

No. 09-50822

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ABIGAIL NOEL FISHER; RACHEL MULTER MICHALEWICZ,

Plaintiffs - Appellants

v.

UNIVERSITY OF TEXAS AT AUSTIN; DAVID B. PRYOR, Executive Vice Chancellor for Academic Affairs in His Official Capacity; **BARRY D. BURGDORF**, Vice Chancellor and General Counsel in His Official Capacity; **WILLIAM POWERS, JR.**, President of the University of Texas at Austin in His Official Capacity; **BOARD OF REGENTS OF THE UNIVERSITY OF TEXAS SYSTEM; R. STEVEN HICKS**, as Member of the Board of Regents in His Official Capacity; **WILLIAM EUGENE POWELL**, as Member of the Board of Regents in His Official Capacity; **JAMES R. HUFFINES**, as Member of the Board of Regents in His Official Capacity; **JANIECE LONGORIA**, as Member of the Board of Regents in Her Official Capacity; **COLLEEN MCHUGH**, as Member of the Board of Regents in Her Official Capacity; **ROBERT L. STILLWELL**, as Member of the Board of Regents in His Official Capacity; **JAMES D. DANNENBAUM**, as Member of the Board of Regents in His Official Capacity; **PAUL FOSTER**, as Member of the Board of Regents in His Official Capacity; **PRINTICE L. GARY**, as Member of the Board of Regents in His Official Capacity; **KEDRA ISHOP**, Vice Provost and Director of Undergraduate Admissions in Her Official Capacity; **FRANCISCO G. CIGARROA, M.D.**, Interim Chancellor of the University of Texas System in His Official Capacity,

Defendants - Appellees

On Appeal from the United States District Court
for the Western District of Texas, Austin Division
1:08-cv-00263-SS, Sam Sparks, Judge Presiding

**BRIEF OF AMICUS CURIAE
THE ASIAN AMERICAN LEGAL FOUNDATION
IN SUPPORT OF REVERSAL**

Ashley C. Keller
2920 N. Commonwealth Avenue
Unit 4B
Chicago, IL 60657
TEL: (773) 248-1135

Gordon M. Fauth, Jr.
Asian American Legal Foundation
1801 Clement Avenue, Suite 101
Alameda, CA 94501
TEL: (510) 238-9610

Counsel for Amicus Curiae The Asian American Legal Foundation

SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

Fisher, et al. v. University of Texas at Austin, et al., No. 09-50822

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Amicus Curiae

1. The Asian American Legal Foundation
2. *Counsel for The Asian American Legal Foundation:*
 - a. Ashley C. Keller
 - b. Gordon M. Fauth, Jr.

/s/ Gordon M. Fauth, Jr. _____
Gordon M. Fauth, Jr.
Counsel for Amicus Curiae
The Asian American Legal Foundation

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the Asian American Legal Foundation submits the following corporate disclosure statement: The Asian American Legal Foundation is a not-for-profit organization under Section 501(c)(3) of the Internal Revenue Code. It has not issued any shares or debt securities to the public and has no parent companies, subsidiaries, or affiliates that have issued any shares or debt securities to the public.

TABLE OF CONTENTS

Supplemental Certificate of Interested Personsi

Corporate Disclosure Statement ii

Table of Contents iii

Table of Authoritiesiv

Interest of Amicus Curiae 1

Argument.....4

I. The District Court Erroneously Held that UT Austin’s Race-Based Admission Policy Is Consistent With the Equal Protection Clause4

 A. Equal Protection Clause Background.....4

 1. Diversity as a Compelling Governmental Interest.....5

 2. Narrow Tailoring.....5

 B. UT Austin’s Avowed Interest in Achieving Minority Enrollment That Mirrors Texas Demographics is Not Constitutionally Compelling6

 C. UT Austin Has Not Shown That its Policy is Narrowly Tailored to Achieve the Benefits of Diversity10

Conclusion15

Certificate of Compliance17

Certificate of Service18

TABLE OF AUTHORITIES

CASES

	Page
<i>Adarand Constructors, Inc. v. Pena</i> , 515 U.S. 200 (1995)	4
<i>Freeman v. Pitts</i> , 503 U.S. 467 (1992)	7, 8
<i>Grutter v. Bollinger</i> , 539 U.S. 306 (2003)	<i>passim</i>
<i>Johnson v. California</i> , 543 U.S. 499 (2005)	<i>passim</i>
<i>Palmore v. Sidoti</i> , 466 U.S. 429 (1984)	4
<i>Shaw v. Hunt</i> , 517 U.S. 899 (1996)	4
<i>Strauder v. West Virginia</i> , 100 U.S. 303 (1879)	4

