

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

ABIGAIL NOEL FISHER; and
RACHEL MULTER MICHALEWICZ

Plaintiffs,

v.

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; 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

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

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. PLAINTIFFS ARE LIKELY TO PREVAIL ON THE MERITS	2
1. UT Austin’s Open-Ended Pursuit of Diversity Is Not A Compelling State Interest.....	2
2. UT Austin Cannot Disregard Race-Neutral Alternatives Proven to be Workable.....	6
3. UT Austin’s Race-Based Admissions Program is Not Narrowly Tailored to Advance Any Compelling State Interest	8
III. THE BALANCE OF HARMS AND THE PUBLIC INTEREST WEIGH IN FAVOR OF PRELIMINARY INJUNCTION.....	9
IV. CONCLUSION.....	11

TABLE OF AUTHORITIES

FEDERAL CASES

Comfort ex rel. Neumyer v. Lynn School Committee,
283 F. Supp. 2d 328 (D. Mass. 2003)5

Faulkner v. Jones,
10 F.3d 226 (4th Cir. 1993)10

Grutter v. Bollinger,
539 U.S. 306 (2003)..... *passim*

Lawson Products, Inc. v. Avnet, Inc.,
782 F.2d 1429 (7th Cir. 1986)10

Martin v. Helstad,
699 F.2d 387 (7th Cir. 1983)10

McLaughlin v. Boston School Committee,
938 F. Supp. 1001 (D. Mass. 1996)10

Parents Involved in Community Schools v. Seattle School District No. 1,
127 S. Ct. 2738 (2007).....8, 9

Regents of University of California v. Bakke,
438 U.S. 265 (1978).....2

United States v. Virginia,
518 U.S. 515 (1996).....5

MISCELLANEOUS

University of Texas at Austin, *Overview*,
<http://www.utexas.edu/opa/pubs/facts/overview.php>
(last visited May 13, 2008)8

University of Texas at Austin, *Backstory*,
<http://www.utexas.edu/opa/utbrand/research.html>
(last visited May 14, 2008)9

I. INTRODUCTION

Plaintiffs' opening brief, now confirmed by Defendants' Answer to the Amended Complaint, established that Defendants were using a race-based admissions program to process admission applications not governed by HB 588. Under well-established Supreme Court precedent, including *Grutter v. Bollinger*, 539 U.S. 306 (2003), Defendants may maintain this program only if they can show that it is a "narrowly tailored" means to advance a "compelling state interest." Based on the essentially undisputed record, Defendants cannot satisfy the "strict scrutiny" the Court must apply to protect Plaintiffs' Fourteenth Amendment right to equal protection. Nor have Defendants shown that the alleged burden of reconsidering these two applicants bars immediate protection of their constitutional rights. Thus, Plaintiffs Motion for Preliminary Injunction should be granted.

HB 588 is a race-neutral means to achieve a diverse entering class at UT Austin. According to Defendants, approximately 30 percent of the students admitted under HB 588, or 2781 potential members of this fall's incoming freshman class, are underrepresented minorities. Notwithstanding this achievement of a "critical mass" of minority students by any known measure, and a record confirming that the combination of HB 588 and race-neutral processing of other applicants satisfies even its own undefined "diversity" goal, UT Austin insists on further race-based processing to the unavoidable detriment of Plaintiffs and other non-minority applicants. Repetition of a "holistic" talisman cannot cure this constitutional defect.

Defendants attempt to shoe horn UT Austin's practices into the University of Michigan Law School ("UMLS") program approved in *Grutter*. But like Cinderella's step-sisters, Defendants cannot make the shoe fit. UMLS individually reviewed each applicant and could achieve a "critical mass" of underrepresented minorities *only* by incorporating race in its holistic review. UMLS defined an educational objective which justified its pursuit of critical mass. UT

Austin cannot establish either the necessity for race-based processing nor any meaningful educational limit on its pursuit of “diversity.” At base, Defendants’ papers demonstrate that UT Austin is chafing under the restrictions imposed on its admissions discretion by HB 588 and seeking to defend its race-based practices by pretending that HB 588 does not exist. “Strict scrutiny” will not permit this court to join in that fanciful exercise.

