

No. 11-345

In The
Supreme Court of the United States

—◆—
ABIGAIL NOEL FISHER, PETITIONER

v.

UNIVERSITY OF TEXAS AT AUSTIN, ET AL.

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

—◆—
**BRIEF FOR LEADING PUBLIC RESEARCH
UNIVERSITIES THE UNIVERSITY OF
DELAWARE, THE BOARD OF TRUSTEES
OF THE UNIVERSITY OF ILLINOIS, INDIANA
UNIVERSITY, THE UNIVERSITY OF KANSAS,
THE UNIVERSITY OF MICHIGAN, MICHIGAN
STATE UNIVERSITY, THE UNIVERSITY OF
NEBRASKA-LINCOLN, THE OHIO STATE
UNIVERSITY, THE PENNSYLVANIA STATE
UNIVERSITY, AND PURDUE UNIVERSITY
AS AMICI CURIAE IN SUPPORT OF
RESPONDENTS**

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THE OHIO STATE UNIVERSITY, THE
PENNSYLVANIA STATE UNIVERSITY, AND
PURDUE UNIVERSITY AS AMICI CURIAE
IN SUPPORT OF RESPONDENTS**

Amici, leading public research universities, submit this brief as amici curiae in support of respondent.¹

INTEREST OF AMICI CURIAE

Like respondent, amici are all large, leading public research universities. To the extent allowed by their respective States' laws, amici strive to educate a diverse population of students in an environment

¹ Letters from the parties providing blanket consent to the filing of amicus curiae briefs have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than amici curiae, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

that is itself diverse.² As such, amici have a keen interest in this Court's resolution of this case.

The University of Delaware is a research-intensive, technologically advanced institution with a tradition of excellence extending back to its founding in 1743. It offers 137 bachelor's programs, 117 master's programs, 50 doctoral programs, and 12 dual graduate programs through its 7 colleges and in collaboration with more than 60 research centers. At present, the University's student body includes nearly 17,000 undergraduates, 3,700 graduate students, and 850 students in professional and continuing studies programs.

The University of Illinois is a world leader in research and discovery and Illinois's most comprehensive public university. Founded in 1867, its three campuses—in Urbana-Champaign, Chicago, and Springfield—enroll more than 77,000 students in hundreds of undergraduate, graduate, and professional programs, making the University the largest educator in Illinois. As part of its commitment to serving Illinois, the University runs more than 700 public service and outreach programs.

² Since this Court's decision in *Grutter*, some States, including Michigan, have taken actions whose effect is to prevent their public universities from using admissions programs like that approved in *Grutter*, where race plays a limited role in admissions. Institutions in those States must comply with state law.

Indiana University is a major multi-campus public research institution, grounded in the liberal arts and sciences, and a world leader in professional, medical, and technological education. Founded in 1820, it enrolls more than 100,000 students across 8 campuses and boasts more than 555,000 living alumni, nearly 272,000 of whom are Indiana residents.

The mission of the University of Kansas is to lift students and society by educating leaders, building healthy communities, and making discoveries that change the world. Established in 1865, it is Kansas's flagship university and a member of the prestigious Association of American Universities, an organization of 61 leading research universities in the United States and Canada. The University of Kansas's five campuses are home to more than 28,000 students studying in more than 345 degree programs.

Established in 1817, the University of Michigan is a world-class research institution known for its diversity of people, heritage, academic disciplines, and scholarly pursuits. The University enrolls more than 58,000 students across 3 campuses and 28 schools and colleges. In the 2010-2011 academic year alone, Michigan awarded close to 15,000 undergraduate, graduate, and professional degrees. The University also boasts one of the largest alumni bodies in the country with more than 517,000 living alumni, many of whom continue to live in the State of Michigan.

Founded in 1855, Michigan State University is the Nation's pioneer land-grant university and one of the top research universities in the world. With one of the largest, greenest campuses in the Nation, Michigan State University is home to nationally ranked and recognized academic, residential college, and service-learning programs. Its student body includes close to 48,000 individuals from all 83 counties in Michigan, all 50 States in the United States, and 130 other countries enrolled in 200 undergraduate, graduate, and professional programs of study.

