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 *AMICI CURIAE* BOSTON BAR ASSOCIATION ET AL. IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL AND STATUTORY PROVISIONS, REGULATIONS AND LEGISLATIVE HISTORY

MISCELLANEOUS

INTEREST OF *AMICI CURIAE*[1]

Amicus the Boston Bar Association ("BBA") was founded in 1761 by John Adams and other Boston lawyers and is the nation's oldest bar association. The BBA's mission is to facilitate access to justice, advance the highest standards of excellence for the legal profession, and serve the community at large. This case implicates two of the most significant aspects of the BBA's mission: promoting education and diversity.

The Education Clause of the Massachusetts Constitution, the oldest functioning state constitution, was drafted by Adams and reportedly was his favorite provision of the document. *McDuffy v. Sec'y of the Exec. Office of Educ.*, 615 N.E.2d 516, 533 & n.40 (Mass. 1993). Consistent with that history, the BBA strives to further educational interests in the legal profession and in society. At the same time, the BBA has developed and implemented a number of diversity initiatives, including formally partnering with various affinity bar associations,[2] establishing a "Diversity and Inclusion" section for its members, administering mentoring and judicial internship programs, and engaging in other pipeline and recruitment work with law schools and public schools. It respectfully submits this brief to advise the Court of the essential

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[1] This brief is filed with the consent of the parties. The letters of consent have been filed with the Court. Pursuant to this Court's Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amici* and their counsel made such a monetary contribution.

[2] Affinity bar associations (sometimes referred to as special purpose bar associations) are formed to promote the administration of justice, improve relations between communities within the legal profession and the public, and serve the interests of local legal communities.

relationship between diversity in undergraduate educational institutions and the current and compelling needs of the legal profession.

Amicus the Asian American Lawyers Association of Massachusetts ("AALAM") is a 30-year old professional bar association that fosters, supports, and promotes Asian Pacific Americans in the legal profession, the judiciary, and the larger Massachusetts business, academic, and community sectors. Among other missions, AALAM aims to advance the diversity of the bar to improve access to services for traditionally underrepresented, disenfranchised populations and to expand access to justice for the community at large.

Amicus the Massachusetts Association of Hispanic Attorneys ("MAHA") is a professional bar association that promotes service and excellence in the Hispanic legal community and seeks to provide opportunities for professional growth to its members in order to increase the participation of Hispanic leaders in the civic arena, and elevate the standard of integrity, honor, and courtesy in the legal profession.

Amicus the Massachusetts Black Lawyers Association ("MBLA"), a professional bar association since 1973, provides a valuable network and visible presence for attorneys of color within the Massachusetts legal community. The MBLA strives to provide its members with professional development and career advancement opportunities through a robust offering of programs, networking events and continuing legal education trainings. The MBLA also sponsors forums on current topics of interest to members of the legal community and seeks collaborations with other bar associations and professional organizations, particularly in the interest of providing services to the communities of color.

Amicus the Massachusetts Black Women Attorneys (MBWA) is a professional bar association committed to the advancement of justice and equality for people of color with a particular emphasis on black women and/or women of African descent. The MBWA seeks to eradicate sexism and racism in the legal profession, advance equal employment opportunities, and provide its members a network to build, develop, and support their careers.

Amicus the Massachusetts LGBTQ Bar Association is a professional bar association of lesbian, gay, bisexual, transgender and queer lawyers and allies that promotes the administration of justice throughout Massachusetts for all persons without regard to their sexual orientation or gender identity or expression.

Amicus South Asian Bar Association Greater Boston ("SABA GB") is a professional bar association that serves as the regional voice for the concerns and opinions of South Asians in the community and in the legal profession. SABA GB's mission includes supporting attorneys and law students of South Asian heritage to advance their careers and promoting greater access to and involvement in the American legal system for all, including the South Asian community.

Amicus the Women's Bar Association ("WBA") is a professional association of over 1,500 attorneys, judges, and policy makers committed to the full and equal participation of women in the legal profession and in a just society. The WBA has been active in advocating for diversity in the legal profession and other professions as well as in educational institutions and other institutions in our society because only when the basic foundations of our society reflect all its members can they be just, fair, and strong.