II. PLAINTIFFS ARE LIKELY TO PREVAIL ON THE MERITS.

1. UT Austin’s Open-Ended Pursuit of Diversity Is Not A Compelling State Interest.

Defendants rely on *Grutter*’s statement that “student body diversity is a compelling state interest that can justify the use of race in university admissions.” 539 U.S. at 325. However, Defendants fail to acknowledge that a justifiable interest in student body diversity is not an unlimited license to discriminate. Rather, strict scrutiny demands that the use of race in the admissions process be tied to “the educational benefits that [student body] diversity is designed to produce,” and not be simply an effort to achieve some measure of “racial balancing, which is patently unconstitutional.” *Id.* at 330.

As first explained by Justice Powell, the educational benefits produced by student body diversity arise from the “robust exchange of ideas” and “wide exposure to the ideas and mores of students as diverse as this Nation of many peoples.” *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 (1978) (internal quotations omitted). A university therefore may seek to achieve a “critical mass” of minority enrollment—a level of minority enrollment “such that underrepresented minority students do not feel isolated or like spokespersons for their race.” *Grutter*, 539 U.S. at 319; *id.* at 318 (describing “critical mass” as “a number that encourages underrepresented minority students to participate in the classroom and not feel isolated”). Contrary to Defendants’ position, a university’s “compelling government interest” is bounded by

critical mass—*i.e.*, a level of minority enrollment sufficient to achieve these educational benefits—not by an indeterminate pursuit of “diversity.” *Id.* at 343. A university’s compelling state interest in pursuing diversity at the expense of non-minority applicants cannot extend beyond achieving an educationally-defined critical mass.

Here, Defendants do not even attempt to tie their use of race in the admissions process to the compelling interest endorsed in *Grutter*. Instead, Defendants associate their interest in furthering minority enrollment with reflecting the changing demographics of the State of Texas. *See* Defs.’ Br. 21. There is, however, nothing to suggest that changing state demographics would affect the enrollment percentage that constitutes critical mass at the university as required by *Grutter*. *Grutter* makes clear that critical mass is the percentage of minority students necessary to ensure that such students “do not feel isolated or like spokespersons for their race” while at the university. 539 U.S. at 318. Changes occurring only in the world *outside* the university—even within the state of Texas—would have no effect on what a minority student requires to feel comfortable *while at the university*. Under Defendants’ view, a university located in a state with a population more homogeneous than Texas would be less entitled to a diverse student population than Texas (or perhaps entitled to operate a “plus” system in favor of Caucasian students). This cannot be the law. Linking critical mass to state demographics is nothing more than a backdoor quota.

Moreover, although UT Austin has never (publicly) identified its minority enrollment goal, UT Austin has admitted in numerous press releases and statements by UT Austin officials that it has achieved satisfactory minority enrollment without race-based evaluation. Ans. ¶ 60 (“The University of Texas at Austin has effectively compensated for the loss of affirmative action, partly by increasing recruiting and financial aid for minority students.”); Am. Compl. ¶¶

58-59, 61-62; Ans. ¶¶ 58-59, 61-62. Defendants fail to even address these statements other than to say they were taken out of context. But the context could not be clearer. Because of *Hopwood*, Texas was forced to find a race-neutral path to critical mass; the legislature decided on HB 588. Having reviewed the results, UT Austin proudly announced that this law achieved its objective. Defendants should not be allowed to walk away from these statements.