The University of Nebraska-Lincoln was chartered in 1869 as a land-grant university and today is an educational institution of international stature. It is one of the nation's preeminent teaching and research institutions with a wide array of sponsored projects aimed at broadening knowledge in the sciences and humanities. Through its three primary missions of teaching, research, and service, the University of Nebraska-Lincoln is Nebraska's primary intellectual center and economic development engine, providing leadership throughout Nebraska and the world through quality education and the generation of new knowledge.

The Ohio State University, founded in 1870, is one of the Nation's top public universities and research centers. At The Ohio State University's main Columbus campus, 55,000 students select from 14 colleges, 175 undergraduate majors, and 240 master's, doctoral, and professional degree programs. The Ohio State University has awarded 622,368

degrees and its legacy extends to more than 465,000 living alumni.

The Pennsylvania State University, founded in 1855 as an agricultural college, is now a top-tier public research university that educates students from Pennsylvania, the Nation, and the world. The University improves the well being and health of individuals and communities through integrated programs of teaching, research, and service. As Pennsylvania's land-grant university, it also provides unparalleled access and public service to support the citizens of the Commonwealth, and engages in collaborative activities with industrial, educational, and agricultural partners here and abroad to generate, disseminate, integrate, and apply knowledge that is valuable to society.

Founded in 1869, Purdue University is a major research institution known for discoveries in science, technology, engineering, and math, among other areas. Purdue enrolls more than 70,000 students in 10 colleges and schools located across 5 campuses. It is particularly well known for its aviation program, which includes studies in advanced spaceflight, and has produced 22 astronauts, including Neil Armstrong, the first man to set foot on the moon, and Eugene Cernan, the last man to leave it.

INTRODUCTION AND SUMMARY OF ARGUMENT

Public universities form the core of the American post-secondary educational system. These institutions educate millions of the best and the brightest from all walks of life. These universities develop future leaders who serve our Nation and their respective States' diverse communities. Amici thus have developed programs designed to foster leadership skills in their students, with the understanding that many of these students, once they graduate, will become leaders in their communities in any number of fields.

Admitting diverse student bodies that have a strong connection to the communities amici serve remains essential to achieving amici's dual objectives of promoting academic excellence and leadership in students. Current research continues to show that student bodies diverse in a multitude of ways lead to improved learning outcomes for all students and benefit the entire educational community. For these and other reasons, amici all share a commitment to inclusiveness and public service as part of their various missions.

The Court should not set aside its precedent recognizing amici's constitutionally based rights to adopt admissions programs that seek to provide their students with these compelling benefits, particularly when petitioner did not even challenge *Grutter* in her question presented to this Court. Amici have relied on the Court's opinion in *Grutter* to implement narrowly

tailored programs that consider (when permitted by state law), in a holistic and individualized manner, an applicant's race as one of many factors. Leading public universities have committed significant resources to carefully crafting student bodies that fit their missions based on the holistic and individualized analysis this Court has required. Public universities commonly have multiple admissions programs and staffs for colleges or programs within the university. Each of these has been adapted to comply with this Court's constitutional pronouncement in *Grutter*. Under this Court's *stare decisis* jurisprudence, such reliance weighs strongly in favor of adherence to *Grutter's* constitutional holding. This is particularly the case where the prior holding has proved workable and there has been no fundamental change in law or fact to justify repudiation of that precedent.

Finally, the Court should tread lightly when reviewing university admissions programs. As leading public universities, amici share an interest in the academic freedom, grounded in the First Amendment, that they have as universities to choose how to implement their institutional missions. Which students a university decides to admit is a core part of that academic freedom. For over half a century, the Court has exercised significant deference when addressing a broad range of issues that affect an institution's academic freedom—from who can teach, to what can be taught, to who will be taught. The Court has recognized that depriving the Nation's universities of sufficient latitude to exercise academic judgment

would imperil the future of our Nation. Universities need the freedom to select the individuals who will best further their particular educational missions.

