at 339, but it must take advantage of “viable nonracial, non-discriminatory . . . criteria” before resorting to racial

⁴ *See also Williams v. City of New Orleans*, 729 F.2d 1554, 1565 (5th Cir.1984) (Gee, J., concurring) (explaining that reliance on the “on the frank ground of race . . . can only be as a last resort, when it is clear that nothing else will suffice”); *Eng’g Contractors Ass’n of S. Fla. Inc. v. Metro. Dade County*, 122 F.3d 895, 926 (11th Cir. 1997) (finding that the “essence of the ‘narrowly tailored’ inquiry is the notion that explicitly racial preferences . . . must be only a ‘last resort’ option.” (quoting *Hayes v. N. State Law Enforcement Officers Ass’n*, 10 F.3d 207, 217 (4th Cir.1993))).

classifications, *Walker*, 169 F.3d at 985. While the former is an unrealistic and unfair measure of the “fit” between means and ends, the latter “ensure[s] that the means chosen ‘fit’ the compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.” *Grutter*, 539 U.S. at 333.

Here, UT Austin has retreated to a race-based model even though a race-neutral approach to admissions is fully capable of meeting its interest in student body diversity. Before *Hopwood* prohibited the use of race in admissions, the university employed a race-based admissions plan that resulted in an African-American and Hispanic enrollment rate of approximately 4% and 14% respectively as necessary to achieve student body diversity. Ex. E. UT Austin has repeatedly used these levels of minority enrollment as benchmarks for measuring its success in achieving diversity. More particularly, UT Austin has trumpeted the success of the Top 10% Law because it met these very benchmarks. Ex. B; Ex. H; Ex. I. In 2003, President Faulkner applauded the Top 10% Law’s impact on diversity not in the abstract, but as judged against these goals: “[T]he Top 10 percent law has enabled us to diversify enrollment at UT Austin with talented students who succeed. Our 1999 enrollment levels for African-Americans and Hispanic freshman have returned to those of 1996, the year before the *Hopwood* decision prohibited the consideration of race in admissions policies.” Ex. H. UT Austin issued a January 29, 2003 press release that likewise stated: “Diversity efforts at The University of Texas at Austin have brought a higher number of freshman minority students . . . to the campus than were enrolled in 1996, the year a court ruling ended the use of affirmative action in the university’s enrollment process.” Ex. I. It therefore comes as no surprise that UT Austin proudly announced that the Top 10% Law had “effectively compensated for the loss of affirmative action.” Ex. B.

Statistical evidence validates the university's public statements. In 1996, the last year of the pre-*Hopwood* race-based admissions program, UT Austin's freshman class was 4.4% African-American and 14.5% Hispanic. In 2004, the final year of the race-neutral Top 10% admissions plan, the freshman class was 4.8% African-American and 16.9% Hispanic. Ex. F, Table 1. Moreover, as President Faulkner explained, relying on the Top 10% instead of racial preferences to meet the university's diversity goal produced additional educational benefits: "minority students earned higher grade point averages last year [in 1999] than in 1996 and have higher retention rates. An impressive 94.9 percent of 1998 African American [sic] freshmen returned to enroll for their sophomore year in 1999. For Hispanics, 85.8 percent returned for their second year. So, the law is helping to create a more representative student body and enroll students who perform well academically." Ex. H. At bottom, whether based on UT Austin's contemporaneous examination of its own admissions information, or an independent examination of the relevant statistical data, the answer is the same—UT Austin is able to meet its interest in "student body diversity" through race-neutral means.

