NO. 11-345

In the
Supreme Court of the United States

ABIGAIL NOEL FISHER,
Petitioner,
v.
UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF THE FAMILY OF HEMAN SWEATT AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Amici curiae are the daughter and nephews of Heman Marion Sweatt, who in 1946 was denied admission to The University of Texas Law School for one reason: "the fact that he is a negro." Texas law forbade UT from considering any of his other qualities: not his intelligence, not his determination, not the grit he gained living under and fighting Jim Crow.

In 1950 – four years before *Brown v. Board of Education* – this Court held that Sweatt must be admitted to UT, because the separate law school created to accommodate him was not equal in – among other things – intangibles such as reputation and because Sweatt would be "removed from the interplay of ideas and the exchange of views" with "members of the racial groups which number 85% of the population of the State."

Today, UT honors the legacy of Heman Sweatt in many ways, none more important than its commit-

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[1] Pursuant to Supreme Court Rule 37.6 of the Rules of this Court, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party has made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to this brief's preparation or submission. Pursuant to Supreme Court Rule 37.3, *amicus curiae* states that counsel of record for both petitioners and respondent were timely notified of the intent to file this brief; the parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

ment to creating a genuinely diverse student body. It does so through an admissions policy that considers (to the extent allowed by the Texas Top Ten Percent Law, which depends on secondary-school segregation to increase minority enrollment) all aspects of an applicant's character – including, in part, how that character has been shaped by race.

The Sweatt Family submits this brief to recount Heman Sweatt's story in the context of Texas's long and continuing history of segregation in education and to support UT's use of a holistic admissions policy as a narrowly tailored means of fulfilling its mission to prepare students to engage and lead Texas's diverse society.

INTRODUCTION AND SUMMARY OF ARGUMENT

Hemella Sweatt-Duplechan, M.D. is a dermatological pathologist. She has three children, ages 13, 8, and 3. Her oldest is serious about soccer, but more so about his studies. In his Cincinnati school, which his parents chose for its diversity as well as academic excellence, he has had the highest GPA for three years running. Last year he scored second among seventh graders in the country on the National Spanish Test. He is understandably a source of pride for the Sweatt Family, which is serious about education. Historically serious.

Dr. Sweatt-Duplechan's father was Heman Marion Sweatt, who for four years fought for the opportunity to study at the University of Texas Law School, which was refused for the sole reason that he

was black. Sweatt's legal battle, led by Thurgood Marshall, culminated in this Court's ruling for the first time that an African American must be admitted to an all-white school.

The lessons from Heman Sweatt's struggle and from this Court's opinion in *Sweatt v. Painter*[2] resound in the issues once again before the Court.

In *Sweatt*, this Court first recognized that in higher education, the interplay of ideas and exchange of views among students are critical. It explained the educational importance of interaction among members of different racial groups representing a large percentage of the population of the state. It was in *Sweatt* – not *Bakke*[3] – that the Court first found that diversity, including racial diversity, was a compelling component of effective higher education. The Court's discussion in *Sweatt* of the benefits of diversity would echo more than a half-century later in *Grutter*.[4] The Court ultimately held in *Sweatt* that the separate school Texas cobbled together was unequal to UT Law School, in part because it could not provide these features of a first-class legal education.

Sweatt's story is but one chapter in Texas's long history of segregation in the education of its black and Hispanic citizens. That history, sadly, is turning back on itself. After years of steady integration (frequently under the firm hand of heroic federal judges), Texas schools are *de facto* resegregating.

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[2] 339 U.S. 629 (1950).
[3] *Regents of the Univ. of Cal. v. Bakke,* 438 U.S. 265 (1978).
[4] *Grutter v. Bollinger*, 539 U.S. 306 (2005)

Each year, more black and Hispanic students attend highly segregated schools, where less than 10% of the enrollment comprises other races. It is against this backdrop that UT faces its mission as a flagship university to train students to engage and lead Texas's increasingly diverse society.

In refusing Sweatt's application for admission, UT was compelled by Texas law to view him in one determinative dimension: his race. As an American – as a human – he deserved more. He deserved consideration of his whole, individual being: his strengths, his weaknesses, his talents, his character, his life experiences – including how they were shaped by his race. He was a black man who grew up in a predominantly white neighborhood, yet he was relegated to "colored" schools and suffered job discrimination and other indignities of Jim Crow, out of which grew his desire to study law and use the law to change the world in which he lived.

UT's admissions policy affords applicants falling outside the Top Ten Percent Law the holistic consideration Heman Sweatt was denied. UT reviews their individual strengths, weaknesses, talents, character, and – in a small, unquantified part – how their unique life experiences have been affected by race. The school neither admits nor excludes any applicant just because of race. True, UT's consideration of race as part of a holistic review produces fewer minority admissions than the Top Ten Percent Law, under which ten percent of graduates from highly segregated schools are automatically admitted. But such complaints miss the point. The purpose of UT's holistic review is not just to admit more minority

students, irrespective of who they are as individuals. UT seeks to supplement its Top Ten Percent admissions with those individuals – be they black, white, Hispanic, Asian, Native American, or other – who will best contribute to a robust exchange of ideas and exposure to different views and life experiences.

Heman Sweatt's legacy lives on at UT and in Austin. Symposia, scholarships, a courthouse, and a side of UT's campus bear his name. But it is UT's commitment to creating a genuinely diverse student body – one based on a holistic review of applicants' unique history and persona, not just their race – that best honors Heman Marion Sweatt.

ARGUMENT

I. *SWEATT V. PAINTER*

A. Sweatt's Application and Painter's Response

Room 1 of the Main Building, contiguous with the iconic University of Texas Tower, houses UT's Office of the Registrar. There, on February 26, 1946, Heman Marion Sweatt, an African-American letter carrier from Houston, handed UT President Theophilus S. Painter a copy of his college transcript and asked to be admitted to study law. The meeting was largely courteous and wholly expected. Sweatt was accompanied by representatives of the NAACP's Texas State Conference of Branches; Painter was joined by UT's Registrar, a Vice President, and a lawyer for the Board of Regents. Painter told Sweatt that the Registrar was not officially accepting his

application, but that Painter would ask the attorney general how UT should respond.[5]

Later that day, Painter requested an official opinion from Texas Attorney General Grover Sellers on Sweatt's application. Painter put the issue simply and starkly:

> This applicant is a citizen of Texas and duly qualified for admission to the Law School at the University of Texas, save and except for the fact that he is a negro.[6]

On March 16, 1946, the Attorney General released Opinion O-7126, "Re: Whether a person of negro ancestry, otherwise qualified for admission into the University of Texas, may be legally admitted to that institution."[7] After summarizing the facts, he began with the commentary:

> The wise and long-continued policy of segregation of the races in educational institutions of this State has prevailed since the abolition of slavery, and such

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[5] *See generally* GARY M. LAVERGNE, BEFORE BROWN: HEMAN MARION SWEATT, THURGOOD MARSHALL, AND THE LONG ROAD TO JUSTICE 97-103 (2010) [hereinafter BEFORE BROWN].