ARGUMENT

A. This Court Should Not Depart From The Principles Enunciated In *Grutter*

Amici are large, public research universities whose missions include educating the best and the brightest from all over the Nation and the world, including the diverse communities of their respective States. For over three decades, amici have relied on the equal protection framework established by this Court in *Grutter*, and before that *Bakke*, to design and implement their admissions programs. See *University of California v. Bakke*, 438 U.S. 265 (1978) (Powell, J.); *Grutter v. Bollinger*, 539 U.S. 306 (2003). This Court should not depart from that framework, particularly where, as here, petitioner did not ask this Court to overrule *Grutter* in her question presented. Principles of *stare decisis* dictate adherence to *Grutter*'s constitutional holding, especially in light of the reliance it has induced. That holding has proved workable, and petitioner has failed to demonstrate any significant change in legal doctrine or factual premises that might justify departure from the Court's prior explication of the Constitution.

1. *Public universities serve and educate diverse communities throughout the Nation and their respective States*

a. Public universities play a unique and vital role in the American educational system. These institutions provide post-secondary education to a large segment of the Nation's high school graduates in almost every geographic region and community. Public colleges and universities enroll approximately 60% of post-secondary education students attending four-year, degree-granting institutions in the United States. National Ctr. For Educ. Stats., U.S. Dep't of Educ., *Digest of Education Statistics: 2011*, ch. 3, tbl. 196 at 288 (2012).³

As leading public universities of their respective States, amici offer access to highly ranked degree and research programs to some of the best students in the Nation and their respective States. Amici educate hundreds of thousands of students each year in hundreds of different disciplines. While amici draw from a national pool of talented applicants, the mission of public universities includes serving the communities of their respective States. *See, e.g.,* University of Delaware, *Path to Prominence: A Strategic*

³ <http://nces.ed.gov/programs/digest/d11/>.

*Plan for the University of Delaware.*⁴ This includes broadly educating the State’s population and producing graduates who are not only diverse themselves, but also are equipped to be leaders in a diverse world.

Amici’s effort to fulfill this mission is not aspirational; it involves concrete, practical programs that have been developed and refined over decades. Some innovative programming has been designed to promote the development of practical leadership skills and to nurture students’ interest in assuming future leadership roles in their communities. The University of Delaware Legislative Fellows Program, for example, “links the research capacity of the University of Delaware with the research needs of the Delaware General Assembly.” University of Delaware Inst. for Pub. Admin., *Legislative Fellows Program: Introduction*.⁵ “[T]he experience offers a valuable opportunity to observe and contribute to the governmental decision-making process,” as “Fellows assist legislators in dealing with critical issues facing the state.” University of Delaware Inst. for Pub. Admin.,

⁴ <http://www.udel.edu/prominence/principles.html> (“Our first and most important commitment is to be the flagship of higher education for the State of Delaware—both by ensuring that every Delawarean has access to a top-quality education, and by applying the strengths and resources of the University to benefit the greater Delaware community.”).

⁵ <http://www.ipa.udel.edu/legfellows/>.

*Legislative Fellows Program: Apply for the Legislative Fellows Program.*⁶

Likewise, The Ohio State University established the OSU Leadership Center. The Center's mission is to provide "research-based resources and high quality practical programs to build and strengthen leadership capacities that make a positive difference in the lives of Ohio's citizens." The Ohio State Univ. Leadership Ctr., *Welcome.*⁷

Amici have developed these and other programs with the understanding that significant numbers of their matriculated students are from the individual university's home State and will choose to remain in their State following graduation. Many of these students, once they graduate, will become leaders in their communities in any number of fields. Indeed, in recent years, in-state residents have comprised upwards of 65% of the freshman undergraduate classes enrolled at large public institutions such as the University of Nebraska-Lincoln, The Ohio State University, Michigan State University, and the University of Michigan. See University of Nebraska-Lincoln, *Fact Book: 2011-2012*; The Ohio State Univ., *Facts: By the Numbers*; University of Michigan, *Comparison of the University of Michigan and Michigan State*

⁶ http://www.ipa.udel.edu/legfellows/LF_recruitment.pdf.

⁷ <http://leadershipcenter.osu.edu/>.