Given the objective evidence and the university's public admissions, UT Austin's re-introduction of race was without constitutional warrant. UT Austin is not being asked to experiment with speculative and unproven race-neutral policies before adopting a race-based admissions plan. Rather, the uncontroverted evidence and the university's own statements prove that UT Austin is able to meet its legitimate diversity goals under the race-neutral admissions plan that was abruptly abandoned in 2004. Thus, for UT Austin, it appears that use of racial classifications is the first choice—not the "last resort" as required by the Supreme Court. Indeed, given the university's disregard for its own statements lauding the diversifying effect of Top 10% Law, Ex. B; Ex. H; Ex. I, and the administration's instantaneous decision to re-

introduce race into the admissions process only hours after *Grutter* was handed down, Ex. J, it is highly unlikely that UT Austin paused for even a moment to fairly consider whether racial classifications were necessary. If narrow tailoring has any meaning, it must forbid a university from re-introducing disfavored racial classifications when its existing admissions program is meeting its legitimate compelling government interest. UT Austin's reflexive affinity for race-based admissions policies is not a lawful justification for invoking a constitutionally suspect remedy.

In fact, UT Austin recently asked the legislature to scale back the Top 10% Law because it "has hurt the university's ability to increase its racial and ethnic diversity" and because "the university could attract a more diverse student body if it was not forced by the state, under a decade-old law, to accept every student with a high class rank." Lisa Sandberg, *Top 10 Rule Limits UT-Austin, Says School President*, Houston Chronicle, Mar. 20, 2008 (Ex. O). According to UT Austin President William Powers, "[o]nly about one in four students admitted under the top 10 percent law is African-American or Hispanic, so there's a natural limit if we don't have discretion in who we can go after." *Id.* "Powers supports capping at 50 percent the number of incoming freshmen admitted by UT-Austin under the top 10 percent law, and giving admission officers more discretion to use other factors, including race, when considering the rest." *Id.* UT Austin, it appears, now blames the very law that allowed it to meet its compelling government interest as an impediment to its increased consideration of race in the admissions process. The university clearly has a desire to increase minority enrollment that far exceeds its right to use racial classifications to achieve that goal. Even more troubling, however, it has declared an intention to widen the use of racial classifications at a time when universities are supposed to be sunseting such practices. *See Grutter*, 539 U.S. at 342.

In any event, if UT Austin has a desire to further boost its minority enrollment, it has ample race-neutral avenues it can more fully explore. *See Grutter*, 539 U.S. at 342 (explaining that universities “can and should draw on the most promising aspects of [the] race-neutral alternatives” adopted by other institutions in the search for race-neutral ways to increase student body diversity). Indeed, UT Austin already takes into account the socio-economic status of the applicant’s family,⁵ whether the applicant lives in a single-parent home, the language spoken at home, the applicant’s family responsibilities, the socio-economic status of the high school attended, and the average SAT/ACT of the high school attended in relation to the student’s SAT/ACT score. Ex. F at 2. The use of these race-neutral admissions criteria, in conjunction with the Top 10% Law, from 1997 to 2004, proved sufficient to meet UT Austin’s compelling government interest. In addition, the upward trend in minority enrollment over this period made clear that this admissions program, had it not been abandoned, promised higher minority enrollment in the coming years. Ex. F, Table 1.

UT Austin also can adopt programs that have been successful for other universities, such as targeting students from schools that have not been “feeder schools” for flagship state universities; skills-development programs for students from traditionally underperforming schools; and partnerships with underperforming schools. *See* U.S. Dep’t of Educ., Office of Civil Rights, *Race Neutral Alternatives in Postsecondary Education: Innovative Approaches to Diversity*, at 6 (Mar. 2003), available at <http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/>

⁵ Socio-economic outreach is particularly effective given the fact that 22.7% of African-Americans and 21.4% of Hispanics live below the poverty line. *See* Bernadette D. Proctor & Joseph Dalaker, U.S. Census Bureau, *Poverty in the United States: 2001*, at 4 (Sept. 2002), available at <http://www.census.gov/prod/2002pubs/p60-219.pdf> (Ex. P); *see also* *J.A. Croson Co.*, 488 U.S. at 528 (Scalia, J., concurring) (“Since blacks have been disproportionately disadvantaged by racial discrimination, any race-neutral remedial program aimed at the disadvantaged *as such* will have a disproportionately beneficial impact on blacks.”).

content_storage_01/0000019b/80/1a/f8/f0.pdf (Ex. Q). Other race-neutral alternatives of proven effectiveness include establishing partnerships between universities and the College Board, the nonprofit education-services association that seeks to prepare students for postsecondary education, and participation with the College Summit program, a national nonprofit organization that focuses on increasing the number of low-income students to enroll in college. *See generally* College Summit: Let Talent Shine, <http://www.collegesummit.org>.