[6] Letter from Theophilus Painter to Grover Sellers (Feb. 26, 1946) (on file with Tarleton Law Library, The University of Texas at Austin), *quoted in* BEFORE BROWN, *supra* note 5, at 104.

[7] Op. Att'y Gen. Tex. No. O-7126 (Mar. 16, 1946), *available at* https://www.oag.state.tx.us/opinions/opinions/39sellers/op/1946/pdf/gs7126.pdf.

> policy is found incorporated not only in the Constitution of the State of Texas but also in numerous related statutes.[8]

He confirmed that the constitutionality of segregation had been repeatedly sustained by this Court, particularly in *Plessy v. Ferguson*,[9] but added:

> there is no doubt that if equal educational advantages are not provided for the applicant within the State, he must be admitted to the law school of the University of Texas.[10]

The Attorney General recounted that the Legislature had recently authorized Prairie View State Normal and Industrial College (which it renamed Prairie View University) to teach any graduate- or professional-level course UT offered to whites.[11] He concluded:

> [T]he segregation of races in educational institutions in Texas may not be abrogated unless and until the applicant in good faith makes a demand for legal training at Prairie View University, gives the authorities reasonable notice, and is unlawfully refused.[12]

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[8] *Id.* at 2 (citations omitted).
[9] 163 U.S. 537 (1896)
[10] Op. Att'y Gen. Tex. No. O-7126, *supra* n.7, at 2.
[11] *Id.* at 3.
[12] *Id.*

The next day, Painter wrote a letter to Sweatt returning his transcripts and enclosing a copy of the Attorney General's Opinion. He concluded: "in accordance therewith it becomes necessary at this time to finally refuse your application to the Law School at the University of Texas."[13]

B. Sweatt's Many Dimensions

Sweatt was denied admission to UT because of one determinative dimension: his race. Although Painter conceded Sweatt was otherwise "duly qualified," under Texas law, UT could not consider any of Sweatt's individual qualities and characteristics. It could not undertake a holistic review to put Sweatt's race in context with his unique life experiences.

If UT could have looked beyond "the fact that he is a negro," it would have learned that Sweatt grew up in a racially mixed Houston neighborhood,[14] yet was forced to attend schools set aside for "colored" children. UT would have learned that education was deeply important to the Sweatt family.

Heman's father was James Leonard Sweatt, Sr. The son of a slave, James was one of the first graduates of Prairie View State Normal School and Industrial College, then the only state-supported institu-

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[13] Letter from T. S. Painter to Heman Sweatt (Mar. 16, 1946) (on file with the President's Office Records, Dolph Briscoe Center for American History, Austin, Texas), *quoted in* BEFORE BROWN, *supra* note 5, at 109.

[14] According to the 1918 *Houston City Directory*, only 24% of the households surrounding the Sweatts' home on Chenevert Street were "colored." BEFORE BROWN, *supra* note 5, at 12, 297 n.21.

tion of higher education for African Americans in Texas.[15] He had been a teacher and principal in Beaumont, but Texas's poor pay for black educators led him to move to Houston, where he worked as a postal clerk. Nevertheless, he saw to it that each of his seven children who reached adulthood not only graduated from college, but earned advanced degrees.[16]

Heman ("Bill" to those who knew him) graduated from Jack Yates High School in Houston and Wiley College in Marshall, Texas, where he majored in biology. His teachers included Melvin Tolson, the legendary African-American writer and rhetorician, who in 1934 coached Wiley's debate team to a stunning victory over national champion University of Southern California.[17]

Like his father, Heman took a position as a teacher and substitute principal, but left due to the poor pay and facilities plaguing the colored schools in Cleburne, as in the rest of Texas. In 1937, he enrolled in the University of Michigan and maintained a B+ average in a pre-med curriculum. But Sweatt, in fragile health, found the northern winters too harsh and did not return after his first year. Having already passed the civil service exam, he took a job

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[15] Prairie View was created in 1876 as a "separate-but-equal" institution to enable Texas to accept federal Morrill Act funds to establish Texas A&M. *See* BEFORE BROWN, *supra* note 5, at 130-31.

[16] *Id.* at 9-11.

[17] *Id.* at 16-17. Tolson was portrayed by Denzel Washington in *The Great Debaters* (2007).

with the Post Office in Houston, and two years later he married his high-school sweetheart.[18]

In the 1940s, Sweatt began a fight against racial discrimination that he would pursue for the rest of his life. He walked door-to-door asking for donations to finance lawsuits challenging Texas's whites-only primaries.[19] He saw that even in the federal postal service, white postmasters would not promote blacks to "indoor" positions, such as clerk, blocking them from moving up to management. In 1944, with the help of an attorney, Sweatt filed a grievance charging the Post Office with violating its own regulations.[20] From that experience grew his desire to study law and to use the law to combat discrimination.[21]

And in 1946, Heman Marion Sweatt was ready to battle UT and the State of Texas.

C. Sweatt's Suit and the "Basement School"

On May 16, 1946, Sweatt filed his landmark case against Painter and other UT officials in the 126th Judicial District Court of Travis County. He was represented by William Durham of Dallas, together

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[18] *Id.* at 18-19, 70.
[19] *Id.* at 61; *see also* DARLENE CLARK HINE, BLACK VICTORY: THE RISE AND FALL OF THE WHITE PRIMARY (1979).
[20] *Id.* at 70-71.
[21] *Id.*; *see also id.* at 137.

with Thurgood Marshall of the NAACP Legal Defense Fund in New York.[22]

In reaction to Sweatt's suit, the Texas A&M Regents passed a resolution that black applicants who otherwise qualified to attend UT Law School would instead be admitted to study law at Prairie View University for the semester beginning February 1947; their courses would be taught by "qualified Negro attorneys."[23] On December 17, 1946, Judge Roy Archer denied Sweatt's Petition for Writ of Mandamus, finding that the legal training to be offered at Prairie View was "substantially equivalent to that offered at the University of Texas."[24] On February 1, the law school officially opened in a suite of offices at 409½ Milam Street in Houston. But no one applied for admission.[25]

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[22] Application for Writ of Mandamus, *Sweatt v. Painter*, No.74,945 (126th Judicial District Court of Travis County, Tex. May 16, 1946) (on file with the Tarleton Law Library, The University of Texas at Austin), *available at* http://www.houseofrussell.com/legalhistory/sweatt/docs/svppldng.htm; Relator's Second Supplemental Petition, *Sweatt v. Painter*, No.74,945 (126th Judicial District Court of Travis County, Tex. May 8, 1947) (on file with the Tarleton Law Library, The University of Texas at Austin), *available at* http://www.houseofrussell.com/legalhistory/sweatt/docs/svppldng.htm.

