

**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 *AMICI CURIAE* OF THE BRENNAN CENTER
FOR JUSTICE AT NYU SCHOOL OF LAW AND
THE LEAGUE OF WOMEN VOTERS OF THE
UNITED STATES IN SUPPORT OF RESPONDENTS**

—◆—
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QUESTION PRESENTED

Petitioner asked the Court to decide the following question:

“Whether this Court’s decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Grutter v. Bollinger*, 539 U.S. 306 (2003), permit the University of Texas at Austin’s use of race in undergraduate admissions decisions.”

Pet. Br. i.

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INTEREST OF THE *AMICI CURIAE*¹

The Brennan Center for Justice at New York University School of Law is a non-partisan public policy and law institute that seeks to improve the fundamental systems of democracy and justice, including by eradicating racial disparities in political participation and access to justice.² The Brennan Center combines scholarship, legislative and legal advocacy, and communications to win meaningful, measurable change in the public sector. It seeks to bring the ideal of representative self-government closer to reality and strives to ensure that our Nation's institutions reflect the diverse voices and interests that make for a rich and energetic democracy. It also seeks to secure the Nation's promise of equal justice for all by reducing the gap between that promise and the day-to-day reality.³

The League of Women Voters of the United States is a nonpartisan, community-based organization that encourages the informed and active participation of citizens in government and influences

¹ The parties have filed letters with the Court consenting to all *amicus* briefs. No counsel for a party has authored this brief in whole or in part and no person or entity, other than *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

² This brief does not purport to represent the opinions of N.Y.U. School of Law.

³

public policy through education and advocacy. Founded in 1920 as an outgrowth of the struggle to win voting rights for women, the League is organized in 800 communities and in every state, with more than 150,000 members and supporters nationwide. One of the League's primary goals is to promote an open governmental system that is representative, accountable, and responsive, and that assures opportunities for citizen participation in government decision-making. To further this goal, the League has fought since its inception to ensure that every citizen can fully and productively participate in American society, from the school room to the ballot box.

Amici support the appropriate consideration of race, ethnicity, and other factors as necessary means to realizing our Nation's "compelling interest" in "obtaining the educational benefits that flow from a diverse student body" at the Nation's colleges and universities. *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003); accord, *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 722 (2007). They do so in recognition that "[t]he enduring hope is that race should not matter; the reality is that too often it does." *Parents Involved*, 551 U.S. at 787 (Kennedy, J., concurring in part and concurring in the judgment). *Amici* agree that state educational institutions have "[a] compelling interest . . . in avoiding racial isolation," and "achiev[ing] a diverse student population." *Id.* at 797-98.

Amici have an interest in this Court's approval of the use of *Grutter*-style programs. Laws like the Top

Ten Percent Law serve valid purposes, such as ameliorating school financing disparities, and may have a beneficial impact on increasing minority enrollment. But these tools lack the precision of a holistic review of applicant files that includes race as but one factor, like that at issue, which accommodates a desire for excellence, including excellence achieved through diversity, by enabling admissions officers to evaluate the content of an applicant's *character* in part by what the applicant *may have experienced* by reason of the color of their skin.⁴



SUMMARY OF ARGUMENT

Nearly sixty years after *Brown v. Board of Education*, 347 U.S. 483 (1954), racial segregation and inequality are still with us. As a result, “[t]his Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all[.]” *Parents Involved*, 551 U.S. at 797 (Kennedy, J.). In the field of education and school admissions, the Court has endorsed both race-conscious policies that are race-neutral on their face and “if necessary, a more nuanced, individual evaluation of school needs and student

⁴ Cf. The Rev. Martin Luther King, Jr., “I Have a Dream,” available at <http://www.americanrhetoric.com/speeches/mlkihavedream.htm> (last visited Aug. 7, 2012). See also William G. Bowen & Derek Bok, *The Shape of the River* (1998) (explaining the distinct benefits of holistic race-conscious admissions policies).

characteristics that might include race as a component,” *id.* at 790, to the end of ensuring classroom diversity that effectively “prepar[es] students for work and citizenship” and provides an open and diverse “training ground for . . . our Nation’s leaders.” *Grutter*, 539 U.S. at 331-32. These goals, the Court has held, properly serve the “compelling state interests” required by the Equal Protection Clause of the Fourteenth Amendment. *Id.*

Petitioner nevertheless challenges the central precept of what constitutes a “compelling state interest,” both with respect to diversity in the general student population and at the classroom level. *See* Pet. Br. at 26-30. Because this challenge ultimately rests on overruling *Grutter* or substantially reformulating it, it is appropriate to revisit the data that demonstrate the benefits to all races of a holistic review of university admissions files that enables admissions officers to take an applicant’s race into account as one factor among many when shaping a multifaceted and diverse group of admittees.

A long history of social science research rebuts the efforts by Petitioner and her *amici* to downgrade Texas’s goal of achieving meaningful classroom-level diversity. *Infra* pp. 11-29. Findings from numerous rigorous studies make clear that affirmative action as practiced by the University of Texas (“UT”) and other selective universities (a) benefits all races and (b) does so with respect to skills central to our democracy by (i) enhancing leadership skills and increasing social

and political engagement and (ii) promoting tolerance and collaboration. *Id.*

Petitioner’s argument, that by reason of the impact of Texas’s Top Ten Percent Law, use of a *Grutter*-style review for the 15 percent of remaining entering class slots is not “narrowly tailored,” must also be rejected because it runs afoul of *Grutter*’s core reasoning, and is based itself on the very error it accuses UT of making – reducing individuals to racial and ethnic labels. It fails to appreciate the obvious purpose of UT’s use of a *Grutter*-compliant program for the 15 percent of the slots available after the Top Ten Percent Law does its work, namely, to identify those individuals whose character, shaped by personal life experience – including their race, among other factors – makes them the best-suited to fill out the class.