Indeed, the University of California System has begun a series of “student-centered” outreach programs in which University of California professors and students work directly with K-12 students in areas of mentoring, advising about college admissions, and assisting with college preparatory coursework. *Id.* at 12-13. Nearly 100,000 California elementary and secondary students are currently being served by this race-neutral program. *Id.* at 13. California also has instituted a “school partnerships” program that pairs each University of California campus with the state’s lowest performing K-12 schools. The universities assist with curriculum development, student instruction, and community engagement in 256 California elementary, middle, and high schools. *See* Univ. of Cal., Educ. Outreach, *Expanding Educational Opportunity: A Status Report on the Educational Outreach and K-12 Improvement Programs of the University of California*, at 5 (Fall 2001), available at <http://www.ucop.edu/outreach/statusreport2001.pdf> (Ex. R). According to the University of California, “the students with whom the University has worked have made substantial progress in recent years and the rates of change are expected to increase rapidly over the next several years.” *Id.* at 7-8.

Texas A&M, which declined to re-introduce race into its admissions process after *Grutter*, also has made great strides by employing measures such as those described above. Among Texas A&M’s most successful race-neutral outreach programs has been the Century

Scholars initiative, which provides \$20,000 scholarships to students from families with an annual household income less than \$40,000. Texas A&M also has implemented the Vision 2020 Plan, a comprehensive, long-term strategy for promoting on-campus diversity. Among the components of the plan are the establishment of Texas A&M “university relations” centers at selected high schools and community colleges with large percentages of minority students; liaising with local community colleges to improve the transfer rates of minority students to Texas A&M; and streamlining and simplification of the financial aid application process to improve accessibility for all students. See Texas A&M Univ., *Vision 2020: The Groundwork—Diversity and Texas A&M*, available at <http://www.tamu.edu/vision2020/groundwork/83.php> (Ex. S). The university’s hard work has been rewarded with a noticeable increase in undergraduate minority enrollment. In 2004, African-American and Hispanic students made up 12.4% of Texas A&M’s total undergraduate enrollment. See Dr. Cindy Dutschke, Texas A&M Univ., Office of Institutional Studies & Planning, *Enrollment Profile Report*, at 1 (Fall 2004), available at <http://www.tamu.edu/opir/reports/student.html> (Ex. T). By 2007, minority enrollment increased such that African-American students and Hispanic students made up 15.4% of Texas A&M’s total undergraduate enrollment. See Dr. Cindy Dutschke, Texas A&M Univ., Office of Institutional Studies & Planning, *Enrollment Profile Report*, at 2 (Fall 2007), available at <http://www.tamu.edu/opir/reports/student.html> (Ex. U). Accordingly, Texas A&M was able to achieve a 3% increase in minority enrollment without resorting to racial classifications.

Programs of this kind certainly can help UT Austin increase its yield among African-American and Hispanic students automatically admitted through the Top 10% Law. Indeed, given the number of automatically admitted African-American and Hispanic students that do not choose to enroll at UT Austin, concentrating and expanding outreach in an effort to increase the

yield among this group of admitted students would make a meaningful difference in overall minority enrollment. In 2007, UT Austin failed to convince 1,066 minority students—a number equal to roughly 14% of the incoming freshman class—out the 2,459 minority students automatically admitted under the Top 10% Law to enroll at the university. *See* University of Texas at Austin Undergraduate Admissions Data Compilation. (Ex. V). UT Austin’s failure to realize the potential of these academically qualified minority students to increase minority enrollment provides further evidence that its use of racial preferences is not narrowly tailored. *See Johnson v. Bd. of Regents of Univ. of Ga.*, 263 F.3d 1234, 1259-60 (11th Cir. 2001).

