No. 14-981

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 AMHERST, ALLEGHENY, BARNARD, BATES, BOWDOIN, BRYN MAWR, CARLETON, COLBY, CONNECTICUT, DAVIDSON, DICKINSON, FRANKLIN & MARSHALL, GRINNELL, HAMILTON, HAMPSHIRE, HAVERFORD, LAFAYETTE, MACALESTER, MIDDLEBURY, MOUNT HOLYOKE, OBERLIN, POMONA, REED, SARAH LAWRENCE, SIMMONS, SMITH, ST. OLAF, SWARTHMORE, TRINITY, UNION, VASSAR, WELLESLEY, AND WILLIAMS COLLEGES, AND BUCKNELL, COLGATE, TUFTS, WASHINGTON & LEE, AND WESLEYAN UNIVERSITIES, *AMICI CURIAE*, SUPPORTING RESPONDENTS

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## INTEREST OF THE *AMICI CURIAE*

*Amici curiae* are thirty-eight private, highly selective residential colleges whose small size and excellence attract students from around the nation and the world.[1] They provide their students with a liberal education in its broadest sense—a rich, deep training in diverse subject matters, in residential settings where education takes place not only in the classroom but throughout four years on campus with classmates from different backgrounds and with different experiences and viewpoints.

Because of their excellence, each of the *amici* colleges is highly regarded and besieged with applications from well-qualified high school seniors. Because of their size, they can offer admission to only a small fraction of applicants. Because of their goals of fostering a rich educational environment, they select applicants not mechanically by SAT or ACT score, but by looking holistically at each qualified applicant and the qualified applicants as a group, taking into account a wide range of factors. Each year, *amici* decide which set of qualified applicants, considered individually and collectively, will take fullest advantage of what the college has to offer, contribute most to the

1. Although five of the *amici* are universities, and others offer masters degrees, their small size, selectivity, and emphasis on a liberal education in a residential setting align them with the others, and for convenience we refer to *amici* as "colleges" throughout.

No counsel for a party authored this brief in whole or in part, and no person or entity other than the *amici curiae* made a monetary contribution to its preparation or submission. Letters consenting to the filing of *amici curiae* briefs have been lodged by the parties with the Clerk.

educational process, and use what they have learned for the benefit of the larger society. Each college consciously seeks to assemble a highly diverse group of students—from different states and countries, from urban and rural backgrounds, home-schooled, private-schooled, and public-schooled, with differing economic circumstances, with different kinds of experience or talent or athletic ability, students who will be the first in their families to go to college and legacy students following after parents or grandparents.

*Amici* have a direct interest in the outcome of this case because petitioner's claim is asserted, *inter alia*, under Title VI of the Civil Rights Act of 1964, which seemingly has identical application to public and private institutions alike. *See, e.g., Grove City Coll. v. Bell*, 465 U.S. 555, 566-67 (1984) (applying Title IX of the Education Amendments of 1972, patterned on Title VI, to a private institution without suggestion of differential application); *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1978) (same).

Both the Court's opinion and Justice Kennedy's dissent in *Grutter v. Bollinger*, 539 U.S. 306 (2003), approvingly cited the brief filed by most of these same *amici* in *Grutter* and commended *amici's* efforts to enroll broadly diverse classes. But in view of Title VI and *Cannon*, a decision condemning Texas' admissions procedures might be taken—depending on how it was written—to confound and restrict *amici's* efforts to assemble diverse student bodies. To alert the Court to the substantial harm that applying petitioner's arguments to *amici* would cause—and to advise it of the extent to which the "alternatives" touted by petitioner are impracticable and illusory for smaller selective institutions—*amici* submit this brief.

Whatever decision is made here as to the Texas plan challenged by Fisher should extend no further, absent a properly presented case raising the issue in the context of small, highly selective private institutions.

## SUMMARY OF ARGUMENT

The Court should examine petitioner's sterile submission with a view to the experience of operating admissions programs at the nation's selective colleges and universities. The Court should consider the experience of admissions before diversity was highly valued, and the progress toward equal opportunity since. Many private colleges were created, and are funded, as engines of social change, and the Court should consider the realities of selecting students in a society in which race still matters and the effects of discrimination and entrenched segregation still linger.

African-American students were absent from, or present in very small numbers at, most selective institutions of higher education, including *amici*, until the 1960s. Only when those institutions began to include racial diversity among the other kinds of diversity long sought for did they begin to enroll more than token numbers of African-American students. Research and experience both suggest that for small, highly selective private colleges like *amici*, carving out race from all the other kinds of diversity consciously aimed for would have a predictable, substantial resegregating effect.

Certainly *amici* could not possibly institute Texas' practice of offering admission to the top 10% of high school graduates, or any program like it, without

radically changing their nature. Additional alternatives suggested—admitting a percentage of each high school class, or focusing on class or economic circumstance without looking at racial background—could not work if the objective is to enroll a class that is both academically excellent and diverse. The rules that petitioner urges would deprive *amici* of the diversity that they value for its contribution to the residential, liberal education they provide. Seeking out and obtaining diversity, including racial diversity and students from diverse national origins, does not violate Title VI and does not amount to a quota. The competition among highly selective institutions ensures a meritocracy and militates against any racial division of spoils. Diversity as practiced at *amici* has had substantial educational benefits.

Both the deference due to the educational policies of universities and colleges, *Grutter,* 539 U.S. at 328-29, and the respect due under *stare decisis* to *Grutter* and *Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265 (1978), support the judgment below.

## ARGUMENT

### I. PRIVATE, HIGHLY SELECTIVE COLLEGES HAVE A COMPELLING EDUCATIONAL INTEREST IN ENROLLING BROADLY DIVERSE—INCLUDING RACIALLY DIVERSE—CLASSES, AND CANNOT DO SO WITHOUT TAKING THE DIVERSITY THEY STRIVE FOR INTO ACCOUNT.