University.⁸ Additionally, institutions including Indiana University and Penn State University have seen a majority of their graduates continue to reside within the State. See Penn State Alumni Ass'n, *Alumni Maps: 315,967 Alumni Living in Pennsylvania*; Indiana Univ. Inst'l Research & Reporting, *Living Alumni: Indiana University—Fall 2011*.⁹

Leading public universities find it important to foster national and local leaders who embody, and can learn from and collaborate with, the diverse communities that they will lead. Throughout the Nation, public universities provide all potential students visible pathways to leadership opportunities. Democracy dictates that those potential paths must remain open to all the Nation's citizens. As Justice Powell explained: "the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples." *Bakke*, 438 U.S. at 313 (Powell, J.) (quoting *Keyishian v. Board of Regents of Univ. of New York*, 385 U.S. 589, 603 (1967)); see also Douglas Laycock, *The Broader Case for Affirmative Action: Desegregation, Academic Excellence, and Future Leadership*, 78

⁸ University of Nebraska-Lincoln (see http://irp.unl.edu/fb11_12_5.pdf); The Ohio State Univ. (see <http://www.osu.edu/facts.php>); University of Michigan (<http://www.umich.edu/~crlteach/UMMSUcomparison.html>).

⁹ Penn State Univ. (http://alumni.psu.edu/about_us/Alumni%20Maps%202012.pdf); Indiana Univ. (http://www.iu.edu/~uirr/reports/standard/factbook/?path=/2011-12/University/Additional_Facts/Alumni/Living_Alumni).

TUL. L. REV. 1767, 1799-1800 (2004) (discussing how a “failure to educate a leadership class among disadvantaged minority populations” would not only harm those students, but could threaten equality and social stability in the communities these universities serve).

b. A diverse student body is essential to achieving amici’s dual objectives of promoting academic excellence and leadership in students.

Contrary to petitioner’s suggestion (Pet. Br. 19), the goal of having a diverse student body to help fulfill a public university’s mission does not suggest quotas, racial balancing, or an attempt to mirror the racial and ethnic composition of a particular State or the Nation. Rather, public universities broadly consider the demographics of their States and the Nation to determine which groups and which communities might be underserved or underrepresented, without setting a target or quota. When permitted by state law, race is but one factor among many in the holistic and individualized admissions processes that many public universities employ. *See* pp. 21-23 *infra*.

Indeed, institutional consideration of such policies of inclusion is not a recent educational innovation. It traces its origins to the time of the Founding, when George Washington bequeathed funds for the establishment of a national university so that “the youth * * * from all parts” could free themselves from “local prejudices and habitual jealousies” through

association. George Washington, *The Will of George Washington* (July 9, 1799).¹⁰

Amici continue to embrace this inclusive vision of diversity. Amici have long asserted: “enroll[ing] a student body that is diverse in a rich variety of ways” “creates the best learning environment for all our students, majority and minority alike.”¹¹ The University of Kansas, for example recognizes that diversity “enhances our productivity, spurs new ideas, and helps us perform on a higher level.” The Office of Diversity & Equity, Univ. of Kansas, *Provost Statement on Diversity*.¹² “Diversity provides our students valuable experiences that will help them prosper after graduation in an increasingly global and multicultural world.” *Ibid.* Likewise, The Ohio State University emphasizes that diversity is “philosophically essential to the nature and well being of any university; and that as a practical matter, diversity is an essential condition for excellence in higher education.” The Ohio State Univ., *Renewing the Covenant: Diversity Objectives and Strategies for 2007 to 2012*.¹³ The University of Delaware similarly views “diversity

¹⁰ *Transcribed in* THE PAPERS OF GEORGE WASHINGTON (Alderman Lib., Univ. of Va.), <http://gwpapers.virginia.edu/documents/will/text.html>.

¹¹ Tomislav Ladika, *CIR to file brief with Supreme Court today*, MICH. DAILY, Jan. 16, 2003, available at <http://www.michigandaily.com/content/cir-file-brief-supreme-court-today>.

¹² <http://www.diversity.ku.edu/provost.shtml>.

¹³ <http://www.osu.edu/diversityplan/index.php>.

as a core value and guiding principle” and consequently “work[s] to make diversity an integral part of everyday life on campus.” University of Delaware, *President’s Diversity Initiative: UD’s Commitment to Diversity and Excellence*.¹⁴

Nor is the educational benefit achieved from these goals theoretical; it is supported by substantial empirical research. For example, a recent study confirms that “being in an *environment* where students are more engaged with diversity had significant positive educational effects,” including improving “student[s’] general academic skills.” Nida Denson & Mitchell J. Chang, *Racial Diversity Matters: The Impact of Diversity-Related Student Engagement and Institutional Context*, 46 AM. EDUC. RES. J. 322, 343 (2009) (emphasis in original). These positive effects extend to “all students,” minority and non-minority alike. *Id.* at 344.