CONSTITUTION, STATUTES, AND LEGISLATIVE MATERIALS

U.S. Const. amend. XIV, § 1	4
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MISCELLANEOUS

Proposal to Consider Race and Ethnicity in Admissions (June 25, 2004), <i>available at</i> http://www.utexas.edu/student/admissions/about/ admission_proposal.pdf	<i>passim</i>
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INTEREST OF AMICUS

The Asian American Legal Foundation, through its undersigned counsel, submits this brief in support of reversal pursuant to Federal Rule of Appellate Procedure 29. All parties have consented to the filing of this brief.

The Asian American Legal Foundation (“AALF”), based in San Francisco, California, was founded to protect and promote the civil rights of Asian Americans. Individual Americans of Asian origin have a particular interest in preventing the use of race in college admissions. They have historically been, and continue to be, denied access to public schools, colleges and universities due to overt racial and ethnic prejudice as well as ostensibly well-intentioned “diversity” programs.

Even though it is not widely known, Asian Americans were some of the earliest victims of “separate but equal” jurisprudence as it related to education. In *Wong Him v. Callahan*, 119 F. 381 (C.C.N.D. Cal. 1902), the district court denied a child of Chinese descent the right to attend his neighborhood school in San Francisco, reasoning that the “Chinese” school in Chinatown was “separate but equal.” 119 F. at 382. In *Gong Lum v. Rice*, 275 U.S. 78 (1927), the Supreme Court affirmed that the separate-but-equal doctrine articulated in *Plessy v. Ferguson*, 163 U.S. 537 (1896), applied to schools, finding that a nine-year-old

Chinese American girl in Mississippi could be denied entry to a “white” school because she was a member of the “yellow” race. *Id.* at 87.

Recognizing the Asian-American contribution to equal protection jurisprudence, in *Lee v. Johnson*, 404 U.S. 1215 (1971), Justice Douglas wrote that California’s “establishment of separate schools for children of Chinese ancestry . . . was the classic case of de jure segregation involved [and struck down] in *Brown v. Board of Education*, 347 U.S. 483 [1954]. . . .” *Id.* at 1216. “*Brown v. Board of Education* was not written for blacks alone. It rests on the Equal Protection Clause of the Fourteenth Amendment, one of the first beneficiaries of which were the Chinese people of San Francisco. *See Yick Wo v. Hopkins*, 118 U.S. 356.” *Lee*, 404 U.S. at 1216.

Despite the advances our society has made with respect to racial equality, discriminatory treatment of Asian Americans finds resurgence in racial balancing schemes such as that at issue here which, even if inadvertently, are used to exclude Asian Americans from schools. It is undisputed that the UT Austin admissions plan does not grant preferences to Asian American applicants, and thus discriminates against them with respect to applicants of the favored races. This discrimination exacts a heavy cost on individual Asian applicants for admission. UT Austin’s statistics reveal that among discretionary admits selected outside of the Top 10% Law, individuals of Asian ancestry achieve an average SAT score of

1322 compared to 1295 for similarly situated Whites, 1193 for similarly situated Hispanics, and 1118 for similarly situated African Americans. *Implementation and Results of the Texas Automatic Admissions Law* at 12–14, December 6, 2007, available at <http://www.utexas.edu/student/admissions/research/HB588-Report-VolumeI.pdf> (last visited Dec. 28, 2009). The statistics therefore confirm that UT Austin’s race-based policy requires individual Asians to work harder and achieve more than any other group, favored or disfavored, to earn the same letter of acceptance.

Amicus curiae AALF submits that the long and tragic history of discrimination against Asian Americans in this country alongside the ongoing discrimination faced by members of this historically oppressed group provide this Court with compelling reasons not to allow the equal protection rights of individuals to be eroded in the name of diversity or social engineering.

Accordingly, AALF and its constituents respectfully ask this Court to hear their arguments in favor of appellants.