During the late 1960s, as American society was coming to grips with the exclusion of African-Americans

from many of the institutions and benefits of American life, *amici* took note of how few such students they had enrolled and began to seek out and enroll students from historically disadvantaged groups. Studies have consistently shown that these efforts to diversify have benefitted the institutions, the student body, and society as a whole. *See, e.g.*, Mitchell Chang et al., *The Educational Benefits of Sustaining Cross-Racial Interaction Among Undergraduates*, 77 J. of Higher Educ. 430, 430-31 (2006) ("[D]iversity-related benefits are far ranging, spanning from benefits to individual students and institutions in which they enroll, to private enterprise, the economy, and the broader society."). The educational benefits that *amici* have gained from those efforts, and their assessment that substantial resegregation would likely follow if the Court precludes consideration of racial or ethnic diversity, are accurately reflected in the path-breaking work by former Princeton President William G. Bowen and former Harvard President Derek Bok, titled The Shape of the River.

The argument of petitioner and her *amici*, if accepted, would harm the education offered at highly selective institutions, and the nostrums that they offer to avoid or mitigate those harms are entirely impractical.

### A. Private, Highly Selective Colleges Are Committed To Obtaining The Educational Benefits Of Diversity, Including Racial Diversity.

In considering petitioner's challenge, the beginning of wisdom is to recognize, as the Court did in *Bakke*, 438 U.S. at 312, that *educators* set the relevant policies

at institutions of higher education, and that there are sound *educational* reasons why America's colleges and universities have virtually without exception concluded that many different kinds of diversity, including (but not limited to) racial and ethnic diversity, create the best environment for learning. *Grutter* expressly accepted that a university's interest "in attaining a diverse student body" is compelling. 539 U.S. at 329-33.

The point is basic, and the agreement of educators is broad,[2] particularly among liberal arts colleges and small universities which *intentionally* are close-knit communities in which students live and constantly engage with each other.[3] The broad diversity that characterizes American colleges and universities makes them unique, educationally superior, the envy of the world, and excellent beyond the capacities of narrower institutions.

The Amherst College Trustees' 1996 Statement on Diversity continues to be representative of the views of *amici* generally:

> We will continue to give special importance to the inclusion within our student body, our faculty and our staff of talented persons from groups that have experienced prejudice and

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2. *See, e.g.,* Ass'n of American Universities, *Diversity Statement on the Importance of Diversity in University Admissions* (by presidents of its 62 member institutions), Apr. 14, 1997, *available at* http://www.aau.edu/WorkArea/DownloadAsset. aspx?id =1652.

3. *See* Paul Umbach & George Kuh, *Student Experiences with Diversity at Liberal Arts Colleges: Another Claim for Distinctiveness*, 77 J. of Higher Educ. 169, 172 (2006).

> disadvantage. We do so for the simplest, but most urgent, of reasons: because the best and brightest people are found in many places, not few; because our classrooms and residence halls are places of dialogue, not monologue; because teaching and learning at their best are conversations with persons other than ourselves about ideas other than our own.[4]

That understanding is not newly minted. Oberlin, which almost uniquely among *amici* has been steadily attentive to the importance of enrolling African-Americans since well before the Civil War, concluded as early as the 1830s that "bringing together students with different backgrounds and experiences" made for a superior education.[5]

The kind of holistic consideration that Justice Powell in *Bakke* referred to as "the Harvard College Program"—in which applicants are each considered, with the choice of offerees made from among well-qualified applicants after considering all their various strengths and experiences, without quotas or reserved slots by race–is standard at each of the *amici* (and has some similarity to UT's A1/PA1 system, but some differences as well). This approach necessarily considers race and ethnic background (all of

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4. https://www.amherst.edu/offices/diversityoffice/welcome. *See also, e.g.,* https://www.conncoll.edu/commitment-to-diversity/#.VibuOBCrTjE; http://www.middlebury.edu/studentlife/doc.

5. Oberlin Alumni Magazine, Winter 2002-03, at 2. Any suggestion that upon enactment of the 1866 Civil Rights law Oberlin was violating the law—which is what petitioner's argument amounts to—is an indefensible misreading of history.

them), because consideration of *every* kind of diversity (socio-economic, artistic, musical, athletic, legacy connection, foreign residence) requires just that.

The proposition that broad diversity (including racial diversity) is important to the education provided by our nation's colleges and universities has been supported by thoughtful, experienced leaders such as former Secretary of State and Stanford Provost Condoleezza Rice.[6] Why is an education characterized by encounters with difference so vital? Because, as W.E.B. Du Bois wrote more than 100 years ago, "The function of the university is not simply to teach bread-winning, or to furnish teachers for the public schools . . . it is, above all, to be the organ of that fine adjustment between real life and the growing knowledge of life, an adjustment which forms the secret of civilization."[7] As former Carleton College President Robert A. Oden, Jr. put the same point, "'the single greatest source of growth and development is the experience of difference, discrepancy, anomaly," and "the free and uncensored play of ideas and opinions and arguments and positions is central to the fabric of a liberal arts education." A college "peopled by those representing and trying out such ideas and opinions and arguments is a finer college for the presence of these people."[8]

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6. Neil Lewis, *Bush Adviser Backs Use of Race in College Admissions*, N.Y. Times, Jan. 18, 2003, at A14.

7. W.E.B. Du Bois, The Souls of Black Folk (1903), *available at* http://www.bartleby.com/114/5.html.

8. Inauguration Convocation Address, Oct. 25, 2002, *available at* www.carleton.edu/inauguration/speeches.php3.

*Amici* share that experience and judgment, and believe that they would receive fewer applications and matriculate fewer of the students that they want of every sort (including white students) if they could not offer the broad diversity that today's students value and demand.