Under any objective measure, UT Austin achieved critical mass before it resumed employing race as a factor in admissions in 2005. In *Grutter*, although law school officials disclaimed any quantification of critical mass in terms of numbers or percentages, the Court recognized that the goal of attaining a critical mass “of course” involves “some attention to numbers.” 539 U.S. at 336. The very idea of critical mass is that “there is . . . some relationship between numbers and achieving the benefits to be derived from a diverse student body, and between numbers and providing a reasonable environment for those [minority] students admitted.” *Id.* As a result, what constitutes a “reasonable environment” must be an objective determination. *Id.* Stated differently, the relevant question is what enrollment percentage, or range of percentages, would be sufficient for the average minority student to feel encouraged and not isolated. As *Grutter* makes clear, this is ultimately a question for the Court.¹

Using Supreme Court precedent as a guide, critical mass can be no greater than 20% minority enrollment. *See id.* (accepting university’s contention that critical mass fell with 13.5% to 20.1%); *United States v. Virginia*, 518 U.S. 515, 523 (1996) (describing 10% female enrollment as “a sufficient ‘critical mass’ to provide the female cadets with a positive

¹ The *Grutter* Court deferred to the law school on its educational judgment that critical mass would have educational benefits; however, it did *not* defer to any subjective assertion as to what would suffice for a critical mass. Rather, the Court determined on its own review whether the law school had adequately considered race-neutral alternatives and whether those alternatives were “currently capable of producing a critical mass.” *Grutter*, 539 U.S. at 340.

educational experience”); *cf. Comfort ex rel. Neumyer v. Lynn School Committee*, 283 F. Supp. 2d 328, 357 (D. Mass. 2003) (noting that “studies describ[e] a 20% figure below which members of a racial minority in a given setting feel isolated or stigmatized” and emphasizing that 20% is “a number well-established in the literature”). By 2004, under UT Austin’s race-neutral admissions plan, which implemented the HB 588 and filled the remainder of the class through the AI/PAI analysis without regard to race, underrepresented minorities made up 21.4% of the incoming freshman class. Am. Compl. ¶ 65; Ans. ¶ 65. Thus, UT Austin has achieved critical mass and, as a result, can no longer use race in its admission process.

In fact, the enrollment figures for underrepresented minorities may be substantially higher, because it is unclear whether Defendants consider Asian-American applicants as underrepresented and thus operate their race-based admissions program to the benefit of Asian-American applicants. Most often, when UT Austin has trumpeted its success in achieving minority enrollment, it has highlighted only the increased enrollment among African-American and Hispanic students. Thus, Plaintiffs’ Amended Complaint and Motion for Preliminary Injunction have focused on the benefit these minority groups obtain through the admissions process to the detriment of Plaintiffs and other Caucasian applicants. In their Answer, however, Defendants objected to a statement that Plaintiffs quoted from the UT Austin website regarding minority enrollment, arguing that Plaintiffs quoted the statement in a “misleading” way by editing the statement so that it did not mention Asian-American enrollment figures. *See* Ans. ¶ 62. And the Vincent Affidavit filed in support of Defendants’ opposition brief highlights the 2008 Impact Report by the UT Austin Office of Diversity and Community Engagement, which demonstrates that UT Austin regards Asian-Americans as an underrepresented minority group. *See* 2008 Impact Report at 4 (attached to Vincent Aff.).

In the end, the enrollment figures for Asian-American applicants undercut Defendants' position regardless of how they treat Asian-American applicants in the admissions process. If Defendants consider Asian-American applicants as underrepresented, then Defendants have so far exceeded critical mass that this is an open-and-shut case (underrepresented minorities would have made up nearly 40% of UT Austin's enrolled freshman class in 2004). On the other hand, if Defendants do not consider Asian-American applicants as underrepresented, then it is odd that Defendants consider Hispanic applicants as underrepresented when they have comparable admission figures to Asian-American applicants.