ARGUMENT

I. The District Court Erroneously Held that UT Austin’s Race-Based Admission Policy Is Consistent With the Equal Protection Clause.

A. Equal Protection Clause Background

The Equal Protection Clause of the Fourteenth Amendment prohibits states from denying to “any person within [their] jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1. Ratified in the wake of Congressional Reconstruction, the principle function of the Equal Protection Clause is “to do away with all governmentally imposed discrimination based on race.” *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984). *See also Strauder v. West Virginia*, 100 U.S. 303, 307 (1879) (observing that the “spirit and meaning” of the Fourteenth Amendment require “that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal” before the law). In keeping with that core purpose, the Supreme Court has long held that “*all* racial classifications [imposed by government] . . . must be analyzed by a reviewing court under strict scrutiny.” *Johnson v. California*, 543 U.S. 499, 505 (2005) (emphasis, brackets, and ellipses in original) (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)). *See also Shaw v. Hunt*, 517 U.S. 899, 908 (1996). Aptly named, that exacting standard of judicial review requires the discriminating state to shoulder “the burden of proving that [its] racial classifications are narrowly tailored measures that further compelling

governmental interests.” *Johnson*, 543 U.S. at 505 (internal quotations and citation omitted).

1. Diversity as a Compelling Governmental Interest

In the context of higher education, the Supreme Court has recognized that a state university may have a compelling interest in enrolling a “critical mass of minority students.” *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003). This interest may be compelling, the Court explained, because a racially diverse student body yields “educational benefits that are . . . substantial,” *id.* at 330; among them, promoting “cross-racial understanding,” breaking down “racial stereotypes,” and enabling students to “better understand persons of different races.” *Id.* However, the link between racial diversity and educational benefits is essential to qualify a university’s interest as constitutionally compelling for mere pursuit of racial diversity “for its own sake”—disconnected from actual educational contributions—is “patently unconstitutional.” *Id.* (citations omitted).

2. Narrow Tailoring

The pursuit of education-enhancing diversity is necessary but is not by itself sufficient to justify race-based admissions policies. To pass muster under strict scrutiny, a state actor bears the heavy burden of proving that its discriminatory practices are “employed no more broadly than the [compelling interest] demands.” *Id.* at 342. In the educational setting, narrow tailoring demands “serious, good

faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.” *Id.* Where a race-neutral substitute for discrimination serves the interest in educational diversity “about as well” as a racial preference, the race-based approach is proscribed. *Id.* (citation omitted).

B. UT Austin’s Avowed Interest in Achieving Minority Enrollment That Mirrors Texas Demographics is Not Constitutionally Compelling

UT Austin does not employ racial preferences to obtain educational benefits that flow from recruiting a diverse student body. Instead, the university candidly admits that its post-*Grutter* “proposal to [reconsider] race in the admission process” reflects an “acknowledgment that significant differences between the racial and ethnic makeup of the University’s undergraduate population and the state’s population prevent the University from fully achieving its mission.” *Proposal to Consider Race and Ethnicity in Admissions* at 24, June 25, 2004, available at http://www.utexas.edu/student/admissions/about/admission_proposal.pdf (last visited Dec. 28, 2009) (hereinafter *2004 Proposal*). But that “mission” goes beyond the narrow justification for use of race recognized in *Grutter*. Resort to racial preferences to align the university’s demographics with the demographic distribution of Texas at large is plainly not designed to promote “cross-racial understanding,” break down “racial stereotypes,” or enable students to “better understand persons of different races.” *Grutter*, 539 U.S. at 330.

Instead, it seeks to achieve the “racial balance . . . for its own sake,” *Freeman v. Pitts*, 503 U.S. 467, 494 (1992), that is “patently unconstitutional,” *Grutter*, 539 U.S. at 330.