To accept Petitioner’s and her *amici*’s arguments that this is not “narrow tailoring” would not only undermine *Grutter*’s central holding and the reasoning of Justice Kennedy’s opinion concurring in the judgment in *Parents Involved*, but defy the logic underpinning this Court’s analysis elsewhere. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 796 (1991) (on “narrow tailoring”); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 511 (1996) (“greater powers include lesser ones”). Neither UT’s tracking of the racial makeup of its applicant pool and entering classes nor the lack of a “hard stop” to its program

are grounds for reversal. *See Grutter*, 539 U.S. at 336, 343; *Parents Involved*, 551 U.S. at 790 (Kennedy, J.).

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ARGUMENT

I. THE COURT HAS LONG HELD THAT INCREASING RACIAL AND ETHNIC DIVERSITY IN EDUCATIONAL SETTINGS IS CRITICAL TO OUR NATION'S DEMOCRATIC INSTITUTIONS AND IS THEREFORE A COMPELLING STATE INTEREST

A. Racial and Ethnic Diversity in Education, Particularly at Institutions of Higher Learning, is Necessary to Promote Democratic Values in a Society in Which Racial Disparities and Segregation Still Exist

Brown v. Board of Education, 347 U.S. 483 (1954), and the cases that followed it, held the promise of a democracy in which all have an equal voice and an equal chance regardless of race, in line with the post-Civil War Amendments' guarantee of full citizenship for all. U.S. Const. amends. XIII, XIV and XV. To realize racial equality and foster a democracy in which race does not inhibit opportunity, it is not enough to legislate equality and invoke ideals of racial harmony. Such things do not occur by fiat; they require learned behaviors and practice.

“This Nation has a moral and ethical obligation to fulfill its historic commitment to creating an

integrated society that ensures equal opportunity for all[.]” *Parents Involved*, 551 U.S. at 797 (Kennedy, J.). Yet racial segregation and inequality are unfortunately still with us and race remains a critical variable in the opportunities afforded to our citizens. *See Grutter*, 539 U.S. at 333 (“Just as growing up in a particular region or having particular professional experiences is likely to affect an individual’s views, so too is one’s own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters.”).⁵

A variety of data show that African Americans and Hispanics are less likely than white Americans to have graduated from institutions of higher education,⁶ are disproportionately imprisoned,⁷ hold a

⁵ *See also* William H. Frey, *Census Data: Blacks and Hispanics Take Different Segregation Paths*, THE BROOKINGS INSTITUTION (Dec. 16, 2010), *available at* www.brookings.edu/research/opinions/2010/12/16-census-frey (last visited Aug. 7, 2012) (noting that urban segregation is still largely prevalent today).

⁶ *See* Labor Force Characteristics by Race and Ethnicity, 2010, U.S. Department of Labor, U.S. Bureau of Labor Statistics, at 1 (2011), *available at* <http://www.bls.gov/cps/cpsrace2010.pdf> (last visited Aug. 7, 2012) (“57 percent of Asians in the labor force ha[ve] a bachelor’s degree or higher, compared with 35 percent of Whites, 24 percent of Blacks, and 16 percent of Hispanics.”).

⁷ *See* Quick Facts About the Bureau of Prisons (June 2012), *available at* <http://www.bop.gov/news/quick.jsp#1> (last visited Aug. 7, 2012) (finding that African Americans make up 37.4% of the federal prison population and Hispanics make up 34.7%); United States Demographics Profile, Index Mundi (2012), *available at* http://www.indexmundi.com/united_states/demographics_

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disproportionately small percentage of political leadership positions,⁸ have poorer health outcomes,⁹ and have lower incomes.¹⁰ Further, race remains a central feature of our democracy, as reflected in the continuing role it plays in elections. *See, e.g., League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006); *Thornburg v. Gingles*, 478 U.S. 30 (1986); *see*

profile.html (last visited Aug. 7, 2012) (showing that whites make up 79.96% of the U.S. population).

⁸ *See, e.g.,* African, Hispanic (Latino), and Asian American members of Congress, *available at* <http://www.ethnicmajority.com/congress.htm> (last visited Aug. 7, 2012) (showing only two Hispanic Senators and no African American Senators).

⁹ *See CDC Health Disparities and Inequalities Report – United States, 2011*, Morbidity and Mortality Weekly Report, at 47-109 (Jan. 14, 2011), *available at* <http://www.cdc.gov/mmwr/pdf/other/su6001.pdf> (last visited Aug. 7, 2012) (stating that various racial minorities had higher rates than whites, often substantially, of strokes, preterm infant births, obesity, asthma, and hypertension-related complications such as diabetes and kidney disease).

¹⁰ *See* Money Income of Households – Percent Distribution by Income, Level, Race, and Hispanic Origin, in Constant (2009) Dollars, Table 690, *available at* <http://www.census.gov/compendia/statab/2012/tables/12s0691.pdf> (last visited Aug. 7, 2012) (showing that in 2009, the median income was \$51,861 for white households, \$32,584 for black households and \$38,039 for Hispanic households, and black and Hispanic households were far more likely to live with an annual income of \$15,000 or less); Labor Force Characteristics by Race and Ethnicity, *supra* note 6, at 3 (“Hispanics and Blacks have considerably lower earnings than Asians and Whites. In 2010, the median usual weekly earnings of full-time wage and salary workers were \$535 for Hispanics and \$611 for Blacks, compared with \$765 for Whites and \$855 for Asians.”).

also Bernard Grofman, Lisa Handley & David Lublin, *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. Rev. 1383, 1400 (2001) (voting patterns and race-based preferences in candidate selection). Notwithstanding the election of an African American to the highest office in the land, race remains a significant issue in electoral politics.¹¹