2. **UT Austin Cannot Disregard Race-Neutral Alternatives Proven to be Workable.**

“Even in the limited circumstance when drawing racial distinctions is permissible to further a compelling state interest, government is still constrained in how it may pursue that end.” *Grutter*, 539 U.S. at 333 (internal quotation omitted). Thus, not only must a race-based admissions program pursue a compelling government interest, but it must be “narrowly tailored to further” that compelling government interest. *Id.* at 326. “This requirement reflects that racial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands.” *Id.* at 342. For this reason, narrow tailoring requires “serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.” *Id.* at 339. To be sure, *Grutter* “does not require exhaustion of every conceivable race-neutral alternative.” *Id.* However, *Grutter* does not allow a university to “consider” but then disregard a proven, race-neutral alternative that works “about as well.” *Id.* To read *Grutter* otherwise would eviscerate the requirement that race-neutral alternatives be considered at all and render strict scrutiny a dead letter.

As Plaintiffs argued in their principal brief, UT Austin has not only a workable race-neutral diversity program, but a proven one. The Top 10% Law used in tandem with a race-neutral AI/PAI analysis yielded minority enrollment levels that are comparable to the minority enrollment levels UT Austin has achieved by employing the Top 10% Law and a race-adjusted AI/PAI analysis. Defendants actually *concede* the point. Ans. ¶ 60 (“The University of Texas at Austin has effectively compensated for the loss of affirmative action, partly by increasing recruiting and financial aid for minority students.”).

More fundamentally, Defendants attempt to establish a false dichotomy between pursuit of critical mass through the Top 10% Law and an individually selective admissions system. In Defendants view, *Grutter* precludes forcing them to use the Top 10% Law in lieu of a race-based holistic admissions program. Defs.’ Br. 19. Plaintiffs do not dispute this proposition but fail to discern its relevance where, as here, the Texas legislature has mandated use of the Top 10% Law. UT Austin plainly dislikes this legislative choice but just as plainly is bound to it. UT Austin is not barred from allocating its non-Top 10% places to admit budding violinists, athletes, mathematicians, the economically deprived or many other categories of diverse students to enhance overall educational experience. It is barred from using racial preferences as an element of that diversity to go beyond the critical mass it must admit to having achieved.

3. UT Austin’s Race-Based Admissions Program is Not Narrowly Tailored to Advance Any Compelling State Interest.

In *Parents Involved in County Schools v. Seattle School District No. 1*, 127 S. Ct. 2738, 2959 (2007), the Supreme Court reiterated that race-based admissions program inherently infringe the constitutional rights of all non-minority students and thus can survive strict scrutiny only if narrowly tailored to substantially enhance a compelling state interest while minimizing impact on non-minority students. Where, as in *Seattle Schools*, alternative means (including

race-conscious initiatives) would achieve virtually the same result as race-based programs, the narrow tailoring prong of strict scrutiny cannot be satisfied.²

Defendants admit that their race-based admissions system applies to the processing of all non-10% applications thus adversely classifying all non-minority students in that group. At the same time, Defendants claim to be unable to specify the extent to which the race-based system actually increases underrepresented minority admissions. Defs.' Br. at 16 (race plays "only a minor role for some applicants and no role whatsoever for others"). Thus, particularly where UT Austin employs other race-conscious diversity criteria in non-Top 10% admissions—*e.g.*, family income, single parent household, non-English speaking home environment—there is no basis for deeming UT Austin's use of race to be narrowly tailored.³ In fact, Defendants seem to be employing a blunderbuss to achieve what may be a negligible increment over critical mass. Moreover, this negligible increment is shrinking. In 2008, UT Austin admitted only 527 African-American and Hispanic applicants outside of the Top 10% Law; in 2007, 920 African-

² Narrow tailoring also requires that "race-conscious admissions policies must be limited in time." 539 U.S. at 309. Defendants suggest that its admission program is limited in time because UT Austin conducts regular reviews of its system to evaluate its necessity and efficacy. But this argument is belied by the fact that UT Austin seeks to consider race even more than it already does despite the fact that its various admissions programs have consistently increased minority enrollment over the past decade, *see* Ex. F at Table 1, despite the fact that UT Austin's total minority enrollment was almost 50 percent of its 2007 incoming freshman class, *see id.*, and despite the fact that UT Austin "has one of the most diverse student populations in the country and is a national leader in the number of undergraduate degrees awarded to minority students." University of Texas at Austin, *Overview*, <http://www.utexas.edu/opa/pubs/facts/overview.php> (last visited May 13, 2008).