As if its unabashed acknowledgement were not enough, the manner in which UT Austin treats individual Asian applicants for admission vis-a-vis their Hispanic counterparts confirms that the university’s true objective bears little resemblance to the interest in diversity the majority in *Grutter* narrowly permitted. It is uncontested that UT Austin gives Hispanic applicants a preference because of their race but does not afford a similar plus to applicants of Asian ancestry; this despite the fact that “the gross number of Hispanic students attending UT exceeds the gross number of Asian-American students attending UT.” *Fisher v. University of Texas at Austin*, 645 F. Supp. 2d 587, 606 (W.D. Tex. 2009). The disparate treatment of Asian applicants is incompatible with UT Austin’s ostensible pursuit of a “critical mass” of minority students and the accompanying educational benefits. For if Hispanics at UT Austin are too few to promote “cross-racial understanding,” break down “racial stereotypes,” or enable students to “better understand persons of different races,” *Grutter*, 539 U.S. at 330, it follows that an even smaller population of Asian students cannot achieve these laudable aims either. Yet UT Austin steadfastly refuses to treat Asian applicants as preferred minorities.

That is because UT Austin has no serious interest in obtaining a critical mass of Hispanic or Asian students. True to its word, the university seeks instead to make the racial composition of its student body mirror the racial composition of the state of Texas. *2004 Proposal* at 24. That odious and unlawful objective fully explains UT Austin's decision to prefer Hispanics over similarly situated Asian applicants. In 2008, the university's student body was composed of roughly 20% Hispanics and 19% Asians while those groups respectively represented 36% and 3.4% of the Texas population. *Fisher*, 645 F. Supp. 2d at 606 and n. 10. Only if the university's aim is racial balancing are Hispanics underrepresented and Asians overrepresented. By any objective standard, each of those groups has achieved the "meaningful representation" necessary to produce substantial educational benefits. *Grutter*, 539 U.S. at 319. UT Austin's stated mission to pursue "racial balance for its own sake" does not comport with the Equal Protection Clause. *Freeman*, 503 U.S. at 494.

Rather than condemn UT Austin's naked attempt at unconstitutional racial balancing, the district court expressly sanctioned it, concluding that achieving diversity "necessarily involves the comparison of a minority group's representation at a university to its representation in society; otherwise, there would be no way to determine which minority groups qualify as 'underrepresented' and which ones do not." *Fisher*, 645 F. Supp. 2d at 606-07. Not so. Under *Grutter*, a group is

underrepresented if it lacks the “meaningful numbers,” *Grutter*, 539 U.S. at 316, or “critical mass,” *id.* at 329, necessary to produce educational benefits. The variance between the group’s student-body representation and its representation in society at large is entirely beside the point. In fact, by requiring that diversity be defined in terms of population statistics, the district court’s approach risks stripping states of their authority to implement race-based policies where such policies are authorized under *Grutter*. To see that this is so, suppose a minority group, such as Native Hawaiians, constitutes a mere .1% of the Texas population but amounts to .2% of UT Austin’s student body. On the district court’s view, Hawaiians would “necessarily” be overrepresented even though, with a mere 16 students out of an 8,000 member student body, their tiny campus footprint would likely leave them unable to produce the substantial educational benefits accompanying “critical mass.”

Even if this Court defers to UT Austin’s “educational judgment that . . . diversity is essential to its educational mission,” *id.* at 329, it cannot, under *Grutter*, defer to UT Austin’s misguided conception of diversity itself. Diversity is not a Rorschach test to be viewed in the manner of a university’s choosing. It is a discrete and well defined legal concept that allows a university to seek a racially diverse student body *only where necessary* to obtain substantial educational benefits for its own student body. UT Austin’s interest—confirmed through the

2004 Proposal and its treatment of Asian applicants—is not an education-enhancing aim. While the university may affix the label “diversity” to its objective, the evidence clearly shows that UT Austin is not pursuing that goal in “good faith.” *Id.* In reality, UT Austin is engaged in “patently unconstitutional” racial balancing. *Id.* at 330. The district court therefore erred in concluding that UT Austin’s racial preferences serve a compelling governmental interest.

C. UT Austin Has Not Shown That its Policy is Narrowly Tailored to Achieve the Benefits of Diversity

Even if UT Austin were pursuing an interest in constitutionally acceptable diversity, its use of race is not narrowly tailored to achieve that interest. If narrow tailoring means anything at all, it is that UT Austin may not discriminate on the basis of race where equally efficacious, race-neutral avenues leading to diversity are readily available. *Grutter*, 539 U.S. at 339. Under the race-neutral Top 10% Law, UT Austin successfully obtained a critical mass of minority students.¹ For instance, in 2002, without resorting to race-based discrimination, UT Austin enrolled a class that was 38% non-white, including a 17% combined African-American and Hispanic population. *2004 Proposal* at 30. By 2004, the number of

¹ The district court is correct that UT Austin need not exhaust “every conceivable race-neutral alternative” to its race-based admission policy. *Grutter*, 539 U.S. at 339. But surely it must consider the success of a race-neutral policy that has already been tried and remains in effect. Thus, to the extent the Top 10% Law has effectively produced a critical mass of minority students, it precludes UT Austin from layering racial preferences on top of extant race-neutral policy.