Our educational institutions play a crucial role in helping to narrow these racial disparities and in providing a model for the diverse society our democracy aspires to be. Thus, nine years ago, this Court upheld the use of appropriate race-conscious tools at the level of higher education, in part to ensure “the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.” *Grutter*, 539 U.S. at 332; see *Parents Involved*, 551 U.S. at 787 (Kennedy, J.); *accord*, 551 U.S. at 722-23. It acknowledged that these mechanisms of social change, including use of “race as a component,” may

¹¹ See, e.g., Seth Stephens-Davidowitz, *How Racist Are We? Ask Google*, N.Y. Times (June 9, 2012), available at <http://campaignstops.blogs.nytimes.com/2012/06/09/how-racist-are-we-ask-google/> (last visited Aug. 7, 2012) (analyzing Google search terms to find that President Obama’s race played a role in the 2008 election and predicting that it will play an even more significant role in the 2012 election); Spencer Piston, *How Explicit Racial Prejudice Hurt Obama in the 2008 Election*, 32 Pol. Behavior 431 (2010) (finding that negative stereotypes about African Americans significantly eroded white support for President Obama).

be essential to assure the kind of diversity that “promotes learning outcomes, and ‘better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.’” *Grutter*, 539 U.S. at 330 (citing William G. Bowen and Derek Bok, *The Shape of the River* (1998)).

These holdings accord with notions expressed by our leaders in every era. As Thomas Jefferson wrote more than two centuries ago, educating “the whole mass of the people” is the “only sure reliance for the preservation of our liberty.”¹² It is against the background of this centuries-long recognition of the importance of education to the functioning of our democratic institutions that this Court has held that “achiev[ing] a diverse student body population” is a “compelling interest” and “[r]ace may be one component of that diversity, but other demographic factors, plus special talents and needs, should also be considered.” *Parents Involved*, 551 U.S. at 798 (Kennedy, J.). Thus, when applicants to colleges and universities are “considered for a whole range of their talents and

¹² 6 The Writings of Thomas Jefferson 391-92 (Memorial ed. 1903); see also Abraham Lincoln, First Political Announcement (1832) (“Upon the subject of education . . . I view it as the most important subject which we as a people may be engaged in.”); Letter from James Madison to W.T. Barry (Aug. 4, 1822), in 9 The Writings of James Madison 103 (Gaillard Hunt ed., 1910) (“Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.”).

school needs with race as just one consideration,” the state’s compelling interests are validly achieved. *Id.* at 793.

B. Social Science Research Demonstrates that Increased Racial and Ethnic Diversity in Higher Education Improves Our System of Democracy

A substantial record of social science research demonstrates that diversity in higher education benefits students of all races and promotes values essential to a strong and vibrant democracy. Diversity encourages the cross-racial interaction that is necessary to enhance students’ ability and willingness to engage more collaboratively in civic activities. Diversity also promotes leadership skills and encourages civic engagement among students of all races and ethnicities, encouraging tolerance. It opens students to different perspectives that affect their view of the world and decisions they make as citizens in this Nation.

A key aspect of Petitioner’s case rests on the notion that, contrary to *Grutter*, having a “critical mass” of minority students in the student body (and, relatedly, in the classroom) is not a compelling government interest. Implicit in the arguments of Petitioner and her *amici* is a focus on the “costs” of any efforts to achieve such goals through race-conscious means, including the stigma allegedly associated with race-conscious admissions programs and the discord

these programs can at times generate.¹³ But this Court, in endorsing Justice Powell's guiding opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), has thoughtfully taken account of these points in its *Grutter* decision and *stare decisis* forecloses Petitioner's claim. Further, the overwhelming record of social science research documenting the great benefits of diversity in higher education, for all races and for our democratic institutions, counsels strongly against undoing the settled law on this topic.

Social science research has shown, at the time when *Grutter* was decided and today, the positive effects racially and ethnically diverse student populations have on students of all races, including enhanced cognitive abilities, self-confidence, leadership skills, social activism and engagement, tolerance, and the ability to work collaboratively in a diverse environment.

The seminal work identifying the effects of holistic admissions programs in which race may be considered as one factor is former Princeton and Harvard University Presidents William G. Bowen's and Derek Bok's book *The Shape of the River* (1998).¹⁴ Bowen and Bok analyzed the effects of racial diversity in

¹³ See, e.g., Pet. Br. at 25, 30, 33, 36, 43-44; see also *infra* notes 17-24 (discussing the particularized positions of *amici* briefs supporting Petitioner).

¹⁴ For the most recent edition, see William G. Bowen & Derek Bok, *The Shape of the River*, lv (2d prtg. 2000).

higher education, primarily as it applies to white and black students. It analyzed data from an immense “College and Beyond” (hereinafter “C&B”) database. The C&B database at the time contained records from more than 80,000 undergraduates at 28 “selective colleges and universities” collected in the fall of 1951, 1976 and 1989. *Id.* at lv-lvi.¹⁵

Bowen and Bok found that race-conscious admissions policies were essential to creating and maintaining racially diverse student bodies at selective universities. *Id.* at 50-51, 234-36. They explained that “race-neutral” methods, such as Texas’s Top Ten Percent Law, would not lead to as genuinely diverse and high quality a student population as a race-conscious policy because, among other reasons, black students are only half as likely as white students to end up in the top ten percent of their high school class. As a result, beyond possibly decreasing the pool of eligible black applicants, this type of policy “could well have the effect of lowering minority graduation rates from college and diminishing the pool of students who can compete effectively for positions of leadership in business, government, and the professions.” *Id.* at 273-74.