SUMMARY OF ARGUMENT

The University of Texas is attempting to promote an educational "atmosphere of 'speculation, experiment and creation'" by placing a limited, flexible value on diversity in the admissions process. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978). It is based on the belief that 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," or, one might add in today's global economy, as diverse as the nations of the world. *Id.* at 313.

Amici, like most lawyers, are not professional educators. They submit, however, that the benefits of diversity in the educational process proffered by respondents in this case mirror the ways in which the legal decision-making process—whether related to jury trials, business negotiations, legal analysis, or client relations—directly benefits from diversity in our ranks. It is why we seek out colleagues with experiences different from ours before we try cases before a jury, particularly in venues where we are not known. It is why we do moot courts before appellate arguments, and carefully pick our panels of moot "judges" in the hopes that they will see things about the case, our argument, or us, that we do not see. It is why we consult with others about how to approach sensitive negotiations, or how to repair or build a client relationship. These are the oldest forms of continuing legal education, and they are practiced and valued throughout our profession by prosecutors, criminal defense lawyers, legal services providers, public servants, private practitioners, and law firms.

Judges may have similar experiences when zealous advocates comprehend the complexities of an adversary's

position, or when the life story of a colleague brings an invaluable perspective to a legal issue, or when exchanges with judicial colleagues from foreign countries highlight the differences between the political and cultural challenges they face and those of our own. The professional satisfaction, engagement, and sometimes even joy, that comes from these experiences mirrors what diversity in the educational setting is designed to achieve.

Amici have no doubt that respondents and other professional educators will explain from their own experiences the ways in which a diverse student body improves academic analyses, solutions, and processes. *Amici* seek to be heard in this case because the effect of the Court's decision likely will extend to law school and other graduate admissions programs. The legal profession's efforts to diversify its ranks cannot succeed without a pipeline of diverse law school candidates rising from undergraduate student bodies.

As this Court has affirmed, the courts play a crucial role in ensuring that consideration of race in a particular admissions policy is necessary to achieve the benefits of diversity and remains within Constitutional limits. *See Fisher v. Univ.of Tex. at Austin*, 133 S. Ct. 2411, 2414 (2013). A university may not consider race or ethnicity as a student's "defining feature" but rather must consider each applicant as an individual. *Id.*

Yet the challenges associated with cultivating a more just and inclusive educational community – and society- are persistent. As Justice Frankfurter once stated, "[o]nly those lacking responsible humility will have a confident solution for problems as intractable as the frictions attributable to differences of race, color or religion." *Beauharnais v. Illinois*, 343 U.S. 250, 262 (1952). Courts must allow

educational institutions facing these challenges to experiment within defined Constitutional limits because only through experimentation will a system emerge that embodies American values of justice, inclusion, and meaningful opportunity.

As shown below, efforts to ensure meaningful diversity of experience within the classroom serve a compelling state interest that is essential to the effective delivery of legal services by our profession. Experimentation in university admissions that considers race as one among many factors is thus necessary to ensure this diversity in the classroom, and in the legal profession.

ARGUMENT

I. STATE EFFORTS TO PROMOTE DIVERSITY IN EDUCATION SERVE COMPELLING GOVERNMENTAL INTERESTS DIRECTLY RELEVANT TO THE GOALS OF THE LEGAL PROFESSION.

All parties to this case (and likely all *amici*) agree that education is both the lifeblood of our democracy and an area of traditional state and local expertise. These propositions are underscored by the fact that the state constitutions adopted by all thirteen former colonies contain provisions making specific reference to the education of the citizenry. *See* Conn. Const. art. VIII, § 1; Del. Const. art. X, § 1; Ga. Const. art. VIII, § I, para. I; Md. Const. art. VIII, § 1; Mass. Const. pt. II, ch. V, § II; N.H. Const. pt. II, art. 83; N.J. Const. art. VIII, § IV, para. 1; N.Y. Const. art. XI, § 1; N.C. Const. art. I, § 15; Pa. Const. art. III, § 14; R.I. Const. art. XII, § 1; S.C. Const. art. XI, § 3; Va. Const. art. I, § 15.