African-American and Hispanic students entering the freshman class had swelled to 21.4% (a 26% increase in only two years), and the total non-white population rose to nearly 43% of the incoming freshman class. (RE 66-67).

These substantial levels of minority enrollment, produced through a race-neutral policy, show that UT Austin achieved a “critical mass” of minority representation through operation of the Top 10% Law alone. Though the Supreme Court has not articulated the level of minority presence sufficient to constitute “critical mass,” it is notable that UT Austin’s minority population under the Top 10% Law exceeds that achieved by the University of Michigan Law School program challenged in *Grutter*. See *Grutter*, 539 U.S. at 336 (“[B]etween 1993 and 1998, the number of African-American, Latino, and Native-American students in each class at the Law School varied from 13.5 to 20.1 percent.”) But even if the evidence were in equipoise, UT Austin’s discriminatory practices would be unconstitutional. To survive strict scrutiny, UT Austin—not plaintiffs—must show that its race-based policies are narrowly tailored to achieve its compelling interest in diversity. *Johnson*, 543 U.S. at 505.

In this task the university fails miserably. To justify racial preferences in conjunction with the Top 10% Law, UT Austin offers evidence that, in 2002, 79% of classes had one or no African-American students while 30% had one or no Hispanics. *2004 Proposal* at 26. Never mind that UT Austin’s idea of “narrow

tailoring” lumps African-Americans and Hispanics into the same “underrepresented” category despite a 49-point gap in the very in-class-representation statistics the university peddled to the district court. The university’s statistics, relied on to indicate a want of “critical mass,” actually support the opposite conclusion.

As noted, “critical mass” is defined by reference to substantial educational benefits that flow from exposure to racially diverse students. *Grutter*, 539 U.S. at 329. UT Austin’s statistics confirm that exposure to African-American and Hispanic students is all but guaranteed in university classrooms. Holding the 2002 in-class figures constant, a typical UT Austin student, over the span of a four-course semester, has a 61% probability of enrolling in a class with at least two African-Americans and a 99.2% probability of attending a class with at least two Hispanics. During a typical student’s four-year academic career, the odds approach 100% that she will take at least one class with two or more Hispanics and at least one with two or more African-Americans.² If near certain in-class

² Out of N classes, the probability of taking at least one class with two or more students of a particular minority group is calculated by taking one minus the probability of a single class not having two or more members of the group raised to the Nth power. Thus, over a four-course semester, the probability of a typical UT Austin student taking at least one class with two or more African-Americans is expressed by $1-(.79^4)$, or 61.049%, while the probability of the same student taking at least one class with two or more Hispanics is expressed by $1-(.3^4)$ or 99.19%. Over the span of a typical student’s four-year academic career, the 4 in

exposure to two or more African-American and Hispanic students is insufficient to promote “cross-racial understanding,” break down “racial stereotypes,” and enable students to “better understand persons of different races,” *id.* at 329, UT Austin has not satisfied its burden to explain why that is so.

Moreover, while the benefits of diversity may be partially achieved in a classroom setting, the out-of-class means for students to interrelate are legion in a vibrant university environment. From dining halls to dormitories, fraternities to political organizations, students have ample extracurricular opportunities to interact and thereby combat benighted racial prejudices. UT Austin offers nary a word about whether its minority population under the Top 10% Law, considered in light of the full range of university experiences, is sufficiently numerous to achieve the benefits of diversity. It simply reports a set of classroom statistics and nothing more. That minimal effort does not satisfy UT Austin’s obligation to show that the race-neutral Top 10% Law fails to produce a diverse student body. *Johnson*, 543 U.S. at 505.