Deliberately seeking out diversity of every sort (including of gender, ethnicity, and race)—and not merely hoping that it magically arrives and shrugging when it doesn't—has been the rule in the judicial appointment process in state and federal courts for the past three decades; for the nation's two principal political parties in myriad federal, state, and local elections, both of which seek to enlist candidates and spokespeople who *as a group* are diverse in various ways (including racially and ethnically); in federal and state cabinet selections; in the service academies; and in the military's officer ranks.[9] It is even more essential now that "minority" births (including Hispanics, African-Americans, Asians, and those of mixed race) comprise over 50% of U.S. births.[10]

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9. Successive presidents since at least 1976 have treated appointing more female, African-American, and Hispanic individuals to the federal bench and cabinet as a laudable goal, not an equal protection violation. Federal and state judiciaries have been transformed from virtually all-white four decades ago to today's judiciary, which looks like the population at large. For the service academies, *see, e.g.,* Adam Clymer, *Service Academies Defend Use of Race in Their Admissions Policies*, N.Y. Times, Jan. 28, 2003, at A17; Albert Hunt, *Service Academies: Affirmative Action at Work,* Wall St. J., Jan. 23, 2003, at A15. Both political parties have for years made a public point of seeking to enlist well-qualified black and Hispanic candidates to run for office, and the ethnically balanced ticket has an even longer pedigree.

10. Sabrina Tavernise, *Whites Account for Under Half of Births in U.S.*, N.Y. Times, May 17, 2012, at A1.

The practical wisdom underlying these practices rebuts any assertion that diverse viewpoints and opinions could be adequately obtained by considering only economic circumstances and disadvantage. Those differences are valuable educationally too, and *amici* devote enormous resources to identifying and supporting such applicants. But they do not exhaust or reflect all of the diversity that students will need to confront, understand, and be able to relate to and work with.

That conversations may be deeper or more powerful when we speak with those whose experience is different—and hit us with a different moral force—is the point made in Justice O'Connor's memoir of Justice Thurgood Marshall. Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur,* 44 Stan. L. Rev. 1217, 1220 (1992). Every President since President Johnson has considered it important to give the nation that measure of diversity in their judicial and cabinet appointments; it is equally important that *amici* be able to do so in admissions as well.

### B. Highly Selective Institutions Cannot Obtain The Diversity They Seek Except By Seeking It Directly.

To assemble a truly diverse student body, Deans of Admission and their staffs need to consider all the talents, interests, and backgrounds of qualified applicants. Among other things, they look for students with particular experiences or talents, international students, legacy students, students whose parents have not had the benefits of higher education, and students from deprived economic backgrounds or struggling rural or urban areas. And

then the larger admissions committee discusses each (or virtually each) qualified applicant file.

Typical of the factors holistically considered is this list from Amherst College, in no particular order:

1. the strength of the candidate's academic program in relation to the opportunities available at the candidate's secondary school;

2. the candidate's academic record, taking into account the rigor of the grading system at the candidate's secondary school;

3. the depth of academic talent at the candidate's secondary school, which is particularly important at secondary schools where rank in class information is provided;

4. evidence of intellectuality, creativity, or unusually well-developed commitment to a particular academic field, as evidenced in the two required teacher recommendations, guidance counselor report, and the candidate's required essays;

5. the candidate's standardized test scores;

6. the extent and depth of the candidate's non-academic achievement and leadership;

7. formalized and standardized assessments of the candidate's athletic or artistic ability made by coaches and arts faculty;

8. the candidate's socio-economic status, as determined by family income and educational attainment of parents, if reported;

9. particular personal, family, and economic hurdles faced by the candidate and/or immediate or extended family, including (but not limited to) race and ethnic background;

10. ongoing and prospective support from extended family, community-based organizations, opportunity programs, or religious organizations;

11. educational attainment of siblings;

12. prospects for success or lack thereof in a candidate's particular field of academic interest;

13. potential to support community-building or cross-cultural understanding across diverse populations; and

14. ability to lend under-represented perspective to intellectual, academic, or social discourse.

The overriding task is to assemble the most interesting and talented class of students, ready to learn from one another and from the college's faculty, and likely to spread the benefits of their education. As Williams College put it, "the college seeks students with strong intellectual skills who will benefit most from the education offered at Williams and then, in turn, benefit society by filling leadership positions in local and national life." It does so believing that "all students—regardless of race, ethnicity,

socioeconomic status, etc.—benefit from studying with students from varied backgrounds rather than in a more homogeneous setting."

This admissions process does not allocate benefits according to race, but rather assesses each applicant's likely success and contribution. In making those assessments, consideration of challenges surmounted—in the broadest sense, where applicants are coming from—is indispensable. The primary and secondary educational system in the United States is far from a level playing field, and although an increasing share of U.S. students attend multiracial schools with more than 10% students from each of three or more racial groups, black and Latino students are becoming more isolated from whites than they have been.[11]

College applicants do not present with equal educations. Highly selective colleges therefore need to be especially alert to evidence of efforts and accomplishment indicating exceptional promise and motivation on the part of students who have not had many advantages and who therefore may not score as highly on standardized tests. Indeed, most *amici* have found that SAT and ACT scores are not predictive of educational achievement after the first year of college.

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11. Gary Orfield, *Reviving the Goal of an Integrated Society: A 21st Century Challenge* (Jan. 2009), *available at* http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/reviving-the-goal-of-an-integrated-society-a-21st-century-challenge/orfield-reviving-the-goal-mlk-2009.pdf. Two in five Latino and African-American students are in 90-100% minority schools. *Id.* at 6, 12, 15.

With applications from far more well-qualified students than they can possibly admit, *amici*'s admissions decisions are nuanced, multi-factorial, and never purely quantitative. They do not, and never have, admitted applicants by descending order from standardized test scores until the class fills up. To the contrary, as Pomona College put it, "We have different expectations for different students: the exam scores from a daughter of two college professors are viewed in a different context than the scores from a first generation college student who attends an underfunded high school."