[23] BEFORE BROWN, *supra* note 5, at 131-32.

[24] Judgment of the Court, *Sweatt v. Painter*, No. 74,945 (126th Judicial District Court of Travis County, Tex. Dec. 17, 1946) (on file with the Tarleton Law Library, The University of Texas at Austin), *available at* http://www.houseofrussell.com/legalhistory/sweatt/docs/svppldng.htm.

[25] BEFORE BROWN, supra note 5, at 141-43.

While Sweatt appealed the denial of mandamus, the Texas Legislature worked swiftly on Senate Bill 140 to establish an "entirely separate and equivalent university of the first class for negroes" to be located in Houston.[26] To address Sweatt's suit, Section II enabled the UT Regents to establish a temporary law school in Austin.[27] On March 3, 1947, within hours of the Governor's signing SB 140, UT Registrar E. J. Mathews, who had been appointed to serve as registrar for the Texas State University for Negroes, wrote Sweatt:

> I am pleased to advise that your qualifications heretofore established and your application heretofore made will entitle you to attend the new school now being opened at 104 East 13th Street, Austin, Texas.[28]

Neither Sweatt nor anyone else registered for the three classes offered by the makeshift law school, which closed one week after it opened.[29]

The temporary School of Law of the Texas State University for Negroes was to occupy part of a three-story building just 100 yards from the State Capitol. Located on the first floor, entrance to the rooms leased for the law school required stepping down two

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[26] 1947 Tex. Gen. Laws 36.
[27] *Id.* at 39-40.
[28] Letter from E. J. Mathews to Heman Sweatt (Mar. 3, 1947) (on file with the Tarleton Law Library, The University of Texas at Austin), *quoted in* BEFORE BROWN, *supra* note 5, at 147-46.
[29] BEFORE BROWN, *supra* note 5, at 150-51.

or three steps from the sidewalk to an area shaded by the gallery of the floor above. At the trial to determine whether the separate school was equal to UT, and in the contemporaneous media campaign and in legend ever after, it would be derided as "The Basement School."[30]

D. The Trial of Intangibles and the Interplay of Ideas

The trial of *Sweatt v. Painter* and subsequent appeals were not really about whether the separate law school was in a basement or whether its physical facilities were equal to UT's. To be sure, the trial record is replete with metrics such as square footage and the number of faculty, course offerings, and books available (and argument over whether the volumes in the Texas State Library in the Capitol, open to the public, should be counted in favor of the separate school).[31] But Marshall shifted the focus to intangibles – what this Court would describe as "those qualities which are incapable of objective measurement but which make for greatness in a law school."[32]

Particularly relevant to the issues in *Fisher*, Dean Earl Harrison of the University of Pennsylva-

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[30] *Id.* at 148-49.

[31] Transcript of Record, Pt. 1, *Sweatt v. Painter*, No. 74,945 (126th Judicial District Court of Travis County, Tex. May 12-13, 1947) (on file with the Tarleton Law Library, The University of Texas at Austin), *available at* http://www.houseofrussell.com/legalhistory/sweatt/docs/svptr1.htm#statements; *see generally* BEFORE BROWN, *supra* note 5, at 155-59, 163-65.

[32] *Sweatt v. Painter*, 339 U.S. 629, 634 (1950).

nia Law School testified that in the "modern system of instruction," the professor does not lecture so much as direct a discussion among the students:

> it is largely a matter of discussion in which the members of the class participate to a large extent, one commenting on the recital made by the previous; another criticizing his statement, either the facts of the case or the decision arrived at by the Court, and it is first and foremost a class discussion.[33]

The larger and more diverse the student body, Dean Harrison testified, the more powerful the teaching tool. The concept was just as important outside the classroom:

> Rubbing elbows with the other students in the law school, taking part in small discussion groups, discussion with advanced students, all are very important considerations, equally so, in my opinion, with the actual class room work itself.[34]

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[33] Transcript of Record, Harrison Direct Testimony, *Sweatt v. Painter*, No. 74,945 (126th Judicial District Court of Travis County, Tex. May 15, 1947) (on file with the Tarleton Law Library, The University of Texas at Austin), *available at* http://www.houseofrussell.com/legalhistory/sweatt/docs/svptr3.htm#directharrison, *quoted in* BEFORE BROWN, *supra* note 5, at 194-95.

[34] *Id.*, *quoted in* BEFORE BROWN, *supra* note 5, at 195-96.

As expected, on June 17, 1947, Judge Archer again denied Sweatt's petition, finding the Law School of the Texas State University for Negroes "substantially equal" with UT Law School.[35] But allowing Marshall, frequently over objection, to put on "sociological" evidence of intangibles, he created the record underlying this Court's opinion three years later.

Equally expected, the Third Court of Civil Appeals affirmed and the Texas Supreme Court denied further review.[36] In oral argument before the Austin appellate panel, Marshall attacked the isolation from other racial groups that marked the "basement education" Texas offered Sweatt:

> The modern law school is operated so the student can understand ideas of all stratas [sic] of society, so he can go out and be of service to his community, his state and his nation. . . . You tell [Sweatt], "You go over there by yourself. You don't have a chance to exchange ideas with anybody."[37]

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[35] Judgment of the Court, *Sweatt v. Painter*, No. 74,945 (126th Judicial District Court of Travis County, Tex. June 17, 1947) (on file with the Tarleton Law Library, The University of Texas at Austin), *available at* http://www.houseofrussell.com/legalhistory/sweatt/docs/svppldng.htm#judgmentdistct646.

[36] *Sweatt v. Painter*, 210 S.W. 442 (Tex. Civ. App–Austin 1947, writ ref'd).