UT Austin’s failure to attract these academically qualified students becomes even more troubling when measured against the marginal gains in minority enrollment attributable to the re-introduction of race into the admissions process. In 2004, when non-Top 10% students were considered for admission under race-neutral criteria, 346 minority students admitted outside the Top 10% Law enrolled in UT Austin’s incoming freshman class. *See id.* By comparison, in 2007, when non-Top 10% students were considered for admission under race-based criteria, 510 minority students admitted outside the Top 10% Law enrolled in UT Austin’s incoming freshman class. *See id.* Thus, if UT Austin could have convinced 164 more of the 2,459 minority students automatically admitted under the Top 10% Law to enroll, the university could have achieved the same increase in minority enrollment through race-neutral means. UT Austin is not entitled to rely on racial preferences—the path of least resistance—to boost minority enrollment when the only obstacle to achieving the same or better results through race neutral means is hard work and a modest financial investment. Strict scrutiny requires far more. *See, e.g., J.A. Croson Co.*, 488 U.S. at 507 (“Many of the barriers to minority participation in the construction industry relied upon by the city to justify a racial classification appear to be race

neutral. If MBE's disproportionately lack capital or cannot meet bonding requirements, a race-neutral program of city financing for small firms would, *a fortiori*, lead to greater minority participation.").

UT Austin, of course, is not required to implement any of these proven measures or invest greater resources in minority recruitment and outreach. Indeed, because the university is able to meet its compelling government interest through a race-neutral admissions plan, it cannot rely on race-based admissions policies to increase minority enrollment for social remediation or any other reason. But, if UT Austin has a continuing desire to further boost its minority enrollment, the examples set by the University of California and Texas A&M illustrate that an array of race neutral means remain at its disposal to accomplish that policy goal. UT Austin's Top 10-Race-Based Plan is not narrowly tailored and, therefore, unconstitutional under the Fourteenth Amendment.

2. The Re-Introduction of Racial Preferences to the Admissions Process Is Not Narrowly Tailored to Advance UT Austin's Interest in Student Body Diversity.

UT Austin's race-based admissions plan also is not narrowly tailored because it produces only minimal gains in student population diversity. To meet strict scrutiny, UT Austin must prove "the way in which [it] . . . employed individual racial classifications" was "necessary to achieve [the university's] stated ends." *Parents Involved*, 127 S. Ct. at 2759; *Palmore*, 466 U.S. at 432-33 (explaining that for racial classifications "to pass constitutional muster" they "must be 'necessary . . . to the accomplishment' of their legitimate purpose") (citations and quotations omitted). On this basis, the Supreme Court recently found that school assignment plans of Seattle, Washington and Louisville, Kentucky, which only affected a "small number" of students, failed to meet this requirement. *Parents Involved*, 127 S. Ct. at 2759. The "minimal effect these classifications [had] on student assignments . . . suggest[ed] that other means would

[have been] effective.” *Id.*; *see also id.* at 2738 (Kennedy, J., concurring) (agreeing that “the small number of assignments affected suggests that the schools could have achieved their stated ends through different means”). Thus, the trivial “annual effect” that the use of race-based policies had on student assignments confirmed that Seattle and Louisville had not “met [their] burden of proving these marginal changes . . . outweigh the cost of subjecting hundreds of students to disparate treatment based solely upon the color of their skin.” *Id.* at 2760.