Further quantitative research continues to confirm that “[c]ollege diversity experiences are associated with gains in cognitive skills, cognitive tendencies, and multiple/other cognitive outcomes” for all students. Nicholas A. Bowman, *College Diversity Experiences and Cognitive Development: A Meta-Analysis*, 80 REV. EDUC. RES. 4, 21 (2010). These gains include positive effects on “basic cognitive skills, such as critical thinking and problem solving.” *Id.* at 22. Indeed, this Court has recognized that a diverse

¹⁴ <http://www.udel.edu/diversity/commitment.html>.

student body “enables students to better understand persons of different races” and that “classroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds.” *Grutter*, 539 U.S. at 330 (brackets and internal quotations omitted); *see also ibid.* (“[N]umerous studies show that student body diversity promotes better learning outcomes, and better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.”) (internal quotations omitted).

2. *Public universities have reasonably relied on Grutter to tailor their admissions programs*

For almost three decades, amici have relied extensively on Justice Powell’s opinion in *Bakke* and on *Grutter*, which reaffirmed and strengthened Justice Powell’s reasoning, to shape and to refine their admissions policies and procedures.

Before *Grutter*, as the Court recognized, “[p]ublic and private universities across the Nation * * * modeled their own admissions programs on Justice Powell’s views on permissible race-conscious policies.” *Grutter*, 539 U.S. at 323. Amici and numerous other public universities understandably recognized *Grutter* as a definitive pronouncement. University of Michigan President Mary Sue Coleman conveyed a sense shared by amici that public universities, where authorized by state law, continue to have a “green light

to pursue diversity,” and that “[t]he court has given us a road map * * * [consisting of] more individualized attention.” News Release, University of Michigan, U.S. Supreme Court rules on University of Michigan cases (June 23, 2003);¹⁵ David Zeman & Maryanne George, *U-M Hails Top Court’s Support Of Race Factor*, DETROIT FREE PRESS, June 24, 2003, at 1A.

In the near-decade that has followed this Court’s ruling in *Grutter*, universities have viewed the decision as an express validation of the diversity values espoused in *Bakke* and as a useful guidepost for charting their future course. Nothing has changed since *Grutter* was decided to justify a sudden and abrupt departure from that precedent. Where state law allows, amici and other public universities have complied with *Grutter*’s “highly individualized, holistic” guidelines, with this Court’s assurance that these measures were consistent with the federal Constitution. These universities have spent millions of dollars to increase staff, to develop new programs, and to adjust policies and procedures to meet *Grutter*.

To be sure, any revision to admissions policies comes with a cost, but this Court in *Grutter* recognized the importance of what universities long have known: the educational benefits of diversity constitute a compelling interest. Furtherance of this interest, based on this Court’s ruling, will have been

¹⁵ <http://www.ns.umich.edu/new/releases/20237-us-supreme-court-rules-on-university-of-michigan-cases>.

wasted if the Court were now to adopt a new constitutional framework, particularly given that there is no compelling justification, in law or fact, for the Court to reverse its holding. Compliance with any new equal protection proclamation would be complicated by the fact that public universities commonly have multiple admissions programs and staffs for colleges or programs within the university.

3. *Altering Grutter’s constitutional holding would violate fundamental principles of stare decisis*

Universities did not establish these admissions policies based on legislative enactments that might be subject to repeal or to revision depending on prevailing political priorities. Rather, they did so based on this Court’s precedent, which interpreted longstanding constitutional principles of equal protection. In such circumstances, *stare decisis* weighs strongly in favor of adherence to the Court’s holding in *Grutter*, as well as to Justice Powell’s separate opinion in *Bakke*.

The Court consistently has recognized that “*stare decisis* is of fundamental importance to the rule of law.” *Welch v. Texas Dep’t of Highways & Pub. Transp.*, 483 U.S. 468, 494 (1987); *see also Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 854 (1992) (O’Connor, Kennedy & Souter, JJ.) (“[T]he very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable.”).