[37] Margaret Mayer, *Counsels Argue Equality Clause In Sweatt Case*, AUSTIN AMERICAN, Jan. 30, 1948, *quoted in* BEFORE BROWN, *supra* note 5, at 231.

E. This Court's Opinions of June 5, 1950

On June 5, 1950, Chief Justice Vinson announced the unanimous decisions in *Sweatt v. Painter*[38] and *McLaurin v. Oklahoma State Regents*.[39]

In *Sweatt*, the Court first concluded that it "cannot find substantial equality in the educational opportunities offered white and Negro law students by the State."[40]

> In terms of number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities, the University of Texas Law School is superior.[41]

But the Court continued on to intangibles – and began the end of *de jure* segregated education in America. "What is more important, the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement, but which make for greatness in a law school."[42]

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[38] 339 U.S. 629 (1950).
[39] 339 U.S. 637 (1950).
[40] *Sweatt*, 339 U.S. at 633.
[41] *Id.* at 633-34.
[42] *Id.* at 634.

> Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of alumni, standing in the community, traditions and prestige.[43]

The Court explained, moreover, that education "cannot be effective in isolation from the individuals and institutions with which the law interacts"; it "cannot be removed from the interplay of ideas and exchange of views with which the law is concerned."[44]

The Court emphasized that the law school to which Texas was willing to admit Sweatt "excludes from its student body members of the racial groups which number 85% of the population of the State" including those "with whom [he] will inevitably be dealing" when he becomes a lawyer.[45]

Justice Tom Clark, a UT Law School alumnus, had addressed these issues in a bench memorandum. He steered the other Justices away from counting bricks and books to considering what cannot be quantified. He concluded that the law school Texas offered Sweatt was not equal to his alma mater for many reasons, including that UT –

> attracts a cross section of the entire State in its student body—affords a wider exchange of ideas—and, in the

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[43] *Id.*
[44] *Id.*
[45] *Id.*

> combat of ideas, furnishes a greater variety of minds, backgrounds and opinions . . . .[46]

The Chief Justice, later writing for a unanimous Court, echoed:

> With such a substantial and significant segment of society excluded, we cannot conclude that the education offered [Sweatt] is substantially equal to that which he would receive if admitted to the University of Texas Law School.[47]

The Court held "that the Equal Protection Clause of the Fourteenth Amendment requires that [Sweatt] be admitted to the University of Texas Law School."[48]

The Court followed *Sweatt* with a unanimous opinion in *McLaurin*, which also underscored the importance in education of the exchange of ideas and interaction with different segments of society.[49] The

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[46] Memorandum from Tom Clark, Associate Justice, Supreme Court of the United States, to Supreme Court Justices (Apr. 1950) (on file with the Tom Clark Papers, Tarlton Law Library, The University of Texas at Austin), *available at* http://www.law.du.edu/russell/lh/sweatt/docs/clarkmemo.htm *quoted in* BEFORE BROWN, *supra* note 5, at 249-50.

[47] *Sweatt*, 339 U.S. at 634.

[48] *Id.* at 636.

[49] *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637 (1950). On the same day as *Sweatt* and *McLaurin*, the Court announced *Henderson v. United States*, 339 U.S. 816 (1950), holding that the Southern Railway Company's segrega-

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University of Oklahoma admitted George McLaurin to its graduate school of education and allowed him to attend the same classes and use the same facilities as other students, but physically isolated him in the classrooms, library, and cafeteria. The Chief Justice wrote that as a result of the restrictions, meant to preserve some semblance of segregation, McLaurin was "handicapped in his pursuit of effective graduate instruction."[50] In particular, "[s]uch restrictions impair and inhibit his ability . . . to engage in discussions and exchange views with other students . . . ."[51] The Court added that isolation from other racial groups impeded the public interest to prepare leaders for an "increasingly complex" society.[52]

Sweatt and *McLaurin* were this Court's first recognition of the importance of diversity in higher education.

II. SWEATT'S LIFE AND LEGACY AFTER *SWEATT V. PAINTER*

A. Sweatt at UT

On September 19, 1950, Heman Sweatt stood in line with five other African Americans and "scores of white boys" to enroll in UT Law School.[53] He would

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tion of its dining cars violated the antidiscrimination provision of the Interstate Commerce Act.

[50] *McLaurin*, 339 U.S. at 641.

[51] *Id.*

[52] *Id.*

[53] *Heman Sweatt's Victory*, LIFE, Oct. 16, 1950, at 64, *quoted in* BEFORE BROWN, *supra* note 5, at 264.

not graduate. While accounts of Sweatt's harassment in law school are inconsistent, the pressure put on him during the long litigation ordeal took its toll on his fragile health.[54] His first year at UT Law School (from which an estimated 50% of all students flunked out in the 1950s) was marked by illness compounded by a then-failing marriage.[55] Moreover, he was an older student who had not attended school since the 1930s. Sweatt left in 1951 before completing his second year.[56]

B. Sweatt at the Urban League

Recovering from health problems in the summer of 1952, Sweatt was offered a scholarship to attend the School of Social Work at Atlanta University. He accepted and in 1954 earned a master's degree with an emphasis in community organizations. He went to work for the Urban League, becoming the Assistant Regional Director responsible for organizing new chapters. During his service, the number of affiliates tripled. He worked for the Urban League for 23 years. [57]

At an Urban League picnic, Sweatt met Katherine Gaffney, whom he married in 1963. She gave birth to a daughter they named Hemella, but called

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[54] BEFORE BROWN, *supra* note 5, at 274-78.
[55] *Id.* at 279-81. Sweatt recalled that his wife left him the night before his first exam. *Id.*
[56] *Id.* at 279-81.
[57] *Id.* at 281.

Mellie, and who today is addressed professionally as Dr. Sweatt-Duplechan.[58]

On October 3, 1982, Heman Marion Sweatt died.[59]

C. Sweatt's Legacy

In Houston, the Texas State University for Negroes was renamed Texas Southern University, and today it is the second-largest predominantly African-American school in the United States. Informally, it is known as "The House That Sweatt Built," and its law school is formally named for his lawyer and champion, Thurgood Marshall, Associate Justice of the Supreme Court of the United States.[60]

In Austin, Sweatt is now a symbol of the equal justice and inclusiveness to which the city and the University of Texas aspire. UT Law School created a professorship and scholarship in his name.[61] In 1987, UT held the first Heman Marion Sweatt Symposium on Civil Rights, an annual event still hosted by the University's Division of Diversity and Com-

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[58] *Id.*

[59] *Id.* at 283

[60] *See generally* Marguerite L. Butler, *The History of Texas Southern University, Thurgood Marshall School of Law: "The House That Sweatt Built,"* 23 T. MARSHALL L. REV. 45 (1997).