The present case is no different. UT Austin’s re-introduction of race into the undergraduate admissions process has subjected thousands of students to racial discrimination, while at the same time failing to meaningfully increase student body diversity. As explained above, assuming that the entire increased minority enrollment from 2004 to 2007 was the result of UT Austin’s renewed focus on race, race-based admissions only yielded an additional 164 minority students—a 2.2% increase in minority enrollment. Ex. V. The minimal impact on diversity generated by UT Austin’s Top 10-Race-Based Plan thus closely resembles the deficient Seattle racial assignment plan, under which only about “307 student assignments were affected,” and the Louisville assignment plan, which “account[ed] for only 3 percent of assignments,” struck down by the Supreme Court. *Parents Involved*, 127 S. Ct. at 2759-60.

Like the Seattle and Louisville plans, UT Austin’s race-based admissions program thus stands in stark contrast to the plan endorsed in *Grutter*, under which “the consideration of race was viewed as indispensable in more than tripling minority representation at the law school—from 4 to 14.5 percent.” *Id.* at 2760. Given that minority enrollment within the non-Top 10% pool of applicants increased by only 2.2% between 2004 and 2007, UT Austin’s employment of race in the admissions process was far from “indispensable” to meeting the university’s legitimate government interest. In fact, as explained above, drawing a moderately higher yield

of minority students automatically admitted under the Top 10% Law would have worked “about as well.” *Wygant*, 476 U.S. at 280 n.6. Moreover, given UT Austin’s statement that these minority students have historically “earned higher grade point averages . . . and have higher retention rates,” Ex. H, the race-neutral approach mandated by the Texas legislature achieves the university’s professed interest in increased diversity without sacrificing UT Austin’s elite academic standards.

A program of race-based decision-making that increases in minority enrollment by a meager 2.2% simply cannot be justified as a “last resort” under governing Supreme Court precedent. Of course, this is not to “suggest that *greater* use of race would be preferable”; rather, as the Supreme Court has explained, “the minimal impact of the districts’ racial classifications on school enrollment casts doubt on the necessity of using racial classifications” in the first instance. *Parents Involved*, 127 S. Ct. at 2760. If UT Austin is to employ a method for choosing students that “by [its] very nature [is] odious to a free people whose institutions are founded upon the doctrine of equality,” *Adarand*, 515 U.S. at 214, it must demonstrate that the benefits of the program are clearly worth its cost, *Parents Involved*, 127 S. Ct. at 2767. Here, where UT Austin has denied thousands of students consideration on an equal basis in the admission process, UT Austin has not “carried [its] burden of showing that the ends [it] seek[s] justify the particular extreme means [it has] chosen—classifying individual students—on the basis of their race and discriminating among them on that basis.” *Id.* UT Austin’s Top 10-Race-Based Plan is not narrowly tailored and, therefore, is unconstitutional for this additional reason.

B. Plaintiffs Will Suffer Irreparable Injury Without a Preliminary Injunction.

It is bedrock law that the deprivation of a constitutional right “unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976) (citation omitted); *see also Deerfield Med. Center v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981) (finding that

a constitutional right “is either threatened or in fact being impaired . . . mandates a finding of irreparable injury”) (internal citation and quotation omitted); *Murillo v. Musegades*, 809 F. Supp. 487, 497 (W.D. Tex. 1992) (finding that “[i]rreparable injury is established” upon a showing that “constitutionally protected rights have been violated”). Accordingly, the abridgement of Plaintiffs’ right to consideration of her application without regard to race, in and of itself, satisfies the irreparable injury requirement.⁶ *See, e.g., Gresham v. Windrush Partners, Ltd.*, 730 F.2d 1417, 1424 (11th Cir. 1984) (finding that “because of the subtle, pervasive, and essentially irremediable nature of racial discrimination, proof of the existence” of discrimination “is sufficient to permit a court to presume irreparable injury”); *Maldonado v. Houstoun*, 177 F.R.D. 311, 333 (E.D. Pa. 1997) (“Plaintiffs can demonstrate irreparable harm based on the sole fact that they will be deprived of their constitutional right to the equal protection of law in the absence of an injunction.”) (citation omitted). “This rule is based on the belief that equal protection rights are so fundamental to our society that any violation of those rights causes irreparable harm.” *Back v. Carter*, 933 F. Supp. 738, 754 (N.D. Ind. 1996).

