

No. 11-345

IN THE
Supreme Court of the United States

ABIGAIL NOEL FISHER,
Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, ET AL.,
Respondents.

*On Writ of Certiorari To The United States Court Of
Appeals For The Fifth Circuit*

**BRIEF OF AMICI CURIAE EMORY OUTLAW
AND EMORY LATIN AMERICAN LAW
STUDENTS ASSOCIATION IN SUPPORT OF
RESPONDENTS**

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QUESTION PRESENTED FOR REVIEW

Does the use of race in admissions at a public university further a compelling governmental interest in obtaining the educational benefits that flow from a diverse student body?

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INTEREST OF *AMICI CURIAE*¹

Emory University School of Law OUTLaw is an organization for lesbian, gay, bisexual, transgender, and queer (LGBTQ) Emory Law students and their supporters. OUTLaw endeavors to combat and oppose discrimination on the basis of race, color, religion, ethnic or national origin, gender, age, disability, sexual orientation, gender identity, gender expression, veteran's status, or any factor that is a prohibited consideration under applicable law.

The Latin American Law Students Association (LALSA) is a student organization at Emory University School of Law dedicated to promoting the exchange of ideas and information on Hispanic culture and raising awareness of social and legal issues affecting the Hispanic community and the legal profession. To these ends, LALSA hosts various cultural and networking events, community service opportunities, and academic tutoring programs designed to help law students of diverse backgrounds integrate to their school and succeed in their careers.

This case is of great importance to *amici* because it concerns issues that lie at the core of their mission: the great and positive impact of diversity within legal education and the legal profession. *Amici* are aware of the educational benefits that diverse backgrounds bring to student bodies in every field of education. A decision in this case will affect the

¹ Pursuant to this Court's Rule 37.3(a), all parties have submitted to the Clerk blanket consents to the filing of all amicus briefs. Pursuant to this Court's Rule 37.6, Amici state that no counsel for any party authored this brief in whole or in part, and no such counsel made a monetary contribution intended to fund the preparation or submission of this brief.

mission and members of *amici* and law students at schools across the nation.

SUMMARY OF THE ARGUMENT

Diversity in the classroom is a compelling government interest because it is essential to good pedagogy. Diversity increases the number of perspectives available to students by bringing together students with very different life experiences. It prepares students to effectively contribute to an increasingly diverse and globalized workforce by helping them to overcome widespread prejudices. It fosters civic engagement by encouraging minority students who are most likely to contribute their services to marginalized communities.

These benefits are of great importance to the legal profession given its unique role in helping people navigate the complex framework of laws that undergirds our society, its particularly global character, and its centrality to movements for civil rights over the past century. The examples of African-American attorneys and law students, which have been the subjects of a significant number of scholarly works, illustrate this point as it applies to underrepresented minority populations in general.

ARGUMENT

I. DIVERSITY IN THE CLASSROOM IS A COMPELLING GOVERNMENTAL INTEREST.

Diversity in the law school classroom is essential to the functioning of the modern legal profession. This Court in *Grutter v. Bollinger*, 539 U.S. 306, 314–32 (2003) identified three aspects of diversity in the classroom that make it worthy of constitutional protection as a compelling governmental interest. Diversity in the classroom increases the number of perspectives available to students. *Id.* at 314. It prepares students to effectively contribute to an increasingly diverse and globalized workforce. *Id.* at 330. It fosters civic engagement. *Id.* at 331-332. This brief considers the ways in which the three aspects of diversity recognized in *Grutter* enhance the legal profession, and it urges this Court to affirm the decision of the court below.

A. Diversity in the Classroom Increases the Number of Perspectives Available to Students.

A legal education is incomplete without exposure to a diverse set of legal, cultural, and political viewpoints. *Grutter*, 539 U.S. at 314. Learning about law in a diverse classroom setting is necessary to understanding that law does not operate in a vacuum. Diversity in the legal classroom ensures that graduating lawyers are cognizant of inequalities within the profession, and of potential client needs to which they would not be exposed in more homogenous settings.