[61] The University of Texas at Austin, Heman Sweatt Endowed Presidential Scholarship in Law, http://endowments.giving.utexas.edu/page/sweatt-heman-eps-law/2343/ (last visited Aug. 2, 2012); Richard Allen Burns, *Sweatt, Heman Marion*, THE HANDBOOK OF TEXAS ONLINE, http://www.tshaonline.org/handbook/online/articles/fsw23 (last visited Aug. 2, 2012).

munity Engagement. That same year, UT renamed the southeast side of campus (then-known as the "Little Campus") the Heman Sweatt Campus.[62] In 2005, the Travis County Courthouse where *Sweatt v. Painter* was tried was renamed the Heman Marion Sweatt Courthouse.[63]

Sweatt's legacy in Texas education extends to his own family members who, with his daughter Dr. Sweatt-Duplechan, submit this brief as *amici*. His nephew and namesake, Heman Marion Sweatt II, is a UT graduate who spent his career with AT&T and participated in the first symposium honoring his uncle.

Nephew James Leonard Sweatt III, M.D., a former member of the Texas State University System Board of Regents, is himself a pioneer. A board-certified thoracic surgeon, he was the first African American admitted to the Washington University School of Medicine. In 1995, he became the first African-American President of the Dallas County Medical Society.

But Heman Marion Sweatt's greatest legacy lives on in the more than ten thousand young men and women who each year graduate from UT, having benefited from the "interplay of ideas" and "exchange of views" with individuals of different backgrounds,

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[62] Burns, *supra* note 61.

[63] The University of Texas School of Law, *Travis County Courthouse Renamed in Honor of Heman Marion Sweatt*, Oct. 25, 2005, http://www.utexas.edu/law/news/2005/102505_sweatt.html (last visited Aug. 2, 2012).

which flow from UT's commitment to create and cultivate a genuinely diverse student body.

III. SEGREGATION IN TEXAS EDUCATION

Sweatt v. Painter did not immediately end segregation of Texas schools. Nor did *Brown v. Board of Education*.[64] We turn to the history of desegregation of Texas public schools and, sadly, their recent trend toward resegregation.

A. A Brief History of Discrimination in Texas Education.[65]

"Texas' long history of discrimination against its black and Hispanic citizens in all areas of public life is not the subject of dispute."[66] Discrimination in Texas has been nowhere more pervasive than in Texas's public education system.[67] "The history of official discrimination in primary and secondary ed-

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[64] *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

[65] This brief encapsulation is not intended to be a comprehensive history of educational discrimination in Texas. A more detailed recounting is found in *Hopwood v. Texas*, 861 F. Supp. 551, 554-63 (W.D.Tex. 1994) (hereinafter *Hopwood I*), *rev'd*, 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996); *see also* SCHOOL DESEGREGATION IN TEXAS: THE IMPLEMENTATION OF UNITED STATES VS. STATE OF TEXAS (Policy Research Report 51, Lyndon B. Johnson School of Public Affairs 1982).

[66] *LULAC v. Clements*, 999 F.2d 831, 866 (5th Cir. 1993); *see id.* at 915 (King, J., dissenting).

[67] *Hopwood I*, 861 F. Supp. at 554-57.

ucation in Texas is well documented in history books, case law, and the record of this trial."[68]

Texas's history of discrimination in primary and secondary education continues to have present-day effects. Even during the 1980s, many Texas students lived in school districts that courts and the United States Department of Justice had determined were still unconstitutionally segregated.[69] Over 70% of blacks in Texas lived in metropolitan areas operating under court-ordered desegregation plans.[70] School districts were found to have practiced official discrimination against Mexican-American as well as African-American students.[71] Indeed, Dallas public schools "opposed any student desegregation, no matter how feasible or how minimal,"[72] and Fort Worth still was not unitary.[73] Although Houston had been declared unitary, "70% of the black students in HISD still attend[ed] schools that [we]re 90% minority, including as minorities black and Hispanic students."[74]

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[68] *Id.* at 554. *See generally* AMILCAR SHABAZZ, ADVANCING DEMOCRACY: AFRICAN AMERICANS AND THE STRUGGLE FOR ACCESS AND EQUITY IN HIGHER EDUCATION IN TEXAS (2004); JACK BASS, UNLIKELY HEROES: A VIVID ACCOUNT OF THE IMPLEMENTATION OF THE *BROWN* DECISION IN THE SOUTH BY SOUTHERN FEDERAL JUDGES COMMITTED TO THE RULE OF LAW (1990).

[69] *Hopwood I*, 861 F. Supp. at 554.

[70] *Id.*

[71] *Id.* at 554, 572-73.

[72] *Tasby v. Wright*, 713 F.2d 90, 93 (5th Cir. 1983).

[73] *Flax v. Potts*, 567 F. Supp. 859, 861 (N.D. Tex. 1983).

[74] *Ross v. Houston Indep. Sch. Dist.*, 699 F.2d 218, 226-27 (5th Cir. 1983).

Many minority applicants to UT have spent all or most of their precollege education in school systems that had been unconstitutionally segregated and had never been declared unitary.[75] Texas's history of segregation in public education continues to be manifest in tangible harm suffered by minority students.[76] Indeed, official discrimination in Texas has "handicapped the educational achievement of many minorities."[77]

Despite *Sweatt v. Painter*, overt discrimination even at UT Law School continued "during the 1950s, and into the 1960s."[78] By the 1970s, the school began to consider race in its admissions process.[79]

For over thirty years the executive branch of the federal government forcefully insisted that Texas take affirmative, race-conscious measures to ensure that the current effects of past discrimination were eliminated in Texas's higher education institutions. In 1977, the District Court for the District of Columbia ordered the Office for Civil Rights ("OCR") of the United States Department of Health, Education and Welfare (now the Department of Education or DOE) to investigate discrimination in Texas's system of higher education.[80] Following a two-year investiga-