Adherence to past precedent “promotes the even-handed, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” *Pearson v. Callahan*, 555 U.S. 223, 233 (2009) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)). Thus, while “*stare decisis* is not an inexorable command,” *ibid.* (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997)), “departure from it is exceptional, requiring ‘special justification,’” *Randall v. Sorrell*, 548 U.S. 230, 234 (2006) (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)). There is no such justification in this case.

Of especial relevance here, “individual or societal reliance on [past precedent] cautions with particular strength against reversing course.” *Lawrence v. Texas*, 539 U.S. 558, 577 (2003) (citing *Casey*, 505 U.S. at 855-856). Any departure from *Grutter* “would dislodge settled rights and expectations.” *Hilton v. South Carolina Pub. Rys. Comm’n*, 502 U.S. 197, 202 (1991). Here, when permitted to do so by state law, amici reasonably relied on *Grutter*—and on *Bakke* before it, *see Grutter*, 539 U.S. at 323—to fashion their admissions programs in a manner consistent with the Court’s constitutional interpretation. A change now would “add inequity to the cost of repudiation.” *Casey*, 505 U.S. at 854; *see also Martinez v. Ryan*, 132 S. Ct. 1309, 1319 (2012); *Montejo v. Louisiana*, 556 U.S. 778, 792 (2009); *Payne*, 501 U.S. at 828.

Other *stare decisis* factors historically considered by the Court further weigh against any precipitous

departure from *Grutter*. As amici’s highly individualized admissions programs demonstrate, *Grutter*’s principles have proven practical and workable. See, e.g., *Casey*, 505 U.S. at 854 (considering “whether the rule has proven to be intolerable simply in defying practical workability”) (citing *Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965)).

Nor has any intervening incremental change in law or fact undermined *Grutter* in such a way as to justify departure from that precedent. See *Casey*, 505 U.S. at 855, 857-861. This Court has explained that departing from prior precedent is unwarranted when “[n]o evolution of legal principle” leaves a prior decision’s “doctrinal footings weaker than they were” at the time of the decision. *Id.* at 857. For a change in factual circumstances to weigh in favor of abandoning a decision, the facts must “have so far changed * * * as to render [the earlier decision’s] central holding somehow irrelevant or unjustifiable in dealing with the issue it addressed.” *Id.* at 855.

Neither justification exists here. Petitioner can identify no meaningful evolution of law or fact on a societal scale that has developed since *Grutter*. Indeed, amici’s extensive experience educating students demonstrates that the need for a diverse student body exists as much today as it did when the Court decided *Grutter*. See pp. 13-16 *supra*; *Denson & Chang, supra*, at 343-344; *Bowman, supra*, at 21-22. To the extent permitted by state law, narrowly tailored admissions programs that consider race as one

of many factors continue to be an essential tool in crafting a diverse student body.

B. Universities Faithfully Apply The Narrow Tailoring Required By *Grutter*

Leading public universities consider a number of factors when creating diverse scholarly communities to meet the current and future needs of their very diverse States and of our increasingly diverse Nation. Such holistic and individualized admissions determinations permit a university to consider all aspects of a candidate, while preserving the university's academic freedom to assemble a student body that helps the university achieve its mission, and thus reflects the character and nature of the learning environment the university has shaped. Such a result is permissible under *Grutter*, and it preserves each university's long-standing freedom to decide who will teach, what will be taught, how it will be taught, and who will be admitted to study.

1. Race is only one of many factors considered by public universities

Since *Grutter*, and to the extent permitted by relevant state law, amici consider an applicant's race as just one consideration in a holistic and individualized evaluation of an applicant's capacity to contribute to diversity and to the academic excellence of the student body as a whole.

For example, The Ohio State University's diversity plan expressly recognizes that "racial and ethnic diversity should be one factor among the many

considered in admissions * * * in order to provide a quality education for all students.” The Ohio State Univ., *Renewing the Covenant: Diversity Objectives and Strategies for 2007 to 2012*.¹⁶

Amici seek to create a diverse campus not only along racial and ethnic lines, but across many attributes. This means that the search for a diverse student body broadly benefits the entire applicant pool, even those who are not underrepresented minorities. Indeed, because diversity encompasses more than race, the holistic and individualized component of the University of Texas’s admissions process has admitted Caucasian students with lower Academic Index and Personal Achievement Index scores than some underrepresented minority applicants who were denied admission. Resp. Br. 15-16. Although amici use admissions procedures that differ from those of the University of Texas, amici likewise have admitted Caucasian applicants based on diverse characteristics and achievements possessed by those applicants.