The American Bar Association acknowledges the necessity of heterogeneous student bodies with its Standard 212, which requires law schools to “demonstrate by concrete action a commitment” to supporting “members of underrepresented groups, particular racial and ethnic minorities, and a commitment to having a student body that is diverse with respect to gender, race, and ethnicity.” American Bar Association Standards for Approval of Law Schools (2011-2012), Ch. 2, Stand. 212(A). Research shows that racial diversity brings students into contact with perspectives they would not otherwise encounter:

Even among the most privileged minority students—those attending an elite university practicing affirmative action—half grew up in segregated or racially mixed neighborhoods . . . [L]argely middle-class black students, along with their similarly segregated Latino peers, are vastly more likely to have witnessed gunshots, muggings, and other social disorders, and to have known homeless people, prostitutes, and gang members than their white peers.

Elizabeth Anderson, *Affirmative Action is About Helping All of Us*, 57 Chron. Higher Educ. Rev. B11, B13 (June 3, 2011). Students who already have experience interacting with the people most likely to come into contact with, and to need the protection of, the justice system are an asset in the classroom. Minority students are equipped with “firsthand knowledge of racial conditions that is essential for elites to know if they are to be able to competently serve disadvantaged, racially segregated sectors of

society.” *Id.* at B13. Their knowledge enables minority students to “bring practical competence in establishing rapport and respectful interaction with the less privileged” into the classroom. *Id.* These are precisely the skills that lawyers, who will work with criminal defendants, at-risk property owners, and victims of injuries on a daily basis, need to have long before they conduct their first client interview.

The benefits of learning in a diverse classroom environment go beyond practical knowledge in dealing with marginalized people, known as members of “outgroups” in sociology. One review of over 500 studies undertaken between 1940 and 2000 showed that encountering people from different groups leads to more favorable attitudes “toward the entire outgroup, outgroup members in other situations, and even outgroups not involved” in the initial encounters. Thomas Pettigrew and Linda Tropp, *A Meta-Analytic Test of Intergroup Contacts Theory*, 90 *J. Personality & Soc. Psych.* 5, 751, 766 (2006). This is as true in law as it is in other sectors of society: “More racial diversity in the [county-level] bar results in less racial disparity in criminal sentencing.” Ryan D. King, Kecia R. Johnson, and Kelly McGeever, *Demography of the Legal Profession and Racial Disparities in Sentencing*, 44 *L. & Soc. Rev.* 1, 1, 26 (2010). Diversity in the classroom is the surest way to inculcate respect for people of diverse backgrounds, which is indispensable to the pursuit of justice.

This diversity only came about recently, as a result of policies such as the University of Texas plan at issue in the present litigation. The history of minority lawyers in the southeastern United States

illustrates the benefits to the legal profession of diversity policies in education.

Charles H. Houston, the first black student on the Harvard Law Review, later vice-dean of the Howard Law School and a champion of desegregation efforts in the courts, was acutely aware of the challenges communities of color faced in the South as African-Americans attempted to advocate for their civil rights in the early twentieth century. Genna Rae McNeil, *Charles Hamilton Houston*, 3 Black L.J. 2, 123, 123-124 (1974). Lack of empathy from the overwhelmingly white legal community was a significant obstacle to the fight for civil rights in Houston's time and the years that followed. In 1935, Houston wrote,

[T]he average white lawyer, especially in the South, cannot be relied upon to wage an uncompromising fight for equal rights for Negroes. He has too many conflicting interests, and usually himself profits as an individual by that very exploitation of the Negro which, as a lawyer, he would be called upon to attack and destroy.

Charles H. Houston, *The Need for Negro Lawyers*, 4 J. Negro Educ. 1, 49, 49 (Jan. 1935).

In 1935, there were only 14 black lawyers in all of Georgia, which had a black population of 1,071,125. *Id.* White lawyers, already materially interested in racial segregation, lacked the kind of diverse educational experiences that would expose them to different perspectives, especially on racial issues. "School segregation was embedded in the Georgia constitution," and integration did not begin in earnest until the 1960s. Gwen Y. Wood, A Unique

and Fortuitous Combination: An Administrative History of the University of Georgia Law School, 100, 204 (1998).