¹⁵ The C&B database included a variety of information about students, such as their race, gender, test scores, high school academic performance, and family background. *Id.* at lvi. It included post-graduation survey data, including information about students’ occupations, professional school enrollments, income, involvement in civic activities and familial status. *Id.*

Bowen and Bok found numerous benefits that accrued to both black and white students at racially and ethnically diverse universities. For example, students who attended schools with racially diverse student populations showed enhanced tolerance and ability to work with members of other races, skills essential for success in an increasingly diverse world. *Id.* at 225-28. Bowen and Bok found students of all races at selective schools, and particularly black students, were more engaged in civic activities, took on more leadership roles, and were more politically active than those at less selective schools. *Id.* at 158-73. All of these benefits from diversity in higher education are critical to the success of our Nation's democratic institutions.¹⁶

As discussed *infra* pp. 17-29, an unbroken line of research over the past 15 years has built on and bolstered these findings. Collectively, this evidence shows racial and ethnic diversity in student bodies at

¹⁶ The authors also identified clear evidence that black students fared better at selective colleges than at other schools in terms of graduation rates, professional school enrollment and post-graduation earnings, even if their grades in college were lower than their high school grades and test scores would have otherwise predicted, and that these students experienced no signs of self-perceived inferiority or demoralization from competition. *Id.* at 88-92, 256-68. Retrospectively, black students at selective colleges reported greater satisfaction with their undergraduate experience than black students at less-selective colleges and white students at more diverse schools reported greater satisfaction with their undergraduate experience than white students at less-diverse schools. *Id.* at 194, 240.

institutions of higher learning benefit students of all races and promote values critical to the functioning of our government and, generally, a collaborative and law-abiding civil society.

Petitioner's *amici* nevertheless argue that race-conscious admissions policies that result in racially and ethnically diverse student bodies in higher education harm minority and non-minority students and negatively affect campus race relations.¹⁷ They allege that these policies dis-incentivize minority students by leading them to expect future preferences, result in academic underperformance by minorities which causes "disidentification with academic excellence,"¹⁸ and discourage minority students from pursuing prestigious and rewarding careers.¹⁹ They claim policies that consider race as one factor in assembling a

¹⁷ See, e.g., Brief of Abigail Thernstrom et al. as Amici Curiae in Support of Petitioners [hereinafter "Am. Brief of Thernstrom et al."], at 10 ("Whether in the former Yugoslavia . . . or the Far East, contact between people of different racial and ethnic groups is more likely than not to lead to tension, ethnic conflict, and a tendency to self-segregate").

¹⁸ See *id.* at 24-32.

¹⁹ See Amicus Brief of Gail Heriot et al. in Support of the Petitioner [hereinafter "Am. Brief of Heriot et al."], at 4-25 (contending that "African-American students attending law schools failed or dropped out at much higher rates than white students" and stating that "[s]ince many of these students who left law school would likely have performed better at a less competitive law school, they appear to have been, in a very real sense, victims of affirmative action").

diverse class harm other minority groups such as Asian Americans.²⁰

Ultimately, the arguments set forth by Petitioner's *amici* hinge on the contention that the substantial body of social science data identifying the positive benefits of racial and ethnic diversity in higher education for students of all races and ethnicities is fundamentally flawed or misinterpreted.²¹ Petitioner's *amici* seek to discredit the conclusions of Bowen and Bok and an array of other social scientists by misconstruing the data,²² by focusing on the data's less telling trends,²³ and by overlooking their obvious and powerful conclusions.²⁴ Petitioner's *amici* essentially seek to undermine *Grutter's* "compelling interest" holding, without genuine support, and it is

²⁰ See, e.g., Brief for the Asian American Legal Foundation and The Judicial Education Project as Amici Curiae in Support of Petitioner, at 6-13; Brief Amicus Curiae of The Louis D. Brandeis Center for Human Rights Under Law et al. in Support of Petitioner, at 5-20.

²¹ See Am. Brief of Heriot et al., *supra* note 19, at 25-34; Brief Amicus Curiae of Pacific Legal Foundation et al. in Support of Petitioner, at 10-13; Brief Amici Curiae for Richard Sander and Stuart Taylor, Jr. in Support of Neither Party [hereinafter "Am. Brief of Sander and Taylor"], at 2-11.

²² See, e.g., Am. Brief of Heriot et al., *supra* note 19, at 25-29.

²³ See, e.g., Am. Brief of Thernstrom et al., *supra* note 17, at 25; Am. Brief of Heriot et al., *supra* note 19, at 8.

²⁴ See, e.g., Brief Amicus Curiae of Pacific Legal Foundation et al. in Support of Petitioner, at 22; Am. Brief of Sander and Taylor, *supra* note 21, at 19 n.53.

imperative that this Court appreciate the significant and positive impact that racial and ethnic diversity in higher education have on the effective functioning of society and our Nation's democratic institutions.

1. Racial and Ethnic Diversity Provides Significant Educational Benefits to All

A broad range of research continues to demonstrate that, by exposing students to divergent perspectives and experiences in the classroom, institutions of higher education enable students of all backgrounds to interact, perhaps for the first time, with racial and ethnic groups different from their own. These experiences enhance their academic success and critical thinking skills, general knowledge, intellectual motivation and self-confidence. The data directly show a convincing link between diversity in higher education and a more educated and informed citizenry, the foundation for an effective and functioning democracy.

For example, social scientists at the University of Michigan found a statistically significant and positive relationship, among students of all races, between cross-racial experiences in the classroom and certain critical learning outcomes, such as active thinking, academic skills, and intellectual engagement and motivation. Patricia Gurin et al., *Diversity and Higher Education: Theory and Impact on Educational Outcomes*, 72 Harv. Educ. R. 330 (2002). The researchers examined two extensive data sets, one local and one

national, that included surveys from nearly 13,000 undergraduate students as freshmen and again four years later. They identified widespread patterns of educational benefits at both a single university and across varying institutional contexts, concluding that “the actual experiences students have with [racial and ethnic] diversity *consistently and meaningfully* affect important learning and democracy outcomes of a college education.”²⁵ *Id.* at 358 (emphasis added).