The oldest functioning state constitution containing an education clause was drafted in principal part by John

Adams. *See* Samuel Eliot Morison, A HISTORY OF THE CONSTITUTION OF MASSACHUSETTS 18-20 (1917); 8 John Adams, PAPERS OF JOHN ADAMS editors' note at 235 (Gregg L. Lint et al. eds., 1989). The clause reflected his beliefs that "education here intended is not merely that of the children of the rich and noble, but of every rank and class of people, down to the lowest and the poorest," and that the "revenues of the state would be applied infinitely better, more charitably, wisely, usefully, and therefore politically, in this way, than even in maintaining the poor." 6 John Adams, THE WORKS OF JOHN ADAMS 168 (C.F. Adams ed., 1851).

In keeping with those principles, the education clause Adams drafted provides:

> Wisdom, and knowledge, as well as virtue, *diffused generally among the body of the people*, being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education in the various parts of the country, *and among the different orders of the people*, it shall be the duty of legislatures and magistrates, in all future periods of this commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them; especially the university at Cambridge, public schools and grammar schools in the towns ....

Mass. Const. pt. II, ch. V, § II (emphases added). *See generally McDuffy*, 615 N.E.2d at 525-28 & 533-37.

Adams was by no means the only leader of his generation to emphasize the unique role and duty of the states in educating their populations. *See, e.g.,* N.H. Const. pt. II, art. 83 ("Knowledge and learning, generally diffused through a community, being essential to the preservation of a free government; and spreading the opportunities and

advantages of education through the various parts of the country, being highly conducive to promote this end; it shall be the duty of the legislators and magistrates, in all future periods of this government, to cherish the interest of literature and the sciences, and all seminaries and public schools"); Va. Const. art. I, § 15 ("That free government rests, as does all progress, upon the broadest possible diffusion of knowledge, and that the Commonwealth should avail itself of those talents which nature has sown so liberally among its people by assuring the opportunity for their fullest development by an effective system of education throughout the Commonwealth."); R.I. Const. art. XII, § 1 ("The diffusion of knowledge, as well as of virtue among the people, being essential to the preservation of their rights and liberties, it shall be the duty of the general assembly to promote public schools and public libraries, and to adopt all means which it may deem necessary and proper to secure to the people the advantages and opportunities of education and public library services.").[3]

Neglect of public education was one of the chief grievances charged against the Mexican Government in the Texas Declaration of Independence. Vernon's Ann. Tex. Const. art. VII, § 1, Interpretive Commentary (2007). The state constitution of Texas reflects the Founders' tradition of

[3] Just as the Equal Protection Clause initially was intended to protect the "newly-made freeman and citizen from the oppressions of those who had formerly exercised dominion over him" and only later was "gradually extended to all ethnic groups," so too do education clauses of state constitutions now extend beyond their original intended beneficiaries to all racial and ethnic groups. *Bakke*, 438 U.S. at 291-92 (quoting *Slaughter-House Cases*, 83 U.S. 36, 71 (1873) (internal quotations omitted)). The history of the clauses, however, confirms the unique state interest involved.

emphasizing the central role of education in state government:

> A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.[4]

No party to this case (and presumably none of the *amici*) disputes that, as the Framers recognized, the "foundation of every state is the education of its youth."[5] Instead, their differences center on the belief of the state of Texas that the very process of education—so critical to a functioning democracy— directly benefits from a diversity of thought, culture, and experience that exists "among the different orders of the people," including those of different race and ethnicity.

Thus, in addition to presenting important issues about racial equality, this case presents an important question about the scope of the "four essential freedoms" that constitute academic freedom: the right to determine on academic grounds "who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (quoted in *Bakke*, 438 U.S. at 312 (internal quotations omitted)). Among other benefits, these protections ensure that educators are free to assess the depth and breadth of the talents and potential of

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[4] Tex. Const. art. VII, § 1. Over time since the desegregation of Texas state universities in 1969, Respondent has sought to discharge this duty such that the liberties and rights of *all* its people are preserved.