Moreover, a preliminary injunction is necessary to secure Plaintiffs meaningful relief at the end of the proceedings. *See Atwood Turnkey Drilling, Inc. v. Petroleo Brasileiro, S.A.*, 875 F.2d 1174, 1178 (5th Cir. 1989) (“The primary justification for granting a preliminary injunction is to preserve the court’s ability to render a meaningful decision on the merits.”). Plaintiffs will

⁶ The denial to Plaintiffs of a race-neutral evaluation of their applications, alone, represents a constitutional injury. *See, e.g., Parents Involved*, 127 S. Ct. at 2751 (explaining that “one form of injury under the Equal Protection Clause is being forced to compete in a race-based system that may prejudice the plaintiff”); *Bd. of Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 281 n.14 (1978) (Powell, J.) (recognizing an “injury, apart from failure to be admitted, in the University’s decision not to permit Bakke to compete for all 100 places in the class, simply because of his race”). Thus, in the unlikely event that Plaintiffs are ultimately denied admission on legitimate race-neutral grounds, Plaintiffs remain entitled to forward-looking relief declaring UT Austin’s Top 10 Percent-Raced Based Plan unconstitutional and enjoining its use in future admissions cycles.

soon be forced to accept admission to another university without judicial intervention. Ex. K ¶¶ 11-12; Ex L ¶¶ 11. That is, the likelihood that this suit will be resolved on the merits before the fall semester begins in August, let alone before Plaintiffs will be forced to accept admission to another university, is close to nil. Without a preliminary injunction, therefore, it is unrealistic that Plaintiffs will be able to enjoy the ultimate relief this lawsuit seeks. This is precisely the type of injury that demands temporary injunctive relief. *See, e.g., Faulkner v. Jones*, 10 F.3d 226, 233 (4th Cir. 1993) (affirming district court’s grant of preliminary injunction requiring temporary admission of female student to The Citadel because denying her “access . . . might likely become permanent for her, due to the extended time necessary to complete the litigation” and “the presence of this time pressure, combined with an absence of present opportunity”).

C. The Harm to Plaintiffs Far Outweighs Any Inconvenience to Defendants.

The irreparable injury that Plaintiffs will suffer without a preliminary injunction far outweighs any injury that would befall UT Austin if interim relief is granted. All that is requested of UT Austin is for it to re-evaluate Plaintiffs’ application for admission on a race-neutral basis. Even assuming that this minimal intrusion constitutes an injury, the deprivation of Plaintiffs’ right to equal protection vastly outweighs any administrative inconvenience to the university. *See, e.g., O’Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 429 (D.C. Cir. 1992). Like any selective university, UT Austin admits far more students into its freshman class than ultimately will enroll. In 2007, for example, UT Austin admitted 13,800 students to its incoming freshman class; 7,485 students chose to enroll. Ex. F, Table 1. Moreover, the number of students enrolled in UT Austin’s incoming freshman class fluctuates greatly from year to year, ranging from 6,430 students in 1996 to 7,935 students in 2002. Ex. E, Table 1. Here, therefore, whether judged against historic averages or against the results of last year’s admissions process,

re-evaluating and possibly offering admission to two more student will not undermine or materially alter UT Austin's ongoing admissions process.

And, if this race-neutral re-evaluation led UT Austin to change its admissions decision, granting Plaintiffs temporary admission, which would add two students to UT Austin's total undergraduate enrollment would "not change or destroy any material aspect of [its] program. Moreover, no temporary adverse impact would be irreversible for" UT Austin. *See Faulkner*, 10 F.3d at 233. In short, "the constitutional imperatives of the Equal Protection Clause must have priority over the comfortable convenience of the status quo." *Williams v. Illinois*, 399 U.S. 235, 245 (1970); *see also Frontiero v. Richardson*, 411 U.S. 677, 690 (1973) (plurality opinion) ("[W]hen we enter the realm of 'strict judicial scrutiny,' there can be no doubt that 'administrative convenience' is not a shibboleth, the mere recitation of which dictates constitutionality."). The balance of harms clearly favors Plaintiffs.