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[75] *Hopwood I*, 861 F. Supp. at 572-73.
[76] *Id.* at 554-55, 573.
[77] *Id.* at 573.
[78] *Id.* at 555.
[79] *Id.* at 558.
[80] *Id.* at 555. *See Adams v. Richardson*, 356 F. Supp. 92 (D.D.C.), *modified and aff'd*, 480 F.2d 1159 (D.C. Cir. 1973). The *Adams* litigation was eventually dismissed *sub nom. Women's Equity Action League v. Cavazos*, 906 F.2d 742 (D.C. continued…)

tion, OCR found that Texas had failed to eliminate the vestiges of its segregated higher education system and was in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d. OCR also found significant under-representation of Hispanics in state institutions of higher education and insisted on a desegregation plan that included enrollment goals for Hispanics as well as blacks.[81]

Because of OCR's findings, Texas submitted the Texas Equal Education Opportunity Plan for Higher Education (the "Texas Plan"), which included a general commitment to equal educational opportunity for both black and Hispanic students and student body desegregation. In 1982, DOE opined that the Texas Plan was deficient. Texas submitted a revised plan that OCR again rejected, in part because it did not seek to increase minority enrollment at *each* institution instead of on a statewide basis. The *Adams* court then found that "Texas has still not committed itself to the elements of a desegregation plan which in [DOE's] judgment complies with Title VI" and ordered enforcement proceedings to begin unless Texas submitted a fully conforming plan. OCR accepted a revised Texas Plan that included a commitment to

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Cir. 1990). But this dismissal of plaintiffs' claims for further relief did not affect the consent decrees with southern universities, which had been spun off from the *Adams* litigation. *See id.* at 746-47 n.4; *Adams v. Bell*, 711 F.2d 161 (D.C. Cir. 1983) (involving the enforcement action against North Carolina).

[81] *Hopwood I*, 861 F. Supp. at 556.

significantly increase the number of black and Hispanic students.[82]

By the late 1980s, it became clear that the Texas Plan was not working, and through the 1990s, OCR continued to oversee Texas's desegregation efforts and reevaluated the Texas system in light of *United States v. Fordice*, 505 U.S. 717 (1992).[83] Despite the Fifth Circuit's 1996 ruling in *Hopwood* that forbade race-based criteria in admissions decisions,[84] OCR remained insistent that Texas continue its affirmative action efforts, threatening, even, to cut off Texas's federal funding if the State followed the Fifth Circuit's ruling.[85] Today, the State of Texas remains subject to a higher education desegregation plan. OCR's evaluation of whether the vestiges of segregation have been eliminated, consistent with the *Fordice* decision, and its progeny, is ongoing.

Moreover, despite substantial outreach efforts, UT finds it hard to overcome its reputation among some groups as a "white" institution that does not provide a welcoming environment for underrepresented minority students.[86] *Amicus* Heman Sweatt II still recalls the excitement he felt seeing another

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[82] *Id.*
[83] *Id.* at 557.
[84] *Hopwood v. Texas*, 78 F.3d 932, 935-38 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996).
[85] *See* Peter Applebome, *Texas Is Told to Keep Affirmative Action in Universities or Risk Losing Federal Aid*, N.Y. TIMES, Mar. 26, 1997, at B4.
[86] SJA 14a.

black student on the UT campus. It was a rare sighting.[87]

B. Resegregation of Texas Public Schools

Since the 1990s, elementary and secondary schools have resegregated in Texas, particularly in urban areas.[88]

In 2009-10, four out of ten black students in Texas attended a school that was "highly segregated" – defined as having 90-100% minority enrollment.[89] 82.4% attended schools with 50-100% minority enrollment.[90] The typical black student would see a white face in only a quarter of her schoolmates.[91]

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[87] *See generally* Katherine Leal Unmuth, *University of Texas Trails State Demographics with Minority, Low-Income Students*, DALLAS MORNING NEWS, Jan. 13, 2010, *available at* http://www.dallasnews.com/news/education/headlines/20100113-University-of-Texas-trails-state-demographics-6891.ece.

[88] In an extensive dissent, Justice Breyer described and documented "the growing resegregation of public schools" nationwide. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 803 (2007); *id.* at 805-06, App. A. Three members of the Court joined Justice Breyer, and none questioned the fact that *de facto* segregation had returned.

[89] Computations by UCLA Civil Rights Project from National Center for Education Statistics, Common Core of Data, *available at* http://nces.ed.gov/ccd/ (last visited Aug. 2, 2012), *to be published in* GARY ORFIELD, JOHN KUSCERA & GENEVIEVE SIEGEL-HAWLEY, *E PLURIBUS*...SEPARATE: A DIVERSE SOCIETY WITH SEGREGATED SCHOOLS (2012), to be available at http://www.civilrightsproject.ucla.edu/.

[90] *Id.*

[91] *Id.*

The statistics for Hispanics are worse. In 2009-10, over half of Hispanic students in Texas attended schools that were 90-100% minority.[92] 87.4% attended schools with 50-100% minority enrollment.[93] And the typical Hispanic student attended a school with only 18.9% whites.[94]

The trend since 1990 is troubling.

School Year[95]	**1991-92**	**2000-01**	**2009-10**
% Blacks in 90-100% Minority Schools	34.9	37.3	39.9
% White in School of Typical Black	35.2	28.1	24.6
% Hispanics in 90-100% Minority Schools	41.8	47.8	52.7
% White in School of Typical Hispanic	25.8	21.9	18.9

In 2000-01, 42% of the students in Texas public schools were white. By 2010-11, that figure dropped to 31.2%.[96] Further reflecting and predicting this

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[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.* 1991-92 and 2000-01 statistics in part previously published in GARY ORFIELD AND CHUNGMEI LEE, *BROWN* AT 50: KING'S DREAM OR PLESSY'S NIGHTMARE (2004).
[96] TEX. EDUC. AGENCY, ENROLLMENT IN TEXAS PUBLIC SCHOOLS 2010-11 8 (2011), http://www.tea.state.tx.us/acctres/Enroll_2010-11.pdf.

trend, 2010-11 white enrollment in public schools drops steadily by grade: 36.4% in twelfth grade, 29.5% in first grade, and 15.6% in pre-kindergarten.[97]

Public schools in Texas's major cities are even more highly segregated.

In 2011-12, only 8.1% of all students in the 279-school Houston Independent School District were white.[98] At Jack Yates High School, from which Heman Sweatt graduated, only 6 of the 1,179 students that year – or 0.5% – were white, and 91.7% were African American.[99]

In 2012, only 4.6% of the students in the Dallas Independent School District were white.[100] But at Highland Park High School only 4.3% of the student body was African American.[101]

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[97] *Id.* at 19.