No numerical points or weights whatever are assigned for any racial or ethnic background, and numerical quotas are not set or enforced. The schools do not require students to categorize themselves by skin color or ethnic background. The same evaluative procedures are used for all applicants regardless of color or ethnic background; for example, different color files are not used, and file readers are not provided with periodic reports of the numbers of students of color admitted to date.

The process for each *amici* college is essentially the Harvard College program described by Justice Powell in *Bakke* and the program upheld in *Grutter*—facially nondiscriminatory, without any quotas, considering racial or ethnic background without insulating any individual "from comparison with all other candidates for the available seats." *Grutter*, 539 U.S. at 334-35.

*Amici* cannot be reasonably assured of having the desired range of talent, international students, legacy students, and students from underprivileged backgrounds without noting and considering all those factors when

it comes time to discuss each applicant. Nor could they be assured of obtaining a racially diverse class without making efforts to attract applications from applicants with various backgrounds and then considering the experience of racial minorities (albeit in a way that ensures that no factor, including race, is "decisive when compared" with any other candidate, as *Grutter* and *Bakke* expressly envisioned). This is particularly important for those institutions (*e.g.,* Bates, Carleton, Grinnell, and Middlebury) which, by virtue of their rural locations in non-diverse states, would draw fewer applications from African-American or Latino students without such efforts.

Indeed, as former Princeton President William Bowen and former Harvard President Derek Bok concluded, because of "continuing disparities in pre-collegiate academic achievements of black and white students" as presently measured, if they are to fulfill their educational missions, selective liberal arts institutions *have to* be sensitive to race in making admissions decisions.[12] While most of the *amici* use grades and standardized tests as an important part of the process, they could not rely on them exclusively even if they were otherwise inclined to rely on purely quantitative scores, because racial gaps of all kinds remain even after attempting to control for the influence of other variables and because experience has taught *amici* that SAT and ACT scores for African-

12. William G. Bowen & Derek Bok, The Shape of the River 51 (1998). "People will debate long and hard, as they should, whether particular gaps reflect unmeasured differences in preparation and previous opportunity, patterns of continuing discrimination, failures of one kind or another in the educational system itself, aspects of the culture of campuses and universities, individual strengths and weaknesses, and so on. But no one can deny that race continues to matter." *Id. at* 279 n.2; *see generally id.* at 269-74.

American students do not accurately predict achievement later in college and beyond.

It follows—as exhaustive research and the experience of the few state universities that were forced to abandon consideration of race confirm—that enforced elimination of the Harvard College/ *Grutter* approach at highly selective institutions would have drastic resegregating impact. African-American enrollment would likely be reduced by up to between 50 and 70 percent; the probability of black applicants obtaining offers would drop to half that of white students; and the percentage of black students matriculating would drop from roughly 7.1% of the student body to roughly 2.1%. Seriously enforced, a "do not consider race" policy would "presumably take black enrollments . . . back to early 1960s levels, before colleges and universities began to make serious efforts to recruit minority students."[13]

### C. Selecting A Broadly Diverse Student Body Does Not Classify Students By Race Or Violate Title VI, And Without More Imposes No Quota, And Built-In Structural And Competitive Factors Afford Substantial Guarantees Against Abuse.

1. The central insight underlying the distinctions drawn by Justice Powell and the *Grutter* Court between the dual-track admissions process operated by the UC-Davis Medical School and the approach used at Harvard

13. Bowen & Bok, *supra* note 12, at 31-34, 39, 50-51, 280. *Amici*'s assessments are the same: elimination of the approach held permissible in *Grutter* would result promptly in sharp reductions in enrolled African-American students.

College and *amici* colleges is that the non-quantitative consideration of all kinds of diversity does not classify by race or deny the equal protection of law even at public institutions. A "facial intent to discriminate is evident" when a public university operates two separate processes, for two lines of racially-reserved admission slots. But "[n]o such facial infirmity exists in an admissions program where race or ethnic background is simply one element—to be weighed fairly against other elements—in the selection process." *Bakke*, 438 U.S. at 318; *see also Grutter*, 539 U.S. at 334-39.

Whatever it decides as to UT's admission practices, the Court should take care to avoid any holding that suggests that the holistic, non-quantitative consideration of all kinds of diversity results in an "explicit racial classification" of the kind subject to strict scrutiny under *Bakke.* It would make no sense to say that white students from the 50 states have been "excluded . . . on grounds of race, color, or national origin" when colleges and universities decide that the advantages of diversity warrant encouraging applications from (and admittance to) students from Japan, South Korea, China, South Africa, and Latin America. For the same reasons, the consideration expressly permitted by *Grutter*, *Bakke,* and *Fisher I* of all aspects of a candidate's background in the service of "'attaining the goal of a heterogeneous student body'" reflects no "facial intent to discriminate" and violates no rights under Title VI or the Fourteenth Amendment. *Grutter*, 539 U.S. at 324; *Bakke*, 438 U.S. at 318.

Consideration of an applicant's background is not different in kind from the consideration that northeastern colleges have for decades given to applicants from

California, Oregon, and Washington State, or that Stanford, Reed, and the Claremont colleges have given to the relatively fewer applications they receive from the northeast. That interest in difference is not actionable discrimination, but rather simply the implementation of the judgment that given an overabundance of well-qualified applicants, it is educationally beneficial for the institution and its student body to have members from far-flung states and nations and myriad backgrounds. *Amici* aspire, after all, to be national institutions, and to draw students from (and prepare future leaders for) the whole nation. Readers at Williams College are advised that consideration for diversity applies broadly, giving as examples a white student of Polish heritage who speaks Polish at home, or a student who is part of a military family living on military installations for much of his or her life.