[5] Library of Congress, Inscription on the North tablet of The West Corridor of The Great Hall of The Thomas Jefferson Building.

applicants. These assessments are necessary to achieve the academic objectives at issue here.

The educational goal is not simply diversity for diversity's sake. A diversity of experience with people of different race, gender, ethnicity and sexual orientation prepares students for the futures they face. As Justice White once observed of Justice Marshall, he shared "things that we knew but would rather forget; and he told us much that we did not know due to the limitations of our own experience."[6] Lack of diversity in the classroom has the same effect as lack of diversity in the jury room: it removes "qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable" and "deprives the [students] of a perspective on human events that may have unsuspected importance," in their future professional and personal lives. *Peters v. Kiff*, 407 U.S. 493, 503-04 (1972).

All students need, and benefit from gaining, the cultural competence that the University of Texas seeks to promote. And given the significant underrepresentation of lawyers of color in the legal profession, it is essential for all lawyers to learn cultural competence while in school if they are to effectively serve their clients.

"[A]lthough the law is a highly learned profession, we are well aware that it is an intensely practical one." *Sweatt v. Painter*, 339 U.S. 629, 634 (1950). Law firms, legal services organizations, and public sector lawyers "cannot be effective in isolation from the [increasingly diverse] individuals and institutions with which the law interacts."

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[6] Byron R. White, *A Tribute to Justice Thurgood Marshall*, 44 STAN. L. REV. 1215, 1216 (1992); *see also* Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 1217 (1992); William J. Brennan, Jr., *A Tribute to Justice Thurgood Marshall*, 105 HARV. L. REV. 23 (1991).

Id. Diversity and cultural competence in the bar increase our capacity to fulfill our profession's commitment to serve all clients, including the most disenfranchised populations seeking access to justice. *See* § II (B)-(C), *infra*.

II. UNDER-REPRESENTATION OF LAWYERS OF COLOR HARMS THE LEGAL PROFESSION AND SOCIETY AS A WHOLE.

A. The Legal Profession Does Not Reflect The Society It Serves.

In 2004, not long after this Court's decision in *Grutter v. Bollinger*, 539 U.S. 306 (2003), the chief legal officer of one of the country's largest corporations wrote "A Call to Action"—a pledge ultimately signed by numerous general counsel vowing to make diversity a major consideration in their selection of outside counsel. The pledge stated, "[o]ur action is based on the need to enhance opportunity in the legal profession and our recognition that the legal and business interests of our clients require legal representation that reflects the diversity of our employees, customers and the communities where we do business."[7] From private law firms to government legal offices to legal aid organizations, the legal profession as a whole has made this commitment to enhance opportunity within the profession in order to effectively represent the legal and business interests of its clients.

Despite these efforts, the past decade has witnessed only incremental progress in promoting diversity within the profession, in part due to the low number of persons of color

[7] Roderick Palmore, Sara Lee, A Call to Action: Diversity in the Legal Profession (2004), http://www.acc.com/vl/public/Article/loader.cfm?csModule=security/getfile&pageid=16074.

graduating from law school. In 2014, only 15.7% of lawyers were Black/African American, Asian, or Hispanic/Latino, as compared to 33.2% of the workforce.[8] Under-representation of lawyers of color is particularly severe in private law practice at the partnership level. Only 7.33% of equity partners in America's law firms are minorities, and only 1.72% are Black/African-American.[9] Although representation of minorities among associates is slightly better, representation of Blacks/African-Americans among associates has declined for each of the past five years.[10] Lawyers of color are also significantly under-represented on law school faculties. Only 6.2% of male tenured professors and 13.5% of female tenured professors are African-American, a number all the more striking given that female professors make up only 32.7% of tenured faculty.[11]

Moreover, while the racial and ethnic diversity of the United States population as a whole is increasing exponentially, the diversity of the legal profession is not. It

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[8] Bureau of Labor Statistics, Labor Force Statistics from the Current Population Survey, Table 11. Employed Persons by detailed occupation, sex, race, and Hispanic or Latino ethnicity (2014), http://www.bls.gov/cps/cpsaat11.htm. (Chart defines workforce as those 16 years and over. 33.2% of total workforce reflects addition of 11.4% Black/African-American, 5.7% Asian, and 16.1% Hispanic/Latino. 15.7% of lawyers reflects addition of 5.7% Black/African-American, 4.4% Asian, and 5.6% Hispanic/Latino.)