The highly individualized admissions process thus looks at numerous factors in addition to academic achievement. For example, Penn State University’s Framework to Foster Diversity 2010-2015 recognizes and fosters multiple dimensions of diversity, including not only race, but also “gender * * * LGBT people; those with disabilities; veterans; low-income, first-generation students; adult learners; and those with

¹⁶ <http://www.osu.edu/diversityplan/index.php>.

dependent-care responsibilities.” Penn State Office of the Vice Provost for Educ. Equity, *A Framework to Foster Diversity at Penn State: 2010-15*.¹⁷ Similarly, The Ohio State’s Freshman Admissions page expresses a preference for attracting not only students who provide racial diversity, but also those who provide “cultural, economic, * * * or geographic diversity” as well as those who “are a first-generation college student,” those who have “demonstrated outstanding talent in a particular area,” and those whose “high school performance was adversely affected by physical, mental, or learning environment factors.” The Ohio State Univ. Office of Admissions, *Undergraduate Admissions: Freshman admission*.¹⁸

2. *When a university employs an individualized admissions policy, core First Amendment issues of academic freedom are implicated which must be reflected in the application of strict scrutiny*

A university’s judgment about which students will best further the university’s mission is entitled to deference by the courts. This is not simply because universities have greater institutional expertise in making such decisions—although universities do have long and deep experience in matching students with their educational missions. Rather, this deference derives from the constitutional principle of

¹⁷ <http://equity.psu.edu/framework/>.

¹⁸ <http://undergrad.osu.edu/admissions/freshman/>.

academic freedom. “Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment.” *Bakke*, 438 U.S. at 312 (Powell, J.). This freedom includes a university’s exercise of its own judgment as to whom to admit into its student body. *Ibid.*

a. Over half a century ago, this Court held that the “essentiality of freedom in the community of American universities is almost self-evident.” *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). In the face of McCarthy era interference into academic freedom, a plurality of the Court explained that to “impose any straight jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.” *Ibid.* Concurring in the result, Justice Frankfurter recognized “four essential freedoms of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.” *Id.* at 263 (Frankfurter, J., concurring in the judgment) (internal quotations omitted).

In the decades that have followed, the Court has recognized that the academic freedom of universities is a “transcendent value” to which “our nation is deeply committed.” *Keyishian*, 385 U.S. at 603. Academic freedom “thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also * * * on autonomous

decisionmaking by the academy itself.” *University of Michigan v. Ewing*, 474 U.S. 214, 226 n.12 (1985) (internal citations and quotations omitted). This Court has reiterated what Justice Frankfurter recognized—that the “[d]iscretion to determine, on academic grounds, who may be admitted to study, has been described as one of ‘the four essential freedoms’ of a university.” *Ibid.* (internal citations and quotations omitted); *Bakke*, 438 U.S. at 312 (Powell, J.) (same); see also WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION* § 2.2.5 (4th ed. 2006) (discussing “judicial (academic) deference”); Robert M. O’Neil, *Academic Freedom and the Constitution*, 11 J.C. & U.L. 275, 283-287 (1984) (discussing doctrinal evolution of academic deference).

b. To achieve their academic missions, universities exercise considerable academic judgment—consistent with the holistic and individualized requirements that *Grutter* requires—to select student bodies that will further their goals. As Justice Powell explained, the “right to select those students who will contribute the most to the ‘robust exchange of ideas,’” is necessary to “achieve a goal that is of paramount importance in the fulfillment of [the university’s] mission.” *Bakke*, 438 U.S. at 313.