More recently, social scientists at the University of California, Los Angeles, found that students who engaged in high levels of cross-racial interaction in college reported “significantly larger gains” than their counter-parts in their critical-thinking skills, problem solving skills, general knowledge, and intellectual and social self-confidence. Mitchell J. Chang et al., *The Educational Benefits of Sustaining Cross-Racial Interaction Among Undergraduates*, 77 *J. Higher Educ.* 430 (2006). This study analyzed data recorded over a four year period from nearly 20,000 students of varying racial and ethnic backgrounds at 227 institutions.

There are a variety of explanations for the correlation between racial and ethnic diversity in higher

²⁵ These benefits include an increase in students’ drive to achieve, intellectual self-confidence, general knowledge, ability to think critically and to employ problem-solving skills, self-ratings of academic ability and listening ability, and beliefs in influencing the political structure and helping others in the community. *Id.* at 347.

education and enhanced cognitive and academic abilities. Gurin et al. posit that personal and social identity is formed during late adolescence and early adulthood, and “[h]igher education is especially influential when its social milieu is different from students’ home and community background and when it is diverse and complex enough to encourage intellectual experimentation and recognition of varied future possibilities.” 72 Harv. Educ. R. at 335. Cross-racial interactions in institutions of higher education are particularly significant because many students enter college having come from a segregated educational background. As Sylvia Hurtado has explained:

The theory of how diversity works in education . . . suggests that most of us are cognitively inclined to rely on familiar ways of thinking that include habits, routine, and even stereotypes that dominate our world view. . . . However, when encountering unfamiliar and novel situations, people, and experiences, it becomes difficult to rely on these familiar ways of thinking and acting. . . . To learn or grow cognitively, individuals need to recognize cognitive conflicts or contradictions, situations that . . . lead to a state of uncertainty, instability, and possibly anxiety. Thus, with the right amount of support and challenge, these moments of instability can lead to many dimensions of growth.

Sylvia Hurtado, *Linking Diversity with the Educational and Civic Missions of Higher Education*, 30 R.

Higher Educ. 185, 189-90 (2007).²⁶ These studies, as well as many others,²⁷ underscore the continued importance of racially and ethnically diverse student bodies at institutions of higher learning.

²⁶ See also Scott E. Page, *The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools and Societies* (2007), discussed *infra* at pp. 28-29 (applying mathematical modeling to suggest that exposure to diverse perspectives enhances cognitive thinking and problem-solving skills).

²⁷ See, e.g., Chad Loes, Ernest Pascarella & Paul Umbach, *Effects of Diversity Experiences on Critical Thinking Skills: Who Benefits*, 83 J. Higher Educ. 1 (2012) (finding that students with low levels of academic preparation prior to college benefitted from interacting with students of another race in college); Sylvia Hurtado, *Linking Diversity with the Educational and Civic Missions of Higher Education*, 30 R. Higher Educ. 185 (2007) [hereinafter Hurtado, *Educational and Civic Missions*] (discussing the extensive social science research that has found educational benefits associated with racial and ethnic diversity in higher education); Shouping Hu & George D. Kuh, *Diversity Experiences and College Student Learning and Personal Development*, 44 J. Coll. Student Dev. 320, 327 (2003) (finding, based on a study of over 50,000 students, that interactional diversity on campus provided “substantial, uniformly positive effects” on general education, personal development, vocational preparation, science and technology, and intellectual development); Sylvia Hurtado, *Linking Diversity and Educational Purpose: How Diversity Affects the Classroom Environment and Student Development*, in *Diversity Challenged: Evidence on the Impact of Affirmative Action* (Gary Orfield ed., 2001) [hereinafter Hurtado, *Educational Purpose*] (finding a “substantial positive” correlation between diversity in higher education and academic abilities including critical thinking and problem solving skills).

2. Racial and Ethnic Diversity Promotes Leadership Skills and Increases Civic and Political Engagement

This Court has consistently recognized that diversity in an academic setting instills civic values in students and is necessary for us to advance as a vibrant democratic society.²⁸ Social science research has found a significant correlation between a student's exposure to diversity in higher education and the student's interest and effectiveness in taking on leadership roles in society and becoming more socially and politically active.

Bowen and Bok found students of all races in a diverse university environment will be more likely to participate in civic contributions and volunteer activities, and perform as leaders in those areas. *See The Shape of the River* at 156-62.²⁹ Hurtado's 2001

²⁸ *See Grutter*, 539 U.S. at 331 (“education . . . is the very foundation of good citizenship” and “the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity”) (citation omitted); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (Powell, J.) (“The atmosphere of ‘speculation, experiment and creation’ – so essential to the quality of higher education – is widely believed to be promoted by a diverse student body.”).

²⁹ They found that African American students at predominantly white universities were particularly likely to give back to their communities after graduation and engage in leadership roles: “[M]inority graduates with advanced degrees are the backbone of the emergent black and Hispanic middle class. Their presence has brought greater diversity to the emergency clinics

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analysis reaffirmed their findings and showed that racially and ethnically diverse student and faculty populations in a college setting strongly influence the development of civic leadership skills in students of all races and ethnicities. Hurtado, *Educational Purpose* at 196-98 (analyzing data from 4,253 students and 16,000 faculty members at 309 universities over a four year period).

Many researchers have also found a positive correlation between diverse student populations in institutions of higher learning and greater student interest, by students of all races and ethnicities, in giving back to their communities and in becoming socially and politically active.³⁰ In fact, researchers

and surgery rooms of leading hospitals, to government offices and law firms, to corporate hierarchies, and to the practice of entrepreneurship. They have also gained the training that will allow them to offer medical services to traditionally underserved communities and give political leadership to struggling urban constituencies.” *Id.* at 116. *Amici* for Petitioner argue that minorities who attend schools with race-conscious admissions policies tend to “abandon” their initial aspirations for certain science-related careers as a result of these policies. *See* Am. Brief of Sander and Taylor, *supra* note 21, at 5. They fail to appreciate that many of these students may simply change their aspirations, without lowering them, to pursue different and more leadership-oriented roles in society.