[9] NALP, Women and Minorities in Law Firms - By Race and Ethnicity – An Update (May 2015), http://www.nalp.org/0515research. The underrepresentation is compounded by gender imbalance in the legal profession such that only 0.63% of equity partners in the United States are Black/African-American women.

[10] *Id.*

[11] Am. Bar Ass'n, Law School Faculty & Staff by Ethnicity and Gender (2013), http://www.americanbar.org/groups/legal_education/resources/statistics.html.

is forecast that by the year 2050, nearly 50% of all Americans will be African American, Hispanic, Asian, or Native American.[12]

Yet representation of persons of color in the legal profession has increased only incrementally, with even those small gains spread unevenly across different demographic groups. The 15.7% of the legal profession that reflects lawyers of color in 2014 has increased only marginally from the 11.0% in 2004, and Black/African-American lawyers now make up only 5.7%, almost no increase from the 4.7% in 2004.[13]

Slow growth in the proportion of attorneys of color correlates with the figures for law school enrollment. The 26.9% of law students who are students of color in 2014 is up only 5.9% over the past 10 years, from 21.0% in 2004-2005.[14] These troubling statistics are no surprise given trends in postsecondary enrollment.

While 45.1% of Whites ages 18- to 24- were enrolled in degree-granting postsecondary institutions in 2013, only

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[12] U.S. Census Bureau, U.S. Interim Projections by Age, Sex, Race, and Hispanic Origin, Table 1a (Mar. 2004), http://www.census.gov/population/www/projections/usinterimproj/natprojtab01a.pdf.

[13] Bureau of Labor Statistics, Table 11, *supra* note 8; Bureau of Labor Statistics, 2004 Annual Averages – Household Data, Table 11: Employed persons by detailed occupation, sex, race, and Hispanic or Latino ethnicity (2004), http://www.bls.gov/cps/aa2004/aat11.txt (11.0% reflects addition of 4.7% Black/African-American, 2.9% Asian, and 3.4% Hispanic/Latino.).

[14] Am. Bar Ass'n, Statistics, First-Year & Total JD Minority, (2014) http://www.americanbar.org/groups/legal_education/resources/statistics.html.

36.9% of Blacks in the same age group were.[15] Minority students also graduate at lower rates. The six year graduation rate for students who enrolled in 4-year college programs starting in 2007 was 62.9% for White students but only 40.8% for Black students.[16]

In 2005, American Bar Association concluded that "the pipeline for minority students–from pre-kindergarten into the legal profession–is leaking."[17] Five years later, a nationwide assessment conducted by the ABA concluded that "the lack of genuine diversity remains a disappointment."

> As America races toward a future where minorities will be the majority and more marginalized groups make their voices heard, the legal profession's next steps towards advancing diversity must produce more viable, sustained outcomes. Despite our efforts thus far, racial and ethnic groups, sexual and gender minorities, and lawyers with disabilities continue to be vastly underrepresented in the legal profession.[18]

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[15] U.S. Dep't of Educ., Nat'l Ctr. for Educ. Statistics, Digest of Education Statistics: 2014 (NCES 2014), Table 302.65, https://nces.ed.gov/programs/digest/d14/tables/dt14_302.65.asp.

[16] U.S. Dep't of Educ., Nat. Ctr. For Educ. Statistics, Digest of Education Statistics: 2014 (NCES 2014), Table 326.10, https://nces.ed.gov/programs/digest/d14/tables/dt14_326.10.asp.

[17] ABA Presidential Advisory Council on Diversity in the Profession, THE CRITICAL NEED TO FURTHER DIVERSITY THE LEGAL ACADEMY & THE LEGAL PROFESSION 2 (2005), http://apps.americanbar.org/op/pipelineconf/acdreport.pdf.