Though *de jure* segregation ended more than five decades ago, minority populations throughout the United States still have vastly different experiences with private and public institutions than do members of the majority population. Minority populations can be the targets of “redlining” practices whereby bank and mortgage companies enact policies that are intended to deny equal credit opportunities to minority residential areas, *see, e.g.*, Mike DeNardo, *Wells Fargo Settles Gov’t Complaint Over Home-Buyer “Redlining”*, CBS Philly (July 16, 2012) *available* *at* <http://philadelphia.cbslocal.com/2012/07/16/wells-fargo-settles-government-complaint-over-home-buyer-redlining/> (last accessed Aug. 7, 2012), and minority U.S. residents are far more likely than their white counterparts to be incarcerated, *see, e.g.*, Office of Justice Programs, Dep’t of Justice, NCJ 236096, *Prisoners in 2010*, 7, 27 (2011). Lawyers and judges hold a special position in the social order, guiding individuals through the complex framework of laws that undergirds our society. Members of the legal profession better serve this role when they come from minority backgrounds and when they gain exposure to their colleagues’ diverse perspectives.

Diversity in the classroom is essential to ensuring that the legal profession ably serves all members of our society. Thanks in part to policies designed to promote diversity, minority students now comprise over twenty percent of law school student bodies. Robert A. Stein, *The Future of the Legal Profession*, 91 *Minn. L. Rev.* 1, 4 (2006-2007). This diversity is

essential to the education of future legal professionals, and it must be allowed to continue.

B. Diversity in the Classroom Prepares Students to Effectively Contribute to an Increasingly Diverse and Globalized Workforce.

Diversity in the classroom prepares students to effectively contribute to an increasingly diverse and globalized workforce. People who graduate law school will undertake a variety of occupations, all of which require the ability to understand many different perspectives.

As the court below noted, “major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.” *Fisher v. Univ. of Texas at Austin*, 631 F.3d 213, 219-20 (5th Cir. 2011) (quoting *Grutter* at 330) *cert. granted*, 11-345, 2012 WL 538328 (U.S. Feb. 21, 2012). The ability to work with diverse clients and colleagues is especially pertinent to legal work. As one prominent Atlanta law firm put it: “It takes diverse perspectives to examine client issues from many angles in order to find the best solutions.” *An Inclusive Environment*, Troutman Sanders LLP, *available at* <http://www.troutmansanders.com/diversity/> (last visited Apr. 4, 2012).

One reason that diversity is so essential to the legal profession is that lawyers must often encounter situations and people to whom they have seldom been exposed before. Large law firms often count multinational corporations among their clients. Pro bono attorneys often represent indigent clients who

are minorities or immigrants. Judges must make decisions on cases involving parties from backgrounds very different than their own.

Being a member of a diverse group, and having been exposed to diversity in one's educational experience, are also valuable to law firms. Many firms view diversity as "a strategic asset that allows for more effective client service" and increasingly look for attorneys capable of contributing in a diverse workplace. *Racial Diversity*, King & Spalding, <http://www.kslaw.com/About-Us/Diversity/Racial-Diversity> (last visited Apr. 8, 2012). This demand for attorneys exposed to diversity is also being driven by clients; "[a]ll law firms want to improve their diversity," and they are also "under increasing pressure from their clients to do so." *King & Spalding Pioneers Diversity Program for Large Law Firms in Conjunction with American Institute for Managing Diversity*, King & Spalding (June 27, 2005), http://www.kslaw.com/NewsandInsights/NewsDetail?us_nsc_id=255 (last visited Aug. 9, 2012). Diversity in the classroom prepares attorneys to work with diverse clients and colleagues, a skill increasingly demanded by firms.

Unfortunately, respect for clients and colleagues with diverse backgrounds is still lacking in society at large. In one recent study, resumes with "White-sounding" names received approximately fifty percent more callbacks for job interviews in Boston and Chicago than similar resumes with "African-American-sounding" names. Marianne Bertrand and Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 *Am.*

Ec. Rev. 4, 991, 992 (2004). Other studies have shown the persistence of discrimination in employment, home mortgage lending, and even used car markets. See Richard Williams, Reynold Nesiba, and Eileen Diaz McConnell, *The Changing Face of Inequality in Home Mortgage Lending*, 52 Soc. Problems 2, 181 (2005); Vincent J. Roscigno, Lisa M. Williams, and Reginald A. Byron, *Workplace Racial Discrimination and Middle Class Vulnerability*, Am. Behavioral Scientist 10.1177/0002764211433805 (Feb. 13, 2012); Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 Harv. L. Rev. 4, 817 (Feb., 1991). Diversity in the classroom helps prepare legal professionals to work with clients and colleagues of different races and backgrounds.