D. Granting a Preliminary Injunction Will Serve the Public Interest.

This Court has recognized that all members of the public "have a vested interest in their government enacting constitutionally sound laws," *Laredo Road Co. v. Maverick County, Tex.*, 389 F. Supp. 2d 729, 748 (W.D. Tex. 2005), and that respect for a plaintiff's constitutional rights "is of paramount importance" when considering the public interest in the context of injunctive relief, *Murillo*, 809 F. Supp. at 498. Put simply, "it is always in the public interest to prevent the violation of a party's constitutional rights." *G&V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994) (citation omitted). The public interest therefore unquestionably favors a preliminary injunction requiring that Plaintiffs' application to UT Austin's undergraduate program be re-evaluated on a race-neutral basis. *See, e.g., McLaughlin by McLaughlin v. Boston Sch. Comm.*, 938 F. Supp. 1001, 1017 (D. Mass. 1996) ("[A] preliminary [injunction] will allow time for the Court to seek additional evidence and to give due

CERTIFICATE OF SERVICE

I hereby certify that on April__, 2008, I directed true and correct copies of the foregoing
to be served by first-class mail on the following:

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Texas State Bar No. 00785094

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
(Austin Division)**

ABIGAIL NOEL FISHER; and
RACHEL MULTER MICHALEWICZ

Plaintiffs,

v.

STATE OF TEXAS; UNIVERSITY OF TEXAS AT AUSTIN; MARK G. YUDOF, CHANCELLOR OF THE UNIVERSITY OF TEXAS SYSTEM IN HIS OFFICIAL CAPACITY; DAVID B. PRYOR, EXECUTIVE VICE CHANCELLOR FOR ACADEMIC AFFAIRS IN HIS OFFICIAL CAPACITY; BARRY D. BURGDORF, VICE CHANCELLOR AND GENERAL COUNSEL IN HIS OFFICIAL CAPACITY; WILLIAM POWERS, JR., PRESIDENT OF THE UNIVERSITY OF TEXAS AT AUSTIN IN HIS OFFICIAL CAPACITY; BOARD OF REGENTS OF THE TEXAS STATE UNIVERSITY SYSTEM; JOHN W. BARNHILL, JR., H. SCOTT CAVEN, JR., JAMES R. HUFFINES, JANIECE LONGORIA, COLLEEN MCHUGH, ROBERT B. ROWLING, JAMES D. DANNENBAUM, PAUL FOSTER, PRINTICE L. GARY, AS MEMBERS OF THE BOARD OF REGENTS IN THEIR OFFICIAL CAPACITIES; BRUCE WALKER, VICE PROVOST AND DIRECTOR OF UNDERGRADUATE ADMISSIONS IN HIS OFFICIAL CAPACITY

Defendants.

Civil Action No. 1:08-cv-00263-SS

**PROPOSED ORDER
GRANTING PLAINTIFFS'
MOTION FOR HEARING ON
THEIR MOTION FOR
PRELIMINARY INJUNCTION**

Plaintiffs have filed a MOTION FOR PRELIMINARY INJUNCTION. Having considered the papers submitted in connection with the MOTION PRELIMINARY INJUNCTION, the Court is of the opinion that Plaintiffs' motion is well taken and should be **GRANTED.**

IT IS THEREFORE ORDERED that Plaintiffs' MOTION FOR PRELIMINARY INJUNCTION is **GRANTED**. Defendants are hereby order to re-evaluate Plaintiffs for admission to the undergraduate program at UT Austin under race-neutral means and admit Plaintiffs to UT Austin's undergraduate program so long as each is qualified under race-neutral criteria.

IT IS FURTHER ORDERED that no bond or other security be posted by Plaintiffs.

DATE: _____, 2008

UNITED STATES DISTRICT JUDGE