[18] ABA Presidential Initiative Comm'n on Diversity, DIVERSITY IN THE LEGAL PROFESSION: THE NEXT STEPS 5 (2010), http://www.americanbar.org/content/dam/aba/administrative/diversity/next_steps_2011.authcheckdam.pdf.

As the most recent statistics illustrate, the challenge of underrepresentation persists. Diversity within the legal profession cannot be achieved without a pipeline of diverse law school graduates. That pipeline, in turn, cannot be maintained without ensuring the presence of strong students and potential leaders from diverse backgrounds in undergraduate institutions. In addition, although this case arises in the context of an undergraduate admissions policy, the Court's decision almost surely will affect the admissions policies of all public university higher education programs and institutions, including medical schools, masters and doctorate programs and, of particular importance to *amici*, law schools. Accordingly, and as further shown below, wholly apart from the resulting significant educational benefits, the limited, flexible consideration of race as one factor in the admissions process serves the compelling governmental interest of helping to ensure the ongoing legitimacy and effectiveness of the legal system.

B. The Lack Of Diversity In The Legal Profession Erodes Public Confidence In The Judicial System.

As advocates and administrators of justice, attorneys and judges must inspire public confidence in and promote public access to the judicial system. In order to perform these tasks, it is necessary to confront the fact that perceptions of the fairness of the judicial system differ sharply based on race and ethnicity.

Blacks and Latinos perceive the probability of fair outcomes in court to be lower than do majority respondents.[19] A 2013 Pew Research Center survey found

[19] David B. Rottman & Randall M. Hansen, How Recent Court Users View the State Courts: Perceptions of Whites, African-Americans, and Latinos 5 (2001), http://www.flcourts.org/gen_public/family/

that 68% of Blacks compared to only 27% of Whites thought that Blacks in their community are treated less fairly than Whites in the courts.[20] Enhancing racial and ethnic diversity within the bar and on the bench is a significant means of countering both the perception and the underlying reality of unfairness in the judicial system. A diverse legal profession demonstrates that those who wield and uphold the law hale from different racial and ethnic backgrounds, much like those whose interests are at stake, and that the judicial system is open to all people.[21]

Until the composition of the legal profession more closely resembles that of the public whose interests are at stake, the perception will remain that the legal system is entrusted to and accessible to the white majority above all others. Not only does that perception undermine the

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diversity/bin/perceptions2.pdf (among survey participants that had no court experience, 57% of Whites, 21% of African Americans, and 35% of Latinos believed that court outcomes are always or usually fair; among recent court users, 49% of Whites, 15% of African Americans, and 40% of Latinos believed that court outcomes are always or usually fair); Hon. John R. Dunne, Comm. for Modern Courts, Testimony at N.Y. State Senate Public Forum: A Lasting Blueprint for Judicial Diversity (Dec. 4, 2006), http://www. moderncourts.org/advocacy/diversity/index.html (describing a "significant racial divide" in a survey of registered voters in New York that asked how fair and impartial New York State judges were, where 71% of registered voters agreed that judges as a whole are fair and impartial, but only 51% of African-American voters agreed judges are fair and impartial).

[20] Eileen Patten, *The Black-White and Urban-Rural Divides in Perceptions of Racial Fairness*, PEW RESEARCH CTR., (Aug. 28, 2013), http://www.pewresearch.org/fact-tank/2013/08/28/the-black-white-and-urban-rural-divides-in-perceptions-of-racial-fairness/.

[21] Malia Reddick et al., *Racial and Gender Diversity on State Courts*, JUDGES' JOURNAL, Summer 2009, at 1, *available at* http://www.judicialselection.us/uploads/documents/Racial_and_Gender_Diversity_on_Stat_8F60B84D96CC2.pdf.

legitimacy of the judicial system,[22] it further discourages participation by people of color, creating a self-perpetuating cycle of exclusion.