[98] HOUSTON INDEP. SCH. DIST., 2011-2012 FACTS AND FIGURES 1 (2012), https://www.houstonisd.org/HISDConnectEnglish/Images/PDF/HISDFactsFigures2012Final.pdf.

[99] TEX. EDUC. AGENCY, ACADEMIC EXCELLENCE INDICATOR SYSTEM, 2010-11 CAMPUS PERFORMANCE REPORT, YATES HIGH SCHOOL, http://ritter.tea.state.tx.us/perfreport/aeis/2011/campus.srch.html (enter campus number "#101912020"; then click "continue") (last visited Aug. 2, 2012).

[100] DALLAS INDEP. SCH. DIST., ENROLLMENT STATISTICS (AS OF 01/20/2012), https://mydata.dallasisd.org/SL/SD/ENROLLMENT/Enrollment.jsp?SLN=1000.

[101] TEX. EDUC. AGENCY, ACADEMIC EXCELLENCE INDICATOR SYSTEM, 2010-11 CAMPUS PERFORMANCE REPORT, HIGHLAND PARK HIGH SCHOOL, http://ritter.tea.state.tx.us/perfreport/aeis/2011/

continued…)

In the San Antonio Independent School District, 1.9% of the 2012 enrollment was white.[102] Harlandale High School in 2011 was 98.7% Hispanic.[103]

Outside Texas's largest cities, a quarter of the school districts are more than 77% white.[104]

This is not to say that UT is responsible for or that its admissions policies attempt to remediate resegregation of Texas's primary and secondary schools. But it is from this racially isolated school system that UT must fulfill its mission as the State's flagship university to select and train students to engage and lead Texas's "increasingly complex" society. Indeed, many students – of all races – encounter a diverse educational setting for the first time when they arrive at UT for freshman orientation.

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campus.srch.html (enter campus number "#188903001"; then click "continue") (last visited Aug. 2, 2012).

[102] SAN ANTONIO INDEP. SCH. DIST., FACTS AND FIGURES (2012), http://www.saisd.net/main/index.php?option=com_content&view=article&id=1326:student-demographics&catid=8:about-us-left&Itemid=104 (last visited Aug. 2, 2012).

[103] TEX. EDUC. AGENCY: ACADEMIC EXCELLENCE INDICATOR SYSTEM, 2010-11 CAMPUS PERFORMANCE REPORT, HARLANDALE HIGH SCHOOL, http://ritter.tea.state.tx.us/perfreport/aeis/2011/campus.srch.html (enter campus number "#015904001"; then click "continue") (last visited Aug. 2, 2012).

[104] TEX. EDUC. AGENCY, SNAPSHOT 2011 SUMMARY TABLES DISTRIBUTION STATISTICS (2012), http://ritter.tea.state.tx.us/perfreport/snapshot/2011/distrib.html.

IV. THE LESSONS FROM *SWEATT V. PAINER*

A. The Importance of Diversity

The compelling importance of diversity in higher education, first recognized in *Sweatt v. Painter*, has been repeatedly reaffirmed. The Court's most extensive discussion of this principle is found in *Grutter*.[105] In *Parents Involved*, a majority of the Court wrote that diversity is a compelling interest in primary and secondary school education.[106] The plurality opinion was not ready to make that extension, but expressly recognized that diversity remains compelling in higher education.[107]

Racial diversity, of course, is important. It allows (indeed requires) students to interact with "members of the racial groups which number [a high percentage] of the population of the State" including those "with whom [they] will inevitably be dealing" when they graduate.[108] Making higher education accessible to individuals of all races and ethnicities legitimizes the state's expenditures of taxes collected from everyone.[109] This is especially true for flagship

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[105] *Grutter v. Bollinger*, 539 U.S. 306 (2005).

[106] *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 710, 789-92 (2007) (Kennedy, J., concurring in part); *id*. at 838-45 (Breyer, J., dissenting).

[107] *Id.* at 722 (Roberts, C. J.) ("[W]e have recognized as compelling … the interest in diversity in higher education upheld in *Grutter*").

[108] *Sweatt*, 339 U.S. at 634. *See also Grutter*, 539 U.S. at 329-32.

[109] *Grutter*, 539 U.S. at 331-32.

institutions, such as UT, charged with preparing the future leaders of the State and Nation.[110]

> Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.[111]

But diversity in higher education is not just about different races. It is about the interplay of different ideas, the exchange of different views, and exposure to different life experiences.[112] As *Grutter* recognized, diversity's

> benefits are important and laudable because the classroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds.[113]

It follows that to be meaningful, diversity must be examined at two levels of magnification beyond the student body as a whole and broad racial classifications. First, for "classroom discussion" to benefit from diversity, there must be diversity in the classroom, not just the campus. College administrators must consider diversity across disciplines, and try to achieve "critical mass," such that minorities feel nei-

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[110] *Id.* at 331-33 (discussing service academies and law schools).
[111] *Id.* at 332.
[112] *Sweatt*, 339 U.S. at 634.
[113] *Grutter*, 539 U.S. at 331.

ther isolated nor responsible to speak for their race or ethnic group.[114] Otherwise, they – *and their white classmates* – lose the lively interplay of ideas and exchange of views that flow from true diversity.

Second, the academy must consider diversity of backgrounds, life experiences, and viewpoints across races – not just broad racial and ethnic groupings. The "white/non-white" dichotomy is simply too "blunt" to ensure meaningfully different life experiences and viewpoints.[115]

The Texas Top Ten Percent Law is a "blunt" tool to build a diverse student body.[116] Passed in reaction to *Hopwood v. Texas*,[117] it assures automatic acceptance to UT (or any other Texas public college) to the top ten percent of the graduating classes of Jack Yates High School and Harlandale High School, just as it does to Highland Park High School. Viewed only somewhat cynically, its success in increasing minority enrollment at UT depends on the continuing segregation of minorities in Texas secondary schools.