³ Defendants also suggest that this part of the narrow tailoring analysis does not apply to a racial classification employed as a component of a holistic admissions program that considers more than simply race. But Defendants cite no case for this proposition; nor could they. *Parents Involved* made clear that this part of the narrow tailoring analysis is indeed applicable to holistic admissions programs, explaining that "the consideration of race [in *Grutter*] was viewed as *indispensable* in more than tripling minority representation at the law school—from 4 to 14.5 percent." *Parents Involved*, 127 S. Ct. at 2760 (emphasis added).

American and Hispanic applicants were admitted outside of the Top 10% Law. *See* Defs.’ Resps. to Pls.’ Interrogs. 1-5 at p.5 (attached).⁴

III. THE BALANCE OF HARMS AND THE PUBLIC INTEREST WEIGH IN FAVOR OF PRELIMINARY INJUNCTION.

“[W]henver the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution’s guarantee of equal protection.” *Grutter*, 539 U.S. at 327. If Plaintiffs are denied a fair opportunity to enroll in the UT Austin freshman class because of their race, they will have been severely injured. Indeed, “[n]early all Texas adults believe a degree from the university is highly valued because many believe the university provides students with the highest quality education available.” University of Texas at Austin, *Backstory*, <http://www.utexas.edu/opa/utbrand/research.html> (last visited May 13, 2008).

Defendants confuse Plaintiffs’ contentions about the imminence of their injury with the issue of irreparability. Plaintiffs made clear that they were facing alternative deadlines at other universities which would bind them, financially and emotionally, to a choice they would not make but for their race-based rejections at UT Austin. Return of their deposits as a measure of damages will not remedy Plaintiffs’ injuries unless coupled with injunctive relief sufficient to safeguard their rights to UT Austin enrollment.⁵

⁴ Defendants argue that because the Top 10% Law is in some sense race-conscious, the success of the Top 10% Law should be tacked onto the minimal gains made by employing race as an element of an applicant’s PAI. Defs.’ Br. 23. This argument appears to be based on a distortion of Justice Kennedy’s concurrence in *Parents Involved*, *see* 127 S. Ct. at 2792. Defs.’ Br. 19-20. It is without merit.

⁵ Defendants’ reliance on cases involving professional and graduate schools to show that Plaintiffs are not injured by being forced to attend another school (or perhaps delay admission to college for one year) is misplaced. This is because “a delay in obtaining admission to a graduate school for purposes of pursuing professional studies . . . is not ordinarily considered irreparable injury.” *Martin v. Helstad*, 699 F.2d 387, 391-92 (7th Cir. 1983). At the university level or

Defendants claim that preliminary injunctive relief would unduly burden UT Austin by forcing a total re-do of its non-Top 10% admissions process. Defs.' Br. 11-13. At the preliminary injunction stage, "rough justice" is permissible. *Lawson Prods. Inc. v. Avel, Inc.*, 782 F.2d 1429, 1435 (7th Cir. 1986) ("The district judge, sitting as a chancellor in equity considering a preliminary injunction, endeavors to achieve a rough justice between the parties.") Defendants need do no more than compare Plaintiffs' credentials to the credentials of admitted non-Top 10% minority applicants without regard to race, recognizing that equal or superior ratings of Plaintiffs require admission.⁶ Ultimately, the Constitution and the public interest will require reform of UT Austin's admissions program. For the present, a modest adjustment in two cases will suffice.

IV. CONCLUSION

For all of these reasons and those set out in the Memorandum in Support of Motion for Preliminary Injunction, Plaintiffs respectfully request that the Court grant the Motion for Preliminary Injunction.

below, however, there is irreparable harm from such a delay because of the Plaintiffs' inability to begin the "bonding" process with [their] prospective classmates and teachers," *McLaughlin v. Boston Sch. Comm.*, 938 F. Supp. 1001, 1011 n.13 (D. Mass. 1996), and because Plaintiffs' lack of access to UT Austin might become permanent during the course of this litigation without preliminary relief. *See Faulkner v. Jones*, 10 F.3d 226, 233 (4th Cir. 1993).