Reduced to essentials, robust participation of persons of color within the legal profession is important because the judicial system is a key component of our democracy. In the words of one advocate before this Court:

> Democracies depend on people seeing each other as peers [in a shared enterprise], that is, people who know and respect each other. Diverse democracies depend on diverse people who know and respect each other.
>
> This is why racial diversity in the legal profession matters. It matters to the legitimacy and health of our democracy.[23]

Stated otherwise, our democracy depends on different perspectives being shared, respected, and valued, which cannot occur absent the inclusion of those different perspectives.

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[22] *See* Dunne, *supra* note 19. Indeed, for much the same reason, this Court long ago struck down jury selection procedures that purposefully exclude persons of color not just because of the harm suffered by the juror and defendant, but because the overall effect is to "undermine public confidence in the fairness of our system of justice." *Batson v. Kentucky*, 476 U.S. 79, 87 (1986).

[23] John Payton, *Democracy and Diversity*, 35 PEPPERDINE L. REV. 569, 582 (2008), http://digitalcommons.pepperdine.edu/ plr/vol35/iss3/1.

C. The Legal Profession Needs Diversity In Its Ranks, And The Additional Skills And Perspectives Diverse Attorneys Possess, To Effectively Attract, Represent, And Retain An Increasingly Diverse Client Base Here And Abroad.

The legal profession is better able to serve diverse populations if: (1) lawyers have been exposed to various forms of diversity through their educational experience; and (2) the profession is sufficiently diverse to ensure that it has the cultural competency to comprehend the differences its clients present.

For example, the nation's top law firms provide representation to a wide range of businesses whose global footprints are expanding and whose competition for attracting both customers and talent is intensifying. More than ever, these clients specifically recognize racial and ethnic diversity as an important component of the overall diversity that is key to their success.[24]

Companies, particularly those in the service industry, are keenly aware of the rapidly changing demographics in the United States and understand that people of color represent a significant and growing share of the consumer market; service firms accordingly are striving to identify the needs of the expanding market segments to maximize profits.

The nation's leading corporations, moreover, are operating and competing in a global economy and understand that "[e]ffective and successful interactions with suppliers and customers require[] a team of individuals who

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[24] *See generally* Melanie Lasoff Levs, *Call to Action - Sara Lee's General Counsel: Making Diversity A Priority*, DIVERSITY & THE BAR, Feb. 2005, *available at* http://0350474.netsolhost.com/FileLib/9/cr_handouts.pdf.

not only reflect these [international] constituents, but also understand their needs and how they can best be met."[25]

Private and public sector legal services organizations face the same challenges. In today's world, a successful lawyer is one who has been exposed—at college and in law school—to the broadest range of perspectives, backgrounds, and personalities. They will be representing the rich and the poor; Black, White, Hispanic, Asian, Native American, and increasingly people of mixed races; gay and straight; domestic and international. They need to graduate with the ability to comprehend and negotiate a range of differences if they, and ultimately the legal system, are to be effective. In a fundamental way, student body diversity—particularly diversity of both colleges and law schools—equips lawyers of all races and backgrounds with necessary skills in today's world. Meaningful racial diversity, including diversity of experience with race, is needed in the classroom, not just on campus, to achieve this goal.

"The overarching message is that a diverse legal profession is more just, productive and intelligent because diversity, both cognitive and cultural, often leads to better questions, analyses, solutions, and processes."[26] For many businesses, diversity is not only a matter of what may be

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[25] Mark Roellig, Mass. Mut. Life Ins. Co., "WHY" Diversity is Critical to the Success of Your Law Department 2 (2012), http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2012_cccle_materials/6_value.authcheckdam.pdf; Levs, *supra* note 24, at 23 (quoting Eli Lilly & Co.'s general counsel as stating, "As a global corporation, we benefit tremendously from a broad spectrum of perspectives that can be achieved by having people from as widely diverse backgrounds as possible working with us.").

[26] ABA Presidential Initiative Comm'n on Diversity, *supra* note 18, at 5.

socially desirable or just, it is a matter of sound business practices and economic survival.

III. THE LIMITED USE OF RACE IN EDUCATIONAL ADMISSIONS PROCESSES REMAINS VITAL TO THE LEGAL PROFESSION'S EFFORTS TO ACHIEVE RACIAL AND ETHNIC DIVERSITY.