2. Saying that consideration of racial background is a "quota" doesn't make it so. None of the *amici* operates under any quota, and their consciousness of race as one of the many factors to be included within the student body neither establishes nor conceals a quota system. A quota is a preset number (or narrow range) reserved for some applicants or limiting offers to another. Results that are fairly reached without an allocation process reflect no "quota."[14]

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14. Justice Kennedy's dissent in *Grutter* contrasted what he saw as the narrow band of variation at the Law School with the broader variation reported at Amherst. *Amici* generally report at least that broad variation over the past twelve years as regards offers to African-American and Hispanic students. The percentage of African-American and Hispanic students admitted and matriculated at *amici* changes year by year, but consistently remains significantly below the percentage of such students in the general high school population. *See generally Black First-Year Students at the Nation's*

Not only does *amici*'s admissions process (a broad, holistic consideration of all kinds of diversity without separate committees or readers for applicants of color) defy the definition of "quota," but so does their results. At each of the *amici*, the racial make-up varies significantly from class to class. At Amherst, for example, since 2003, offers extended to students with African-American backgrounds have varied widely, ranging without discernible trend from 125 to 179, resulting in matriculations ranging from 22 to 61 in classes averaging 450. At Pomona, the percentage of African-Americans in the first-year class has ranged between 6.7% and 13.2%.

Holistic review at the *amici* colleges entails no governmental (or institutional) assignment of a personal designation according to a "crude system of individual racial classifications," a concern expressed in *Parents Involved v. Seattle School District*, 551 U.S. 701, 789 (2007). Students self-identify (or not), and not according to any "white or nonwhite" dichotomy, but, if they choose, with the full richness of their background.

3. In a variety of contexts, some members of this Court have expressed concern that racial preferences may be self-perpetuating, or become fixed (or even expanding) entitlements. Whatever may be the case when government adopts quotas or affords quantitative advantages, no such tendency has been seen or is likely in the case of highly selective colleges.

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*Leading Liberal Arts Colleges*, J. of Blacks in Higher Educ. (2014), *available at* https://www.jbhe.com/2014/12/black-first-year-students-at-the-nations-leading-liberal-arts-colleges.

The extraordinary competition among private colleges and universities—for the best applicants, the best matriculants, the best faculty, the most foundation and governmental grants, and the most important graduate fellowships—operates as a constant check on any abuse. Every institution has a powerful, continuing incentive to improve the intellectual capacity and post-collegiate success of its student body. The natural constraining power of this competitive quest for excellence virtually guarantees that the consideration of all aspects of diversity has the genuine purpose of finding the best and the brightest students and improving the educational product offered, not filling any quota.

Nor will these efforts become entrenched. As the black and Hispanic middle class expands and the educational opportunities available to those students improve, there is reason to expect a further narrowing of the test score gaps that have created the need to consider racial and ethnic background among other diversity factors.

## II. THE ALTERNATIVES SUGGESTED BY PETITIONER CANNOT WORK AT SMALLER, HIGHLY SELECTIVE COLLEGES.

1. Petitioner and her *amici* argue that the Texas 10% plan or replacing any consideration of race with socio-economic status would adequately obtain racially diverse student bodies. *It is vital for the Court to understand that even if those measures could work at large state universities—and the reported experience and reason suggest difficulties and reasons for concern—neither they nor any other alternatives of which we are aware could conceivably work at small, highly selective schools like amici.*

First, given how each *amicus* conducts admissions (every application folder except perhaps for the most exceptional read by multiple readers, and then evaluated in meetings without quantitative point systems), there is no possibility of a *race-blind* admission process: consciousness of *all* the diversity that each applicant would contribute (to the extent that an application and supporting references reflect it) is unavoidable.[15] There is no alternative for these colleges but to accept the reality of this inevitable consciousness of differences of every kind (including racial or ethnic background) and to use it intelligently as part of the complex weighing of multiple factors leading to admission decisions.

To the small extent that petitioner's *amici* bother to recognize or address the problem, the alternatives suggested for obtaining diversity without attending to it—or for deterring any subjective, even if unexpressed consideration of race or ethnicity by exposing colleges to litigation risk if they cannot defend admissions on an entirely quantitative basis considering grades, tests scores, graduation rank, and the like—would radically change the profile and very nature of each *amici* college and their ability to generate the resources (through legacy consideration) that make their excellence possible.

Because of their tightly constrained size, no highly selective small college or university could use the "percentage of each high school class" method adopted by Texas, or Florida's guarantee of placement to all students who successfully complete a two-year degree at a community college.

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15. *Amici* do not require identification of racial or ethnic background, but many applications nonetheless reflect it.

The repeated suggestion that schools could substitute consciousness of color with socio-economic or cultural context factors (poverty, first in a family to attend college) is equally implausible. Those approaches are already employed by each *amicus* in their efforts to assemble diverse classes. But although socioeconomic and cultural diversity is valuable and pursued in its own right, it cannot address the gaps that would emerge if racial diversity was banned from consideration in the admissions process.

Similarly, it is unrealistic that highly selective institutions could retain diversity by improving search techniques, augmenting search investments, or focusing more than they now do on low socio-economic rank. Many schools have considerably increased those efforts and investments in recent years. For example, California has focused on socio-economic diversity since its adoption of a race-blind admissions policy; yet despite those efforts, California has been unable to avoid a sharp drop of African-American and Hispanic students at the more selective institutions—*i.e.*, the ones most comparable to *amici.*[16]

After analyzing the problem, Williams College concluded that the use of a race-neutral affirmative action plan based solely on socio-economic disadvantage would:

- significantly limit the number of African-American and Latino applicants it could consider, with the likely long-term effect of discouraging those students—from any socioeconomic background—from applying;

16. *See* Brief *Amici Curiae* of the American Social Science Researchers.