Indeed, UT Austin’s bald assertion that Hispanics are insufficiently represented is rendered all the more incredible in light of the university’s treatment of Asians. While 30% of classes in 2002 had less than two Hispanic students, 33% had less than two Asian Americans. *2004 Proposal* at 26. Yet as noted *supra*, it is

the previous equations is replaced with a 32, yielding results that round to 100% for both minority groups.

undisputed that UT Austin does not accord a preference to Asian applicants. Assuming UT Austin is actually pursuing the benefits of diversity recognized in *Grutter*, its program, in light of the statistics, can be explained in only one of two ways. Either UT Austin believes that Hispanics require greater in-class numbers than Asians to promote “cross-racial understanding,” break down “racial stereotypes,” and enable students to “better understand persons of different races,” *Grutter*, 539 U.S. at 329, or UT Austin has concluded that the in-class representation of *both* Asians *and* Hispanics adequately produces the substantial benefits of diversity. If UT Austin believes the former, it has mustered absolutely no evidence to support the strange hypothesis that more Hispanics than Asians are needed to achieve the “critical mass” necessary to obtain the purported educational benefits of race-based diversity. If the latter possibility is true, UT Austin’s decision to continue a race-based preference for Hispanic applicants is needless, anything but narrowly tailored, and thus unconstitutional. Either way, UT Austin has failed to demonstrate the validity of its racially discriminatory admission policy.

Instead of placing the burden on UT Austin to demonstrate that its level of minority representation under the Top 10% Law is inadequate, the district court, invoking *Grutter*, erroneously held that “courts should provide some level of deference to a university in determining whether additional diversity is needed.”

Fisher, 645 F. Supp. 2d at 611 (citing *Grutter*, 539 U.S. at 329). But *Grutter* says no such thing. The passage in *Grutter* to which the district court refers merely states that a university’s “educational judgment that [diversity] is essential to its educational mission is one to which [courts] defer.” *Grutter*, 539 U.S. at 329. Deference to the university’s decision that diversity is a necessary part of its educational mission is *not* tantamount to deference regarding the means and tactics the university deploys to achieve the allegedly needed diversity. Nothing in *Grutter*, or any other opinion for that matter, relieves UT Austin of its burden to show that its use of race is narrowly tailored. Nor does *Grutter* represent an open-ended invitation to spuriously declare that proportional racial representation results in educational benefits. The district court’s decision to the contrary is reversible error.

CONCLUSION

The judgment of the district court should be reversed and the case remanded with instructions to enter summary judgment for plaintiffs.

Respectfully Submitted,

/s/ Gordon M. Fauth, Jr.

Gordon M. Fauth, Jr.

Asian American Legal Foundation

1801 Clement Avenue, Suite 101

Alameda, CA 94501

TEL: (510) 238-9610

Ashley C. Keller

2920 N. Commonwealth Ave.

Unit 4B

Chicago, IL 60657

TEL: (773) 248-1135

Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 3,381 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32.2. The certificate was prepared in reliance on the word count option in the tools menu of the Microsoft Office Word 2003 word-processing software program that was used to prepare this brief.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in 14 point, Times New Roman.

/s/ Gordon M. Fauth, Jr.
Gordon M. Fauth, Jr.
Counsel for Amicus Curiae

December 28, 2009

CERTIFICATE OF SERVICE

I hereby certify, pursuant to Fed. R. App. P. 25(d)(2), that the foregoing brief was timely filed in accordance with Fed. R. App. P. 25(a)(2)(B) by sending 7 paper copies of the brief, along with an electronic version of the brief in PDF format, via overnight mail to the Office of the Clerk on December 28, 2009.

I further certify that, on December 28, 2009, 2 paper copies of the foregoing brief and an electronic version of the brief in PDF format were served on the following individuals via the method indicated:

Bert W. Rein
Thomas R. McCarthy
Claire J. Evans
Wiley Rein LLP
1776 K Street, NW
Washington, DC 20006

hand delivery

Paul M. Terrill
Joshua Katz
The Terrill Firm, P.C.
810 W. 10th Street
Austin, TX 78701

via overnight mail

James C. Ho, Solicitor General
Office of the Attorney General
300 W. 15th Street
Austin, TX 78701

via overnight mail

Joseph D. Hughes, Assistant Solicitor General
Office of the Attorney General
300 W. 15th Street
Austin, TX 78701

via overnight mail

/s/ Gordon M. Fauth, Jr.
Gordon M. Fauth, Jr.
Counsel for Amicus Curiae