Twelve years ago, this Court held that "student body diversity is a compelling state interest that can justify the use of race in university admissions," *Grutter*, 539 U.S. at 325, and that the "goal of attaining a critical mass of under-represented minority students" is entirely constitutional. *Id.* at 335.

No intervening event has challenged the wisdom or rationale of this holding. The "logical end point" of diversity as a compelling academic objective, or as an imperative for the legal profession, simply has not been reached. *Id.* at 342. Unconscious bias (a phenomenon which compounds structural racism) continues to perpetuate damaging homogeneity, particularly among lawyers and judges. Flexible and limited consideration of race in admissions decisions is one narrowly tailored way to overcome unconscious bias by intentionally putting the issue on the table, and to create structural anti-racism, which is an essential tool in the effort to dismantle the structures that continue to perpetuate racial inequity in this country.

Two studies released by the Harvard Civil Rights Project have demonstrated that programs admitting students at the top of their high school classes—like the "Top Ten Percent Law" utilized by the University of Texas—are not sufficient to achieve the goals of diversity.[27] *See generally*

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[27] *See* Patricia Marin & Edgar K. Lee, Harvard Univ., APPEARANCE AND REALITY IN THE SUNSHINE STATE: THE TALENTED 20 PROGRAM IN

Fisher v. Univ. of Texas at Austin, 631 F.3d 213, 240 (5th Cir. 2011) ("The reality is that the Top Ten Percent Law alone does not perform well in pursuit of the diversity *Grutter* endorsed and is in many ways at war with it. While the Law may have contributed to an increase in overall minority enrollment, those minority students remain clustered in certain programs, limiting the beneficial effects of educational diversity.").

Nor are ongoing private efforts by themselves sufficient. Nearly one hundred of the country's largest corporations joined the 2004 "Call to Action," challenging corporate legal departments and law firms to improve their efforts in hiring and retaining women and persons of color. The signatory corporations agreed to "end or limit [their] relationships with firms whose performance consistently evidences a lack of meaningful interest in being diverse."[28] Since 2004, some companies have taken further measures, requiring outside counsel to demonstrate diversity within the ranks of relationship partners and upper levels of the firm.[29]

The legal profession has taken measures of its own, such as establishing organizations like the Leadership Council on Legal Diversity. Law firms and other legal services employers throughout the country have undertaken targeted recruitment efforts, often conducted in tandem with law schools, including diversity job fairs and on-campus interviews; firm-sponsored conferences, workshops, and

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FLORIDA (2003); Catherine Horn & Stella M. Flores, Harvard Univ., PERCENT PLANS IN COLLEGE ADMISSIONS: A COMPARATIVE ANALYSIS OF THREE STATES' EXPERIENCES (2003).

[28] *See supra* text accompanying note 7.

[29] Karen Donovan, *Pushed by Clients, Law Firms Step Up Diversity Efforts*, N.Y. TIMES, June 21, 2006, http://www.nytimes.com/2006/07/21/business/21legal.html.

panel discussions at schools with diverse student populations; specialized mentoring and training programs for summer clerks; and scholarship programs.

Many of the bar association *amici* also have undertaken numerous initiatives to cultivate diversity within the bars of their home states. Examples include, but are not limited to, the BBA's Summer Job Program, pipeline and diversity initiatives, judicial internship program, and its partnerships with affinity bar associations.

The fact remains, however, that not only have these efforts fallen short of achieving diversity in the legal profession, all of them are highly dependent upon the continuing flow of diverse students through the pipeline that leads from high schools to colleges and universities to law schools to the legal profession.

For all of these reasons, *amici* respectfully submit that the limited and flexible consideration of race as one of several factors in an admissions policy remains vital to integrating our nation's colleges and universities and, by extension, the legal profession. It also is essential to the uniquely compelling state interest, expressed in the constitution of Texas and other states, of promoting the "general diffusion of knowledge" that is so "essential to the preservation of the liberties and rights of the people." Tex. Const. art. VII, § 1.

CONCLUSION

For the foregoing reasons, the decision of the Fifth Circuit should be affirmed.

Respectfully submitted,

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November 2, 2015