⁶ Defendants suggest that a preliminary injunction is inappropriate because the Court could resolve this case on summary judgment with enough time for UT to implement any remedy before the start of the school year. On Plaintiffs' view of the law, the now undisputed material facts warrant summary judgment. If the Court agrees with Defendants that there is enough time to consider the merits of the case on summary judgment and issue a ruling that would allow Plaintiffs (if victorious) to be admitted to UT this year, then Plaintiffs would welcome Defendants' invitation to move promptly to disposition on the merits.

Respectfully submitted,

Bert W. Rein
Thomas R. McCarthy
Suzette Rodriguez Hurley
David C. Rybicki
(*admitted pro hac vice*)
WILEY REIN LLP
1776 K Street, N.W.
Washington, DC 20006
TEL: 202.719.7000
FAX: 202.719.7049

/s/

Paul M. Terrill
The Terrill Firm, P.C.
810 W. 10th Street
Austin, Texas 78701
TEL. 512.474.9100
FAX: 512 474.9888

Texas State Bar No. 00785094

Counsel for Plaintiffs

Dated: May 14, 2008

CERTIFICATE OF SERVICE

I hereby certify that on May 14, 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system. In addition, a true and accurate copy of the foregoing was served via electronic mail to:

Mishell B. Kneeland
Assistant Attorney General
Texas Attorney General's Office
300 W. 15th Street
Austin, TX 78701
mishell.kneeland@oag.state.tx.us

/s/

Paul M. Terrill
The Terrill Firm, P.C.
810 W. 10th Street
Austin, Texas 78701
TEL. 512.474.9100
FAX: 512 474.9888

Texas State Bar No. 00785094

Exhibit

A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

ABIGAIL NOEL FISHER and
RACHEL MULTER MICHALEWICZ,
Plaintiffs,

CIVIL ACTION NO. 1:08-CV-00263-SS

v.

STATE OF TEXAS; UNIVERSITY OF
TEXAS AT AUSTIN; *et al.*,
Defendants.

DEFENDANTS' RESPONSES TO PLAINTIFFS' INTERROGATORIES 1 THROUGH 5

TO: Plaintiffs, Abigail Noel Fisher and Rachel Multer Michalewicz,, by and through their attorney of record, Paul M. Terrill III, The Terrill Firm, P.C., 810 West 10th Street, Austin TX 78701

Defendants University of Texas at Austin ("UT-Austin"), Mark G. Yudof, David B. Pryor, William Powers, Jr., 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, and Bruce Walker ("Defendants") answer Plaintiffs' Interrogatories 1 through 5 as follows:

OBJECTIONS TO INSTRUCTIONS

Defendants make the following objection to Plaintiffs' instructions, which are incorporated by reference into each Answer to each Interrogatory.

1. Defendants object to the Interrogatories to the extent that they request information protected by the attorney-client or work product privilege.

Defendants' Response to Plaintiffs' Interrogatories 1 through 5

ANSWERS TO INTERROGATORIES

INTERROGATORY NO. 1:

List each data element used to calculate the “pgpa” described in paragraph 3 of the affidavit of Kedra B. Ishop filed in this case. For each listed element, explain how its numerical value is derived.

RESPONSE TO INTERROGATORY NO. 1:

The elements used to calculate an applicant’s PGPA depend on whether the applicant took the SAT or the ACT. For fall 2008 applicants who took the SAT, the elements used to calculate PGPA for the freshman year at UT-Austin are the SAT Critical Reading Score (“SAT CR”), the SAT Mathematics Score (“SAT M”), the applicant’s class rank, and a possible addition of .1 for exceeding UT-Austin’s high school coursework requirements. For applicants who took the ACT, the elements used to calculate PGPA are ACT English (“ACT E”), ACT Math (“ACT M”), the applicant’s class rank, and a possible addition of .1 for exceeding UT-Austin’s high school requirements. The SAT and ACT scores are reported to UT-Austin by the entities that administer those examinations. High School Rank (“HSR”) is the student’s percentile rank within the student’s graduating class. HSR is computed as: $[1 - (\text{class rank} / \text{class size})] * 100$.