³⁰ *See* Ernest T. Pascarella et al., *Some Complexities in the Effects of Diversity Experiences on Orientation Toward Social/Political Activism and Political Views in the First Year of College*, 83 *J. Higher Educ.* 467 (2012); Hurtado, *Educational and Civic Missions*, *supra* note 27, at 191-92; Hurtado, *Educational Purpose*, *supra* note 27, at 197. These studies powerfully rebut Petitioner’s *amici*’s assertions regarding the so-called “low effort

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recently found that this increase in sense of civic duty and eagerness to improve society began as early as the first year in college and remained well after graduation. See Ernest T. Pascarella et al., *Some Complexities in the Effects of Diversity Experiences on Orientation Toward Social/Political Activism and Political Views in the First Year of College*, 83 J. Higher Educ. 467, 488 (2012) (analyzing data from 19 institutions and nearly 3,000 students over four years).

It is thus no surprise that, when researchers set out to determine the long-term effects of diversity experiences on a college student, they found a positive correlation between racial and cultural diversity in college and volunteer work thirteen years after graduation. Nicholas A. Bowman et al., *The Long-Term Effects of College Diversity Experiences: Well-Being and Social Concerns 13 Years After Graduation*, 52 J. Coll. Student Dev. 729, 735 (2011) (analyzing data from 416 respondents who completed three waves of surveys over a 13 year period).³¹

syndrome” and the prediction that minority students who benefit from race-conscious admissions policies will be less likely to “work hard” in the future. Am. Brief of Thernstrom et al., *supra* note 17, at 26-32.

³¹ See also Alexander W. Astin, *Diversity and Multiculturalism on the Campus*, 25 Change 44 (1993) (finding that diversity in higher education promotes specific values such as dedication to improving the environment). It is also important to note the effect of higher education on increased voting participation. See, e.g., Barry C. Burden, *The Dynamic Effects of Education on Voter*

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Scholars have identified a variety of reasons why interacting with people of different races during college or graduate school may spur a student to become more involved in the social and political dimensions of a democratic society. One is that experiences with racially and ethnically diverse groups give rise to the “orientations that students will need to be citizens and leaders in the postcollege world: perspective-taking, mutuality and reciprocity, acceptance of conflict as a normal part of life, capacity to perceive differences and commonalities both within and between social groups, interest in the wider social world, and citizen participation.”³² Others suggest that racial, ethnic, and other forms of diversity in a college setting expand a person’s awareness of different perspectives and knowledge of people in marginalized groups, and this personal orientation may increase

Turnout, 28 *Electoral Stud.* 540 (2009); D. Sunshine Hillygus, *The Missing Link: Exploring the Relationship Between Higher Education and Political Engagement*, 27 *Pol. Behav.* 25 (2005). Greater access to higher education for minorities should therefore lead to increased voting participation by these groups.

³² Patricia Gurin et al., *Diversity and Higher Education: Theory and Impact on Educational Outcomes*, 72 *Harv. Educ. R.* 330, 341 (2002). See also Nicholas A. Bowman et al., *The Long-Term Effects of College Diversity Experiences: Well-Being and Social Concerns 13 Years After Graduation*, 52 *J. Coll. Student Dev.* 729, 736 (2011) (“[These] behavioral and attitudinal outcomes are quite consistent with some of the primary intended impacts of college diversity: to increase students’ recognition of societal inequities and their demonstrated commitment to improving society.”).

the student's motivation to engage in social and political activism.³³

Regardless of the reason – or, more likely, reasons – behind the outcomes, the evidence establishes that racial and ethnic diversity in higher education promotes the skills and motivation necessary for students to become active, productive, and engaged members of and leaders in our democratic society.

3. Racial and Ethnic Diversity in Higher Education Increases Tolerance and Leads to a More Collaborative Civil Society

“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.” *Grutter*, 539 U.S. at 332. Lessons of tolerance and collaboration learned in diverse academic settings underscore our shared concerns and interests that keep our democracy healthy and ameliorate the divisions that hinder realization of the goal of “E Pluribus Unum.”

Nearly a decade ago, this Court acknowledged that “the skills needed in today’s increasingly global marketplace can only be developed through exposure

³³ See Loes, Pascarella & Umbach, *supra* note 27; Linda J. Sax, *Gender matters: The variable effects of gender on the student experience*, 14 *About Campus* 2, 8 (2009).

to widely diverse people, cultures, ideas, and viewpoints.”³⁴ Since then, the Nation’s cultural and racial composition has grown even more diverse.³⁵ A growing body of research confirms that student body diversity along a variety of variables, including race and ethnicity, in higher education promotes values – such as cross-racial tolerance, awareness and understanding – necessary for achieving a collaborative civil society composed of many racial and ethnic groups.³⁶

It is now well-established that exposing undergraduate and graduate students to others in the student body from diverse racial and ethnic backgrounds increases students’ knowledge of and ability to accept peers who are of different races and cultures.³⁷ Although merely placing students in an

³⁴ *Grutter*, 539 U.S. at 330.

³⁵ See Laura B. Shrestha & Elayne J. Heisler, Cong. Research Serv., *The Changing Demographic Profile of the United States*, RL32701, 21 (2011), available at www.fas.org/sgp/crs/misc/RL32701.pdf (last visited Aug. 7, 2012).

³⁶ See Hurtado, *Educational and Civic Missions*, *supra* note 27, at 190-91; Mitchell J. Chang, *Is It More Than About Getting Along? Broader Educational Relevance of Reducing Students’ Racial Biases*, 42 J. Coll. Student Dev. 93 (2001).