- leave it with a pool of black and Latino applicants whose academic record would be on average considerably weaker than it now can select from (because a disproportionate share of the economically disadvantaged students will have attended under-resourced schools and have generally weaker preparation);

- create greater competition for black and Latino students at the higher end of the academic scale, resulting in a decreased yield of admitted students of color; and

- enlarge the already existing socio-economic disparity between black and Latino students and their white counterparts, creating a dynamic in which nearly all of the admitted black and Latino students would be poor.

*See also* William G. Bowen & Derek Bok, The Shape of the River 46-50 (1998) ("[C]lass-based preferences cannot be substituted for race-based policies if the objective is to enroll a class that is both academically excellent and diverse.").

Search techniques (including obtaining printouts of every minority student at a specified standardized test score level) and efforts to expand offers to (and matriculations by) students from families without substantial financial resources or cultural capital are already extraordinarily comprehensive. *See, e.g.*, http://www.questbridge.org/. Because so many of the poor applicants are white, attending to socio-economic factors without race consciousness would not maintain the present

mix of diversity, but would shed the middle-class applicants of color who, research and experience show, are most likely to excel.[17] The result of a much poorer cohort of black and Hispanic students would likely *increase* stereotyping, when "diminishing the force of such stereotypes" should be the goal. *Grutter*, 539 U.S. at 333.

Another difficulty with leaving racial diversity to chance is that a critical mass of students with particular backgrounds or experiences can be important in attracting particular students of exceptionally high quality. Just as it is hard to attract a violinist to a school that has no orchestra, it is hard to attract students of color to Middlebury, Grinnell, and other rural campuses in highly un-diverse regions without the comfort supplied by familiar faces: it's hard to see yourself at a place where you don't see yourself at all.

And finally, there is the stark reality of the extraordinarily high cost of providing the education that *amici* offer. Attempting to use socio-economic status to retain present racial and ethnic diversity could not work at all rural campuses, and at others would require a huge increase in financial aid, well past the ability of many private institutions.

2. Particularly worrisome for *amici* is the repeated implication in the briefs of petitioner's *amici* that a case of discrimination would be established, warranting strict scrutiny, simply on the basis of a discrepancy between the numbers of African-American or Hispanic students, as compared to white students, admitted at given

17. Bowen & Bok, *supra* note 12, at 46-51.

standardized test scores. *See, e.g.*, Brief *Amici Curiae* of the Pacific Legal Foundation at 27-36. None of *amici* ever has, or would choose to, admit students on any such quantitative basis.

Not only does that assumption ride roughshod over the *amici's* First Amendment right to choose whom to admit and educate, but the Court has repeatedly rejected comparable arguments that discriminatory results necessarily prove discriminatory intention in a wide variety of contexts. *See, e.g., McCleskey v. Kemp,* 481 U.S. 279 (1987); *Batson v. Kentucky*, 476 U.S. 79 (1986); *Washington v. Davis*, 426 U.S. 229 (1976).

The careless premise of the "odds ratio" analysis offered up by the Pacific Legal Foundation, for example, is that colleges should be (or at some point were) admitting students strictly by SAT or ACT scores, and that any departure from that quantitative regime in the service of diversity is suspect. But there is no such norm or obligation, and common sense, judicial restraint, and the First Amendment preclude the grotesque displacement of private educational prerogatives that that kind of analysis would entail.

## III. THE COMMITMENT TO SEEK A BROADLY DIVERSE STUDENT BODY HAS BROUGHT MYRIAD BENEFITS WHICH THE COURT SHOULD RESPECT AND SAFEGUARD.

### A. *Amici* Recognized That Their Student Bodies Were Not Racially Or Ethnically Diverse, And Have Undertaken To Obtain A Broader Diversity.

That the precious resources Americans have committed to private colleges from the earliest days of the Republic should be available to the students who in the judgment of each college will best advance its goals, including those historically disadvantaged, is a view with deep roots in American history and cannot be dismissed as a fad or late-twentieth-century social engineering.

Hamilton College was established as the Hamilton-Oneida Academy in 1793 as "a school for the children of the Oneida Indians and of the white settlers" moving into the region. Dartmouth's charter created a college "for the education and instruction of youth of the Indian tribes, and also of English youth and others." Oberlin resolved in 1835 that "the education of people of color is a matter of great interest and should be encouraged and sustained in this institution."[18] Bates was founded by abolitionists in 1855 who resolved immediately to admit applicants previously excluded from most American institutions of

18. By 1900, Oberlin had graduated 128 African-Americans, nearly one-third of *all* black college graduates in the United States. Surely, Oberlin's continuing race-conscious efforts would not properly have been held to violate the 1866 Civil Rights Act upon its enactment.

higher education. Middlebury graduated a black student in 1823, and Amherst and Bowdoin followed in 1826 and 1833.[19] In short, even while many African-Americans were still enslaved, some northeastern colleges were intentionally recruiting diverse students in the service of their educational missions.

Despite such aspirations here and there, until the mid-1960s, African-American students were absent or rare at every one of the *amici* colleges to a degree inexplicable except as a consequence of the underlying discrimination rampant throughout American society and the systematic denial of equal opportunity.[20] Even today, with their outreach efforts and consideration of color and ethnic background in the admissions process, none of the *amici* colleges enrolls African-American students in anything like their proportion of the high school population.

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19. Harold Wade, Black Men of Amherst 5 (1976).

20. No African-Americans graduated from Haverford until 1951. None graduated from Amherst from 1939 to 1947, even though under different leadership Amherst had, from 1915 to 1926, enrolled a number of African-American students, including four from the M Street (Dunbar) High School in Washington, D.C who are among its most illustrious and successful graduates by any standard: William Hastie (who after arguing a series of civil rights cases in the Supreme Court became the first African-American federal judge, and later served on the Third Circuit), Charles Houston (Dean of Howard Law School and NAACP Special Counsel who planned the strategy leading to *Brown v. Board of Education*), Charles Drew (who perfected the storage of blood plasma, saving thousands of lives in World War II), and Mercer Cook (twice a United States Ambassador). *See* Wade, *supra* note 19, at chs. IV-V.