Judicial diversity is especially important: “[J]udges from different backgrounds and a diversity of experiences help to guard against the possibility of narrow decisions.” Lawyers’ Comm. for Civil Rights Under Law, *Improving Diversity on the State Courts: A Report from the Bench*, Justice at Stake, 7 (2009), http://www.justiceatstake.org/media/cms/DiversityReport2009_4F739E0E55910.pdf. “To reinforce democratic values and strengthen the public’s confidence in the justice system, it is crucial that the judiciary reflect the diversity of the citizenry and that judges have the background to appreciate the circumstances of those who appear before them.” *Id.* at 35. It is impossible to achieve judicial diversity without a diverse pool of attorneys as candidates.

The ability to understand a variety of perspectives is perhaps more important now than it ever has been. “[I]n a global economy—and with a foreign policy premised on human rights and

dignity—lacking a diverse workforce is embarrassing to the United States, undermines its credibility, and hurts its business success in dealing with other nations.” Sally Coleman Selden, *A Solution in Search of a Problem? Discrimination, Affirmative Action, and the New Public Service*, 66 P. Admin. Rev. 6, 911, 911 (Nov.-Dec. 2006). This is especially true of law, which serves as a major conduit through which people around the world negotiate, coordinate their activity, and seek justice. Educational diversity aids students in developing their intercultural communication skills, sensitivity to cultural differences, and understanding of multicultural issues. Carol Logan Patitu and Melvin C. Terrell, *Benefits of Affirmative Action in Student Affairs*, 83 New Directions for Stud. Servs. 41 (Fall 1998). It equips students with the “skills in and awareness of language and culture” that drives the modern economy. *Id.* at 46. These skills are also important in public law, as the administrative state is expected to deal fairly with all citizens and engages with every community in America. Educational diversity, because of its importance in preparing leaders for the global economy and modern legal profession, is indispensable to the training of future lawyers.

C. Diversity in the Classroom Fosters Civic Engagement.

Diversity in the classroom fosters civic engagement by minority students. The court below recognized this, holding,

A diverse student body is crucial for fostering this ideal of civic engagement, because “[i]n order to cultivate a set of leaders with legitimacy in the eyes of

the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity” . . . “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.”

Fisher, 631 F.3d at 220, 257 (quoting *Grutter*, 539 U.S. at 332).

When participation in universities is not visibly open to people of different races and ethnicities, minority students can feel unwelcome. Students quoted in one study conducted after California banned the consideration of race in public education admissions said, “[Campuses of the University of California] don’t want people like me,” and “When you’re a minority as well as a woman, you just have . . . two major strikes against you.” Robert T. Teranishi and Kamilah Briscoe, *Contextualizing Race: African American College Choice in an Evolving Affirmative Action Era*, 77 J. Negro Educ. 1, 20 (Winter 2008). Unfortunate though it is, the “many alternative strategies implemented at public universities . . . have not been able to maintain minority enrollment absent affirmative action.” Mark C. Long, *Affirmative Action and Its Alternatives in Public Universities: What Do We Know?*, 67 P. Admin. Rev. 2, 315, 315 (Mar.-Apr. 2007). Without affirmative action, “U.S. law schools would each year admit fewer than 2,000 blacks.” George B. Shepherd, *No African-American Lawyers Allowed: The Inefficient Racism of the ABA’s Accreditation of Law Schools*, 53 J. Legal Educ. 103, 104 (2003).

Becoming a leader in society by accessing legal education is difficult enough without the added weight of feeling like an institution is unwilling to consider one's unique racial and cultural identity as an asset. To expand on the baseball metaphor used by the student quoted above, actively fostering diversity in the classroom helps keep minority students in the game so that they can make their contributions to society.

Minority students who have become lawyers thanks to institutions being visibly open to them have done a commendable job of taking up leadership in the community over the past century. Thanks to the legacy of committed service to underrepresented people that minority lawyers have created and to the life experiences minority students bring to the classroom, minority students also help their peers to appreciate the need to work for justice and sympathize with others. Over the past century, minority lawyers have led the way to greater equality before the law and greater ideals for the entire legal profession. This has been especially true in the movement for civil rights, the pro bono movement, and contemporary volunteer work.