³⁷ See Mitchell J. Chang et al., *The Educational Benefits of Sustaining Cross-Racial Interaction Among Undergraduates*, 77 J. Higher Educ. 430 (2006); Hurtado, *Educational Purpose*, *supra* note 27; Astin, *supra* note 31; see also Jim Antony, *Can We All Get Along? How College Impacts Students’ Sense of the Importance of Promoting Racial Understanding* (Nov. 7, 1993) (paper presented at the Annual Meeting of the Association for the Study of Higher Education) (finding that cross-racial awareness

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environment in which other students are interacting across racial lines contributes to a student's development, a student's own interaction (in and outside the classroom) with a person of another racial or ethnic group is a more powerful way to inculcate democratic values and foster the kind of collaboration needed in civil society in a democratic republic such as the United States.³⁸

Tolerance and awareness resulting from cross-racial experiences prepare college level students for the diverse workplace they will encounter after graduation and better enables them to work collaboratively with people of other races.

To improve students' racial judgments so that they are more favorable and less stereotypic, students must be provided with the opportunity to thoroughly inspect biased and erroneous information and to more effectively process new information. . . . Institutions of higher education do not only provide extraordinary possibilities for sustained meaningful interaction and dialogue between

is particularly enhanced if students discuss diversity-related issues in class).

³⁸ See Chang et al., *supra* note 37. This evidence refutes *amici's* argument that increasing cross-racial interaction between students actually *damages* relations among the races. Am. Brief of Thernstrom et al., *supra* note 17, at 9-10 (comparing interaction among students of different races at U.S. schools to strife among ethnic groups in Central Africa as well as in the former Yugoslavia).

individuals of different racial groups, but can also deepen students' understanding of different points of view about how race affects individual and institutional biases.³⁹

In *The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools and Societies* (2007), University of Michigan Professor Scott Page uses mathematical models and case studies to illustrate the positive impact that diversity in institutions of higher learning can have on our democratic society. Page shows that organizations composed of different types of individuals are more productive than homogeneous organizations because diverse groups of people provide more and different ways of viewing a problem, thereby providing more and different – and quicker – ways of solving the problem.

Page found that diverse groups of problem solvers outperformed the groups of the smartest individuals at solving problems measured traditionally, the reason being the diverse group became stuck less often than the smart individuals who tended to apply similar cognitive “tools” to a given situation – *i.e.*,

³⁹ Chang, *supra* note 36, at 103; *see also* Patricia Gurin, Biren A. Nagda & Gretchen E. Lopez, *The Benefits of Diversity in Education for Democratic Citizenship*, 60 *J. Soc. Issues* 17, 19 (2004) (students “who interact with diverse students in classrooms and in the broad campus environment will be more motivated and better able to participate in a heterogeneous and complex society”).

similar people think similarly.⁴⁰ Applying this analysis to a democracy, Page concluded that a more diverse group of voters will make better decisions than a group that is homogenous and that nations with diverse market economies and cultures may be at an advantage.⁴¹ *Id.* at 347. As Page concisely notes: “Our hope for democracy cannot rest on informed, engaged citizens. It must include diversity as well.” *Id.*

II. THE UNIVERSITY OF TEXAS’S ADMISSIONS PROGRAM IS “NARROWLY TAILORED” AND SUMMARY JUDGMENT WAS APPROPRIATE

In addition to wrongly seeking the overruling or undermining of *Grutter’s* “compelling state interest” analysis, Petitioner and her *amici* ask the Court to depart from the straightforward principles that its “narrow tailoring” analysis dictates, not just in the arena of race-conscious admissions programs but across a broad swath of constitutional law. In describing “the hallmarks of a narrowly tailored [race-conscious]

⁴⁰ See also *supra* at pp. 17-20 (discussing research finding that exposing students to racially diverse perspectives positively affects their cognitive abilities).

⁴¹ *Amici* for Petitioner allege that affirmative action policies cause students to receive lower grades and therefore have a “Costly Side-Effect.” Am. Brief of Sander and Taylor, *supra* note 21, at 5. Aside from ignoring premiums applied to grades from elite institutions, *amici’s* cost-benefit analysis fails to take into account the advantages that diverse perspectives provide to students of all racial and ethnic groups.

admission plan,” this Court in *Grutter* observed that such plans require that “race be used in a flexible, nonmechanical way” and “that universities cannot establish quotas for members of certain racial groups or put members of those groups on separate admissions tracks” or “insulate applicants who belong to certain racial or ethnic groups from the competition for admission.” 539 U.S. at 334. Insofar as it operates as a race-conscious plan at all, UT’s admissions program adheres to all of these mandates.

Petitioner and her *amici* point to several features of the UT affirmative action program that purportedly distinguish this case from *Grutter*, most pointedly the fact that the Top Ten Percent Law has proved somewhat helpful in increasing the numbers and percentages of African Americans and Hispanics in the entering classes. *See* Pet. Br. at 37-42. Petitioner contends that the race-conscious “holistic” review of the remaining applicants as “a factor of a factor of a factor of a factor”⁴² is insufficiently necessary given the success of the Top Ten Percent Law and other means UT could use to boost minority enrollment. Petitioner’s arguments, in this context, rest on the truism that no prior decision of this Court can ever be “strictly controlling, in the sense that no holding can be broader than the facts before the court.” *United States v. Stanley*, 483 U.S. 669, 680 (1987). But in

⁴² *Fisher v. Univ. of Texas*, 645 F. Supp. 2d 587, 608 (W.D. Tex. 2009).

applying its precedents this Court looks to the “reasoning” of prior cases. *Id.* *Grutter*’s reasoning, fairly stated, and that of other lines of “narrow tailoring” cases provide no support to Petitioner.