INTERROGATORY NO. 2:

Explain, by formula/equation or otherwise, how the data elements listed in response to Interrogatory No. 1 are combined to derive the “pgpa” for an individual student.

RESPONSE TO INTERROGATORY NO. 2:

Multiple regression equations are used for predicting an applicant’s PGPA. These equations

differ across various schools and majors at UT-Austin and are shown below for each school.

For Liberal Arts, Communications, Fine Arts, Social Work, and Education:

$$\text{PGPA} = -0.19949 + (\text{SAT CR} * 0.00142) + (\text{SAT M} * 0.00191) + (\text{HSR} * 0.01459)$$

$$\text{PGPA} = 0.09689 + (\text{ACT E} * 0.02513) + (\text{ACT M} * 0.04577) + (\text{HSR} * 0.01351)$$

For Nursing, Natural Sciences, Architecture, and Geosciences:

$$\text{PGPA} = -1.10339 + (\text{SAT CR} * 0.00088166) + (\text{SAT M} * 0.00230) + (\text{HSR} * 0.02416)$$

$$\text{PGPA} = -0.51242 + (\text{ACT E} * 0.00824) + (\text{ACT M} * 0.05007) + (\text{HSR} * 0.02199)$$

For Engineering:

$$\text{PGPA} = -1.53545 + (\text{SAT CR} * 0.00072937) + (\text{SAT M} * 0.00313) + (\text{HSR} * 0.02285)$$

$$\text{PGPA} = -1.78910 + (\text{ACT E} * 0.01074) + (\text{ACT M} * 0.07335) + (\text{HSR} * 0.02708)$$

For Business:

$$\text{PGPA} = -2.31253 + (\text{SAT CR} * 0.00157) + (\text{SAT M} * 0.00229) + (\text{HSR} * 0.03419)$$

$$\text{PGPA} = -2.14521 + (\text{ACT E} * 0.02892) + (\text{ACT M} * 0.05405) + (\text{HSR} * 0.03409)$$

(For applicants submitting both ACT and SAT scores the highest PGPA is used.)

INTERROGATORY NO. 3:

Provide the "pgpa" calculations for Ms. Fisher and Ms. Michalewicz as described in paragraph 18 of the affidavit of Kedra B. Ishop filed in this case.

RESPONSE TO INTERROGATORY NO. 3:

Ms. Fisher's PGPA for Business was calculated as 3.038; her PGPA for Liberal Arts was

calculated as 3.093. Ms. Fisher's AI is 3.1. Her AI of 3.1 reflects the sum of her Liberal Arts PGPA (3.093) plus .1 for exceeding UT Austin's minimum high school coursework requirements.

Ms. Michalewicz's PGPA for business was calculated as 3.202; her PGPA for Liberal Arts was calculated as 3.234. Ms. Michalewicz's AI is 3.3. Her AI of 3.3 reflects the sum of her Liberal Arts PGPA (3.234) plus .1 for exceeding UT Austin's minimum high school coursework requirements.

INTERROGATORY NO. 4:

For the UT fall class of 2008, provide the following information: Total number of students admitted; total number of African-American students admitted; total number of Hispanic students admitted; total number of Caucasian students admitted; total number of all other students admitted. For each total provided, specify the number admitted under the "Top 10" law and outside the "Top 10" law.

RESPONSE TO INTERROGATORY NO. 4:

Defendants object to this Interrogatory because it cannot be answered due to the separation of the fall class and summer class. Subject to this objection, Defendants state that it is the policy of UT-Austin to admit HB588 applicants to the fall semester. However, some HB588 applicants apply directly to the summer program with the intent of attending Summer I and/or Summer II or may request to be admitted to the summer freshman class. The 58 students listed as summer admits under HB 588 fall into one of these scenarios.