Since the assassination of Martin Luther King sparked reflection and action across American campuses, *amici* have graduated more African-American students, and are more diverse in multiple ways, than in the previous 175 years. They have done so through the use of race-conscious admissions efforts permitted by *Bakke* and *Grutter*—indispensable efforts that petitioner would foreclose.

### B. The Colleges' Experience Demonstrates That Aiming For Diversity Has Had Educational Benefits—And Benefits For American Society.

In the years since *amici* colleges recognized that they were each more insular and less diverse than was educationally wise or socially defensible—and less diverse than the students they sought to attract wanted them to be or their missions warranted—their efforts to cast their nets more widely have paid off in numerous respects. Their well-considered efforts to attract more qualified students of color enabled the colleges to better accomplish the missions they set for themselves, which include assembling a class of students who, individually and collectively, will contribute most to—and gain most from—the educational process, and be most successful in using what they have learned for the benefit of the larger society.

l. As part of their commitment to educational excellence, *amici* are cognizant of the interaction between campus diversity and educational attainment, and they consider their diversity to be an integral part of their educational strengths. Pomona, for example, studied the correlation between the diversity of students' interactions with others and various educational outcomes

and concluded that increased diversity led to significant gains in educational attainment for both students of color and white students. These and other studies confirm the diffuse and wide-ranging educational benefits of the diversity sought by *amici*.

The educational benefits from diversity have also been manifest in the form of curricular and pedagogical innovations. As colleges gain experience from enrolling diverse students, the curriculum is adjusted to incorporate students' and alumni's practical experience of diversity, fostering better preparation for life beyond college. *Amici* report changes and improvements in what is taught, how it is taught, and extracurricular programming. For instance, Carleton's sciences faculty began an intensive effort to improve the success rates of students of color in science and math, which resulted in pedagogical innovations that benefitted Carleton's math and science students generally. At Swarthmore, a study of a peer-mentoring initiative implemented with students in entry-level biology, aimed at closing the gap in retaining students in biology and other STEM areas between underrepresented minority students and majority students, resulted in a marked, gap-closing improvement for students of both groups.

To preclude colleges from choosing a diverse class risks throwing away the educational gains that have already accrued and forestalling new innovations that the experiences and perspectives of a diverse student body foster.

Diversity is also an increasingly important part of the subject matter of various fields of study. The inescapable realities of increased diversity in the country and growing

global interconnectedness have led *amici* colleges to incorporate the understanding of diversity in many fields of study. Students need to learn how to work with, market to, and buy from people from diverse backgrounds and cultures.

2. The consumers of education from *amici* colleges, the students, are in the best place to determine what they want out of their educational experiences, and overwhelmingly they demand diversity. Diminished diversity will make it much more difficult to attract the best students.

Overwhelming majorities of incoming students rate "understanding other cultures" and "learning to relate to people of other races and nationalities" as "essential" or "very important" skills to learn in college. Campus diversity is highly correlated with various measures of student satisfaction, including the sense of community, which is critically important to the effective functioning of small liberal arts colleges. A lack of student body diversity would prevent students from developing critical skills, decrease satisfaction with life on campus, and lead many of *amici*'s most promising students to matriculate at a school that offers more of what they want.

3. The outcomes of students of color who attend *amici* colleges bear out the educational benefits of attendance at diverse institutions. The graduation rates of students of color at liberal arts colleges are not substantially different from their peers (higher, at some of *amici*), and these students go on to achieve great personal and professional success. Thousands of successful students of color who have graduated from *amici* colleges have gone on to leadership roles in the public, private, and nonprofit

sectors. The contention by some of Fisher's *amici* that admissions policies that permit consideration of race and ethnicity among other factors place African-American and Hispanic students at schools they should not be attending is a cruel defamation, belied by their successes on campus and beyond.

## IV. BARRING INSTITUTIONS OF HIGHER EDUCATION FROM MAINTAINING THEIR OWN ADMISSION CRITERIA WOULD VIOLATE VITAL PRINCIPLES OF ACADEMIC FREEDOM AND INSTITUTIONAL AUTONOMY, AS WELL AS *STARE DECISIS*.

Petitioner's argument for displacing educational judgments about admissions is at war with two fundamental principles of constitutional law: the rule that "[c]onsiderations of profound importance counsel restrained judicial review of the substance of academic decisions," *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985), and the rule of *stare decisis*.

1. *Grutter* expressly followed *Ewing*'s rule of judicial restraint, recognizing "a constitutional dimension, grounded in the First Amendment, of educational autonomy." 539 U.S. at 329. Academic freedom includes the "[d]iscretion to determine, on academic grounds . . . who may be admitted to study," which is "one of 'the four essential freedoms' of a university." *Ewing*, 474 U.S. at 226 n.12 (citations omitted).

The judicial restraint commanded by *Ewing*, quoting *Bakke*, 438 U.S. at 312, has old and deep roots, reaching back to *Trustees of Dartmouth College v. Woodward,* 17

U.S. 518 (1819), and the Court's recognition there that a free society requires public and private spheres, and limitations on governmental intrusion and control so as to preserve those key distinctions. "Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students . . . but also . . . on autonomous decision-making by the academy itself . . . ." *Ewing*, 474 U.S. at 226 n.12 (citations omitted). Only a "hands off" policy leaves colleges free to reform, experiment, refine, and thereby offer to the whole society the improvements that result from a free market in ideas and practices.