Petitioner’s central point is that the use of a holistic review, including race as just one factor, generates “‘gratuitous racial preferences.’” Pet. Br. at 35 (quoting Pet. App. 182a (Jones, C.J., dissenting from the denial of en banc review)). But nothing could be more wrong, as Respondent amply demonstrates in its brief. UT considers race, but gives it no more weight than socioeconomic background, work experience, community service or a number of other factors. *See* Resp. Br. at 13-14. Race is not considered in isolation, but is simply part of UT’s examination of each applicant as a “whole person.” *Id.* There is no evidence for Petitioner’s claim that UT measures “success” solely along the criteria of “racial balancing,” *i.e.*, by the percentage of minorities admitted irrespective of the *other* qualities minorities chosen through a non-blind review will bring to the class. Instead it is Petitioner, not UT, who is guilty of focusing solely on applicants’ race and nothing more. “[S]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike,” *Jenness v. Fortson*, 403 U.S. 431, 442 (1971), and it is this error that underpins the whole of Petitioner’s case.

Race conscious measures to achieve this type of diversity and integration are entirely appropriate in a democracy in which segregation and racial

inequalities continue to exist. The Texas Legislature recognized this essential truth in its recent legislation, finding that basing admissions decisions on any simple criterion, such as being in the top 10 percent of one's high school class, is unlikely to be a complete substitute for policies that permit assessment of an applicant's race as one component out of many.⁴³ The Texas Legislature thus has made clear that the Top Ten Percent Law does not pre-empt use of race as a factor in a holistic review of an applicant's file. Section 7 of Acts 2009, 81st Leg., ch. 1342, addressing Texas's "Closing the Gaps" initiative, states: "Nothing in this Act prevents a general academic teaching institution in this state from engaging in appropriate individualized holistic review, consistent with that purpose [of fostering diversity including racial diversity], for the admission of students who are not entitled to automatic admission under [the Ten Percent Law]." Thus, Texas recognizes that applicants admitted outside of the "grades-only" track dictated by the Top Ten Percent Law may be different in ways critical to democratic values underlying publicly supported higher education.

It is not unconstitutional in this context that UT's system admits relatively few minority students,

⁴³ See also Jessica S. Howell, *Assessing the Impact of Eliminating Affirmative Action in Higher Education*, 28 J. Labor Econ. 113, 116 (2010) (finding that race-neutral admissions policies would cause black and Hispanic representation at four-year colleges to decline, particularly at the most selective institutions).

at the margin, via its race-conscious holistic admissions program. *Compare Parents Involved*, 551 U.S. at 790 (Kennedy, J.). As both the District Court and the Fifth Circuit recognized, this case is not about “[c]rude measures . . . that threaten to reduce children to racial chits,” *id.* at 798, but rather a system that evaluates each applicant not admitted under the Top Ten Percent Law according to a broad spectrum of factors, of which race is only one that is looked at in the context of all the others. It is “a more nuanced, individual evaluation of school needs and student characteristics that might include race as a component.” *Id.* at 790. Furthermore, unlike the Top Ten Percent Law, this holistic review process “permits the consideration of diversity within racial groups,” in recognition of this Court’s observation of the need to “account for the differences between people of the same race” in order to foster true diversity and break down racial barriers. Resp. Br. at 33-34 (*quoting League of United Latin American Citizens v. Perry*, 548 U.S. 399, 434 (2006)).

By seeking to create a “critical mass” of students whose race, combined with other factors, such as *either* academic or extra-curricular achievement or both, puts them ahead of others, Texas has, doubtless to avoid upsetting expectations that grew up around the Top Ten Percent Law, sought to create, to the extent feasible, a class of students admitted based on the same criteria that this Court adopted in *Grutter*. Although it is not always the case, here *less is less*. See 44 *Liquormart Inc. v. Rhode Island*, 517 U.S. 484,

511 (1996) (“we do not dispute the proposition that greater powers include lesser ones”). In this respect, the relevant “critical mass” Texas seeks is not one based on racial balancing, but rather the desire to admit candidates of all backgrounds for whom race and other factors, each weighed individually, illustrate potential for leadership or other skills.

Precisely because the Top Ten Percent Law poses the risk of downplaying the role of extracurricular activities in university admissions (as well as potentially adversely affecting equally academically qualified students from highly competitive high schools), UT’s plan is the quintessential “narrowly tailored” program. *See Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1991) (if the government’s goal would be “achieved less effectively” without the challenged feature, the feature is “narrowly tailored” to the end advanced).⁴⁴ Given that every applicant of every race can compete for these slots and is not subject to rejection *solely* based on their race, this is a properly tailored way of realizing UT’s First Amendment interests in selecting who shall attend in order to achieve the benefits of a diverse student body. *Compare Grutter*, 539 U.S. at 334-35 *with* J.A. at 152a-314a (depositions of University officials). Here, race is “used in a flexible, nonmechanical way,” *Grutter*, 539 U.S. at 334-35, such that a white student who has

⁴⁴ *See also, e.g., Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 568-70 (2001); *United States v. Paradise*, 480 U.S. 149, 171-85 (1987).

overcome personal obstacles can be admitted on the same basis as others whose racial status and experience, and other factors, indicate academic strength, character or potential for leadership.

Beyond this, Petitioner and her *amici* focus on two other features of this case. First, they challenge UT's tracking of statistics showing the numbers and percentages of minorities who apply, are admitted, and enroll, *see* Pet. Br. at 26-30, conduct that this Court in *Grutter* and Justice Kennedy in his controlling opinion in *Parents Involved* held were insufficient to support a conclusion that the program was not "narrowly tailored" to support a compelling interest. *See Grutter*, 539 U.S. at 336 ("[S]ome attention to numbers, without more, does not transform a flexible admissions system into a rigid quota."); *Parents Involved*, 551 U.S. at 790 (Kennedy, J.) (noting the constitutional validity of "a more nuanced, individual evaluation of school needs and student characteristics that might include race as a component"). Second, they point to the lack of a "hard stop" to Texas's program, a factor that was also present in *Grutter*. *See* 539 U.S. at 343; Pet. Br. at 36. Here, it suffices that the University's admissions program is subject to periodic, close review. *See* J.A. at 124a, 398a.



CONCLUSION

For these reasons, the judgment below should be affirmed.

Respectfully submitted,

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