While “[t]he average white lawyer, especially in the South, [could not] be relied upon to wage an uncompromising fight for equal rights for Negroes,” Houston at 49, black lawyers took up the mantle of civil rights. Professors and students affiliated with the Howard University Law School were active in so many cases involving desegregation in education, public accommodations, voting, and housing that its annual report for 1953-54 “reflected the institutional and collective nature of the struggle for liberty” throughout the country. Genna Rae McNeil,

Comment *Justiciable Cause: Howard University Law School and the Struggle for Civil Rights*, 22 *Howard L.J.* 283, 295 (1979). The school, which was visibly open to minority students, “became a living laboratory where civil rights law was intervened by teamwork.” *Id.* at 291 (quoting R. Kluger, *Simple Justice*, 128 (1975)).

It was not just at Howard that minority lawyers worked at the cutting edge of social justice. Even before the advent of the pro bono movement in the 1960s, “National Bar Association members were leaders of the pro bono movement at a time when they could least afford to provide free legal services to the poor” J. Clay Smith, Jr., *The Black Bar Association and Civil Rights*, 15 *Creighton L. Rev.* 3, 651, 663 (1981-82). The National Bar Association even set a goal of establishing free legal clinics “in all cities with a colored population of 5000 or more,” despite there being only slightly more than 1,000 black lawyers nationwide at the time. *Id.* at 664.

By the early 1980s, when institutions had begun in earnest to consider race an asset in school admissions, black lawyers contributed significantly to community and public interest groups. Geraldine R. Segal, *Blacks in the Law: Philadelphia and the Nation*, 107 (1983). They believed in continuing the legacy of service to others, as do minority lawyers today. One study of University of Michigan Law School graduates found that its minority graduates in private practice “performed an average of 121 hours per year of uncompensated legal service compared to 98 hours performed by white graduates.” Carla D. Pratt, *Way to Represent: The Role of Black Lawyers in Contemporary American Democracy*, 77 *Fordham L. Rev.* 1409, 1425 (Mar.

2009). For black Harvard Law School graduates, the average amount of pro bono time was 133 hours annually, compared with a national average of 25 hours. *Id.* Part of this extensive commitment to pro bono work may stem from the role minority lawyers can play in helping poor members of their extended communities in “obtaining an informal referral to a lawyer willing to provide legal services for low or no cost.” *Id.* at 1431. For at least some minority clients, a shared group identity with a legal professional encourages the rapport and trust that is essential to good lawyering. See Shani M. King, *Race, Identity, and Professional Responsibility: Why Legal Service Organizations Need African American Staff Attorneys*, 18 Cornell J.L. & Pub. Pol’y 1, 4 (Fall 2008).

Many law schools and firms view their own commitment to community engagement as entailing that they bring together students and employees who are diverse and who are capable of working effectively in a diverse environment. Starting from the belief that their commitment to diversity and community service “is not only a business imperative – it is also a moral one,” law schools and firms have found that the benefits of diversity extend not only to education and meeting client needs, but to civic engagement as well. *Our Commitment*, McKenna Long & Aldridge, available at <http://www.mckennalong.com/careers-diversity-commitment.html> (last visited Apr. 9, 2012). One firm stated that a commitment to diversity enhances “both our ability to provide world-class services to clients and our collective and individual contributions to the strength and vitality of the communities in which we work and live.” *Better*

Together: Diversity & Inclusion, Kilpatrick Townsend, available at http://www.kilpatricktownsend.com/en/About_Us/Diversity.aspx (last visited Apr. 8, 2012). Diversity in the classroom produces diverse and civic-minded attorneys whom firms view as essential to furthering their own commitments to civic engagement.

In the years since institutions began adopting affirmative action policies in school admissions, universities have appreciated more and more that race is an asset in the classroom. Thanks in part to that attitude and policies stemming from it, minority lawyers now serve as the President and Attorney General of the United States, sit on supreme courts throughout the nation (including in Georgia, where two black chief justices have held the office in the last two decades), sit on America's school boards and town councils, advise its museums and hospitals, and much more. Ensuring that primary, secondary, college, and graduate school classrooms are diverse galvanizes more students to join the legal profession, and to serve their communities with their legal degrees. Diversity in the classroom drives students into the legal and other professions, and then out into the world where they provide leadership for countless government and community organizations.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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