Accordingly, "When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms . . . ." *Ewing*, 474 U.S. at 225; *see also id.* at 227-28 (courts may displace such judgments only if they are "aberrant" or "beyond the pale of reasoned academic decisionmaking"); *Grutter*, 539 U.S. at 329 (in advancing an institution's goal of "attaining a diverse student body" as part of its "proper institutional mission," "'good faith' on the part of a university is 'presumed'" (quoting *Bakke*, 438 U.S. at 318-19)).[21]

Individually but with impressive unanimity, private selective colleges and universities have made a collective judgment that obtaining broad diversity in their student

21. *See also Bd. of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 89-92 (1978) (courts are not equipped or authorized to evaluate academic decisions).

bodies, including (but not limited to) racial diversity, is a matter of profound *educational* importance, and that the way to obtain that diversity is by seeking it, in a process in which the reality of race is considered along with numerous other factors. Deference to the colleges' educational judgments that diversity is a core component of the education that they are seeking to provide is plainly called for, as *Grutter* held. 539 U.S. at 328. The attempt by petitioner and her *amici* to strike racial and ethnic background from the list of all the other factors that are considered in assembling a class does not meet the *Ewing* standard.

Displacement of a college or university's core prerogative to decide which set of applicants, considered individually and collectively, will take fullest advantage of what the college has to offer, contribute the most to the college and classmates, and most successfully use what they have learned for the benefit of the larger society would be an extraordinary departure from the deference that courts have long shown to institutions of higher education generally, and particularly private institutions.

2. *Stare decisis* independently leads to the same judicial restraint required by *Dartmouth College* and *Ewing*. The standards for reversal of *Bakke*'s constitutional holding, as set forth in *Dickerson v. United States*, 530 U.S. 428 (2000), are not nearly met.

After *Bakke* and then again after *Grutter*, each of the *amici* (and undoubtedly other selective colleges and universities as well) reviewed their admissions procedures in light of Justice Powell's opinion sketching out a permissible approach, and set sail accordingly. Enormous

reliance interests have built up as a result. In dozens of ways, the institutions where diversity is a significant reality have invested in change, and changed.

The peopling of the college communities with a more diverse group of students has made the colleges different (and better) than they were. Reliance on *Grutter* and *Bakke* has had a huge impact on the world in which aspiring families and their high school students, and college students, live. *Grutter* and *Bakke* have left their mark on recruiting efforts, on relationships with secondary public and private schools and high school counselors, on support services and programs, on housing choices, and on curricula.

Not only have the colleges invested in reliance, so too have students and their parents. Current students and those applying have expectations about being in a diverse community and not being isolated. Thousands of such students have been aiming for admission to the *amici* colleges, or their highly selective university counterparts. Blockage of the course set by *Grutter* and *Bakke* would as a practical matter turn realistic opportunities into lottery chances. Without the ability to take race and ethnic background into account—and even more, with the expensive likelihood that differential admission rates in test score bands after such a decision would be attacked as *prima facie* evidence of unlawful discrimination, with colleges left to prove that they did not exclude on the basis of race—the presence of African-Americans and Latinos on America's most selective campus would plummet, as it did in California's and Michigan's selective universities.

In short, upending the world that *Grutter* and *Bakke* invited and approved would interfere substantially with reasonable expectations and long-settled social patterns. That dislocation should weigh heavily against dispatching *Grutter* (which itself followed *Bakke*) and foreclosing the broadened opportunity that they allowed for African-Americans and other disadvantaged students of color at the nation's most selective colleges and universities.

Extraordinary progress in opening up previously closed educational institutions has occurred since conscious efforts to include African-Americans within the circle of those admitted to highly selective educational institutions in the United States began in the 1960s and were effectively held permissible in *Bakke*.[22] Many thousands of black and Hispanic Americans have graduated, taken their place in American society, and benefited the society at large through their accomplishments and civic contributions. For the Court to render a decision that would be widely taken as deeming their very degrees illegitimate—the basis for their achievements and contributions the product of violations of constitutional or statutory law—would be permissible, if at all, only if the constitutional or statutory text or history left no doubt whatever that *Grutter* and *Bakke* reached the wrong result.

History, though, confirms that *Grutter* and *Bakke* got it right. The Congress that adopted the Fourteenth Amendment repeatedly enacted race-conscious and race-targeted legislation in order to close the social gap

22. Jack Greenberg, *Affirmative Action in Higher Education: Confronting the Condition and Theory*, 43 B.C. L. Rev. 521, 569-71 (2002).

between blacks and whites and eliminate the lingering effects of discrimination. That history precludes any finding that the original understanding of the Fourteenth Amendment prohibits what *Grutter* and *Bakke* permit, particularly for private institutions.[23] In view of that original understanding, it is not possible to say that the holdings in *Bakke* and *Grutter*—that race may be considered along with other factors, so long as separate racial tracks are not set up—were plainly wrong.

* * * *

The judicial deference owed to colleges and universities, joined to the wise policy of *stare decisis*, counsels against any resolution of this case that would interfere with the powers of colleges and universities generally—and particularly private institutions—to experiment and pursue their own judgments as to how to best use their resources for educational and charitable purposes, even when doing so entails some consideration of racial background as one factor, among many, to be considered and weighed with many others.

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23. Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 Va. L. Rev. 753, 784-85 (1985); Jed Rubenfeld, *Affirmative Action*, 107 Yale L.J. 427, 429-32 (1997); Greenberg, *supra* note 22, at 577 & n.322.

## CONCLUSION

Academic freedom and the deference due educational judgments leave colleges and universities free to select those students who, in their judgment and as *Grutter* and *Bakke* contemplate, will, individually and collectively, take fullest advantage of what the college has to offer, contribute most to the educational process, and best use what they have learned for the benefit of the larger society. The Fourteenth Amendment and Title VI do not mandate admission to private colleges and universities on the basis of quantitative measures, or forbid them from considering background among other factors to be holistically evaluated and considered in admission decisions, without quotas. The judgment below should be affirmed.

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