The admissions statistics requested are:

Semester Applied	F04 Admit Decision	Race	HB588 Auto Admit		Grand Total
			No	Yes	
20086 Summer Freshman	ADMIT	Not Reported	4	1	5
		AMERICAN INDIAN	7		7
		ASIAN AMERICAN	211	8	219
		BLACK	80	5	85
		FOREIGN	32	2	34
		HISPANIC	236	16	252
		WHITE	863	26	889
		ADMIT Total		1433	58
20086 Total			1433	58	1491
20089 Fall Semester	ADMIT	Not Reported	9	4	13
		AMERICAN INDIAN	12	30	42
		ASIAN AMERICAN	351	1732	2083
		BLACK	46	576	622
		FOREIGN	266	242	508
		HISPANIC	165	2205	2370
		WHITE	1262	4428	5690
		ADMIT Total		2111	9217
20089 Total			2111	9217	11328
Grand Total			3544	9275	12819

INTERROGATORY NO. 5:

For the UT Summer Freshman Class ("SFC") of 2008, provide the following information: Total number of students admitted; total number of African-American students admitted; total number of Hispanic students admitted; total number of Caucasian students admitted; total number of all other students admitted. For each total provided, specify the number admitted under the "Top 10" law and outside the "Top 10" law.

RESPONSE TO INTERROGATORY NO. 5:

Defendants object to this Interrogatory because it cannot be answered due to the separation of the fall class and summer classes. Subject to this objection, Defendants refer Plaintiffs to their Response to Interrogatory No. 4.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

KENT C. SULLIVAN
First Assistant Attorney General

DAVID S. MORALES
Deputy Attorney General for Litigation

JAMES C. HO
Solicitor General

ROBERT B. O'KEEFE
Chief, General Litigation Division

RYAN CLINTON
Assistant Solicitor General



MISHELL B. KNEELAND
Texas Bar No. 24038256
MARINA GRAYSON
Texas Bar No. 24042098
Assistant Attorneys General
General Litigation Division
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
mishell.kneeland@oag.state.tx.us
512-475-4099
512-320-0667 fax
ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I certify that a copy of foregoing document has been sent by First Class U.S. Mail and e-mail on this the **14th day of May, 2008**, to the following individuals at the listed addresses:

Bert W. Rein
David C. Rybicki
Thomas R. McCarthy
Wiley Rein LLP
1776 K Street, NW
Washington, DC 20006
brein@wileyrein.com
drybicki@wileyrein.com
tmccarthy@wileyrein.com

Paul M. Terrill
The Terrill Firm, PC
810 West 10th Street
Austin, TX 78701
pterrill@terrill-law.com

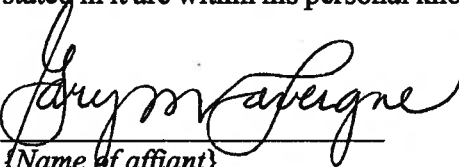


Mishell B. Kneeland
Assistant Attorney General

STATE OF TEXAS §
TRAVIS COUNTY §

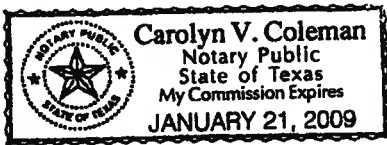
VERIFICATION

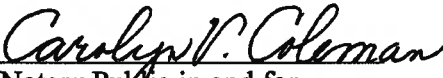
On this day, Gary M. Lavergne appeared before me, the undersigned notary public. After I administered an oath to him, he said that he had read Defendants' Response to Plaintiffs' Interrogatories 1 through 5, and that the facts stated in it are within his personal knowledge and are true and correct.



{Name of affiant}

SWORN TO and SUBSCRIBED before me by {name of affiant} on May 14, 2008.





Notary Public in and for
the State of Texas