But does it truly produce "the greatest possible variety of backgrounds"? Today's school segregation is not *de jure*, but *de facto* – the result of segregated

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[114] *Id.* at 329-31.
[115] *Cf.*, *Parents Involved*, 551 U.S. at 803 (Kennedy, J., concurring in part).
[116] *Fisher v. Texas*, 631 F.3d 213, 242 (5th Cir. 2011) (Higginbotham, J.).
[117] *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.) (forbidding any consideration of race in admissions decisions), *cert. denied*, 518 U.S. 1033 (1996).

housing.[118] Unlike Heman Sweatt, children today do not walk past "white" schools to get to their "colored" schools.[119] Because *de facto* school segregation stems from residential patterns, students in the top ten percent of a highly segregated school likely grew up in the same inner-city attendance zone. The top 29 Jack Yates High School graduates live in the same predominantly African-American neighborhood of Houston's Third Ward, probably went to the same elementary and middle schools, had the same teachers, and hung out together watching the same TV shows and listening to the same music. We would expect them to share the views of their schoolmates and neighbors. The same holds true for the top 38 graduates of 98%-Hispanic Harlandale High in San Antonio and the overwhelmingly-white schools in Highland Park and a quarter of Texas school districts. Sweeping in the top ten percent of a highly segregated high school certainly increases minority enrollment at UT, but it hardly guarantees a genuine diversity of life experiences and viewpoints. Moreover, while the benefits of racial diversity in elementary and secondary education may be debated,[120] what is certain is that none flow to the students attending highly segregated schools. Not even the top ten percent.

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[118] *See Parents Involved*, 551 U.S. at 793-95.

[119] BEFORE BROWN, *supra* note 5, at 12-13. Nor do they, as did *Amici*'s Counsel of Record until 1968, walk past the "colored" school to get to his "white" school in East Texas.

[120] *Compare Parents Involved*, 551 U.S. at 839-42 (Breyer, J., dissenting) (citing studies) *with id.* at 761-63 (Thomas, J., concurring) (citing studies).

B. The Importance of the Individual

Seeking to create a student body of truly diverse backgrounds, UT supplements its Top Ten Percent admissions with students selected after evaluation of their entire record of achievements, interests, talents, character, and background. It includes, but is hardly limited to race, which is viewed as but one facet of their unique life experiences. In short, UT affords them the holistic review that UT and the State of Texas denied Heman Sweatt.

In UT's holistic review (consciously modeled after that approved in *Grutter*) race is not determinative. No one is admitted because of his race; no one is excluded because of his race. No one is assigned to a particular program based solely upon race. Rather, the individual's "whole range of talents and school needs" are weighed in seeking the benefits of truly diverse classrooms.[121] UT's holistic review takes consideration of race far past the "blunt distinction of 'white' and 'non-white'" condemned in *Parents Involved*.[122] It recognizes that diversity means more than a student's skin color or surname.[123] Reviewing the whole file and whole persona, UT admissions officers assess how the interplay of ideas will be furthered by the daughter of Jamaican immigrants living in a mixed-race neighborhood

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[121] *Cf. Parents Involved*, 551 U.S. at 793 (Kennedy, J., concurring in part) (school district relied upon "mechanical formula" on the basis of "rigid criteria" to make school assignments).
[122] *See id.* at 786.
[123] *Regents of the Univ. of Cal. v. Bakke,* 438 U.S. 265, 269 (1978) (Powell, J.).

versus someone whose background differs little from the 29 top graduates of Jack Yates High School. They can consider the likely contribution to be made by the son of a Cuban father and Costa Rican mother, compared with a more typical top-ten-percent graduate of Harlandale High. They can appreciate the student of Indian descent from Highland Park who wants to follow UT alumnus Walter Cronkite into journalism rather than her father into computer science.

Some criticize UT's consideration of race as only part of a holistic review as having "too minimal" an impact on diversity, because far fewer minority students are admitted through holistic review than through the Top Ten Percent Law. That simply misses the point. Race in the holistic review is but part of the mix intended not just to enroll more persons of a certain race or ethnicity, but to round out a student body with those who will contribute most to genuine diversity in the classroom and on campus. UT seeks to assess in applicants "those qualities which are incapable of objective measurement but which make for greatness in a" student body.[124]

No one is "stigmatized" with a racial "label" when no one in the pool of applicants afforded holistic review is either given or denied an offer based solely on race. Stigma attaches not when one is recognized as a member of a racial or ethnic group; stigma attaches when one is seen as nothing more. In UT's holistic review, applicants are appreciated

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[124] *Sweatt v. Painter,* 339 U.S. 629, 634 (1950).

for their many dimensions, not just race. This is precisely what Heman Sweatt deserved but was denied.

C. The Importance of Race

Race matters. In the real world, it still matters. "The enduring hope is that race should not matter; the reality is that too often it does."[125]

But in UT's holistic review, race matters only in the context of an applicant's whole life experience and her ability to contribute to the interplay of ideas and exchange of different worldviews. In UT's assessment, an applicant's race can be a plus or it can have no impact whatsoever – for an applicant of any race. It all depends on context.

Consider the difference race makes to diversity in the context of these hypothetical applicants from the second decile of their graduating classes:

- John is captain of the track team at Jack Yates High School. It makes a difference whether he is African American or one of the six whites in the school.

- Janet is chair of the Spanish Club at Harlandale High. It makes a difference whether she is Hispanic or one of the twelve African Americans in the school.

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[125] *Parents Involved*, 551 U.S. at 787 (Kennedy, J., concurring in part).

- Joseph is president of the senior class at Highland Park High. It makes a difference whether he is white or one of the few Hispanics in the school.

It is naïve in the extreme to think that race does not influence our lives and how we view the world. In UT's holistic review, however, race influences lives and views; it does not define them.

Would that a majority of the Court had joined Justice Harlan's dissenting opinion in *Plessy v. Ferguson*,[126] instead of providing the precedent Texas invoked to deny Heman Sweatt's admission to UT. "As an aspiration, Justice Harlan's axiom ['[o]ur Constitution is color-blind'] must command our assent. In the real world, it is regrettable to say, it cannot be a universal constitutional principle."[127]

D. The Importance of Patience

The 25-year horizon Justice O'Connor envisioned for race-conscious admissions decisions[128] may have been optimistic, particularly in light of recent resegregation of this country's elementary and secondary schools. The road is long, but it really hasn't been that long. Remember the 13-year-old Sweatt-Duplechan honor student in the Introduction? His grandfather was Heman Marion Sweatt. And Heman's grandfather, Richard Sweatt, was a slave.

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[126] 163 U.S. 537 (1896).
[127] *Parents Involved*, 551 U.S. at 788 (Kennedy, J., concurring in part).
[128] *Grutter*, 539 U.S. at 343.

CONCLUSION

For these reasons, The Family of Heman Sweatt, *Amicus Curiae*, urges the Court to affirm the judgment below.

Respectfully submitted,

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