While all amici seek to educate and create future leaders (see pp. 9-13 *supra*), the individual missions of each public university differ and reflect the institution’s (and its State’s) traditions, cultures, and values. This fact is self-evident to anyone who visits the campuses, attends lectures, and interacts with the

students, faculty, and alumni of the numerous public research universities throughout the Nation. Indeed, even particular colleges or programs within a large public research university can have specific missions. Universities need the ability to select the individuals that will best fit their particular missions and goals. This is true not only at the university-wide level, but also within each of the separate colleges and schools that comprise large public universities such as amici.

Within the strictures of *Grutter*, amici should be permitted to exercise their well-established constitutional rights under the First Amendment by choosing the students they will educate. Such individualized decisions are not readily susceptible to judicial oversight and intervention. As the Court has recognized, there are a number of “complex educational judgments” that “lie[] primarily within the expertise of the university” to which the Court will defer “within constitutionally prescribed limits.” *Grutter*, 539 U.S. at 328; *see also Christian Legal Soc’y Chapter of Univ. of California v. Martinez*, 130 S. Ct. 2971, 2988-2989 (2010) (recognizing the “on-the-ground expertise and experience of school administrators” in higher education). Courts thus should be “reluctan[t] to trench on the prerogatives of state and local educational institutions.” *Ewing*, 474 U.S. at 226. The “Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, rather than through any kind of authoritative selection.”

Keyishian, 385 U.S. at 603 (internal quotations and brackets omitted).

c. Nor is this result inconsistent with the Court's equal protection jurisprudence outside the context of university admissions. The First Amendment issues at stake here differentiate equal protection cases involving core areas of academic freedom—such as whom to teach—from equal protection cases in other contexts. As this Court explained in *Grutter*, “[c]on-text matters when reviewing race-based governmental action under the Equal Protection Clause,” as “the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in th[e] particular context” must be taken into account. *Grutter*, 539 U.S. at 327.

To be sure, deference to universities cannot be absolute, and should not insulate universities from judicial scrutiny. As the Court's ruling in *Gratz* demonstrates, when race is considered in admissions, academic freedom can be limited where the university fails to exercise sufficient educational judgment in its admissions policies. *Gratz v. Bollinger*, 539 U.S. 244, 270-271 (2003). In *Gratz*, rather than conduct a holistic and individualized admissions process, the undergraduate admissions policy at issue automatically gave twenty points to every “underrepresented minority applicant,” rather than examining each candidate as a whole. *Ibid.*

But that is not the case here. Where a university faithfully has applied *Grutter*'s endorsement of a

holistic and individualized consideration of race as one of many factors, the decisions as to which students to admit to further the university's mission fit squarely within the category of academic determinations over which educational institutions historically have held plenary authority.

3. *Grutter does not require universities to forgo consideration of a candidate's race in selecting their student bodies*

Other non-individualized admissions regimes, such as percentage plans, notably are not mandated by *Grutter*. To the contrary, *Grutter* rejected such a mandate because those alternatives can require “a dramatic sacrifice of diversity, the academic quality of all admitted students, or both.” *Grutter*, 539 U.S. at 340. “Narrow tailoring does not require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups.” *Id.* at 339.

Requiring non-individualized policies would impose a top-down solution that would run counter to the historical deference to educational institutions to craft admissions programs responsive to their unique needs and the needs of the communities they serve. Such admissions plans operate as broad, blunt instruments that fail to account for differences in the admissions standards and universities' applicant pools. Indeed, as this Court has recognized, such plans “may preclude the university from conducting

the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university.” *Grutter*, 539 U.S. at 340. Moreover, there is little evidence that these non-individualized policies are effective in promoting diversity without grossly distorting academic admissions standards. *See, e.g.*, CATHERINE L. HORN & STELLA M. FLORES, PERCENT PLANS IN COLLEGE ADMISSIONS: A COMPARATIVE ANALYSIS OF THREE STATES’ EXPERIENCES 59-60 (THE CIVIL RIGHTS PROJECT, HARVARD UNIV. 2003).

Diversity is but one aspect of the admissions process; racial diversity is but one aspect of diversity. To the extent permitted by the laws of their States, amici recognize this in their detailed and carefully calibrated plans, which were adopted in reliance on the constitutional rulings in *Grutter* and *Bakke*, to select a student body.

CONCLUSION

For the foregoing reasons and those in the brief for respondent, the judgment of the Fifth Circuit should be affirmed.

Respectfully submitted,

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