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* COALITION OF BAR ASSOCIATIONS OF COLOR (NATIONAL BAR ASSOCIATION, HISPANIC NATIONAL BAR ASSOCIATION, NATIONAL ASIAN PACIFIC AMERICAN BAR ASSOCIATION, AND NATIONAL NATIVE AMERICAN BAR ASSOCIATION) IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

This brief is filed on behalf of the National Bar Association, the Hispanic National Bar Association, the National Asian Pacific American Bar Association, and the National Native American Bar Association (collectively, "*Amici*"). *Amici* are bar associations whose members are predominantly minorities. *Amici* are partners in the Coalition of Bar Associations of Color, which was established in 1992. Members of the coalition meet regularly to discuss issues of mutual concern and to advocate in support of shared interests with the executive branch and with elected officials.

The National Bar Association is the largest and oldest association of predominantly African-American attorneys and judges in the United States. The National Bar Association was founded in 1925 when there were only 1,000 African-American attorneys in the entire country and when other national bar associations, such as the American Bar Association ("ABA"), did not admit African-American attorneys. Throughout its history, the National Bar Association consistently has advocated on behalf of African Americans and other minority populations regarding

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[1] In accordance with Supreme Court Rule 37.6, *Amici Curiae* note that the position they take in this brief has not been approved or financed by Petitioners, Respondents, or their counsel. Neither Petitioners, Respondents, nor their counsel had any role in authoring, nor made any monetary contribution to fund the preparation or submission of, this brief. Pursuant to Supreme Court Rule 37.3, *Amici Curiae* state that all parties have consented to the filing of this brief; blanket letters of consent have been filed with the Clerk of the Court.

issues affecting the legal profession. The National Bar Association represents approximately 44,000 lawyers, judges, law professors, and law students, and it has over eighty affiliate chapters throughout the world.

The Hispanic National Bar Association is a nonprofit, nonpartisan, national professional association that represents the interests of thousands of attorneys, judges, law professors, law students and other legal professionals of Hispanic descent in the United States. The Hispanic National Bar Association has forty-eight affiliated bars in various states across the country. The continuing mission of the Hispanic National Bar Association is to improve the study, practice, and administration of justice for all Americans by ensuring the meaningful participation of Hispanics in the legal profession. Since its inception 43 years ago, the Hispanic National Bar Association has served as the national voice for Hispanics in the legal profession and has promoted justice, equity, and opportunity for Hispanics. Consistent with its mission, the Hispanic National Bar Association wishes to ensure that colleges and universities are able to implement policies allowing them to admit students reflecting the diversity of our nation.

The National Asian Pacific American Bar Association is the national association of Asian Pacific-American attorneys, judges, law professors, and law students, representing the interests of nearly seventy-five state and local Asian Pacific-American bar associations and nearly 50,000 attorneys who work in solo practices, large firms, corporations, legal services organizations, nonprofit organizations, law schools,

and government agencies. Since its inception in 1988, the National Asian Pacific American Bar Association has served as the national voice for Asian Pacific Americans in the legal profession and has promoted justice, equity, and opportunity for Asian Pacific Americans. The National Asian Pacific American Bar Association believes that there is a compelling governmental interest in achieving diversity in higher education and supports upholding the use of race-conscious admissions programs in education. The National Asian Pacific American Bar Association opposes the use of Asian Pacific Americans as a wedge group in debates about affirmative action.[2]

The National Native American Bar Association is the oldest and largest association of predominantly Native-American attorneys in the United States.[3] The National Native American Bar Association was founded in 1973 when the first group of Native-American attorneys was entering the legal profession. The National Native American Bar Association's core mission since its inception has been to promote the development of Native-American attorneys. Native Americans comprise one of the smallest groups of

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[2] The National Asian Pacific American Bar Association joins this brief filed by its partners in the Coalition of Bar Associations of Color instead of a brief filed by its longtime partner, the Asian American Center for Advancing Justice ("AAJC"). Both the Coalition of Bar Associations of Color and AAJC have a longstanding commitment to serving the needs of Asian Pacific Americans and all communities of color, and the National Asian Pacific American Bar Association supports both briefs.

[3] Native American includes American Indian, Alaska Native, and Native Hawaiian.

attorneys of color in the nation, totaling approximately 2,500. The National Native American Bar Association is committed to increasing the number of Native-American students who attend college and continue their education to attend law school. The National Native American Bar Association and its chapters are involved in pipeline initiatives to promote the recruitment and retention of Native-American law students and law faculty. And an initiative of the National Native American Bar Association is to increase the appointment of Native Americans to the state and federal judiciaries; there have only been four Native Americans in U.S. history who have become federal judges.

Amici have a deep interest in this case because the legal profession, which has had a long history of discrimination against racial minorities, is strengthened by racial and ethnic diversity. Diversity benefits all sectors of the legal profession, including both minority and non-minority members of the judiciary, lawyers, and clients. Diversity has these benefits because a diverse legal profession is better able to create and test new and innovative legal principles and ideas. For both minority and non-minority lawyers and judges, a diverse legal profession creates heightened sensitivity to the particular legal problems that minorities confront and the contexts for those legal challenges. A diverse legal profession also broadens the availability and effectiveness of legal representation, including by facilitating the provision of legal services to historically underserved communities.

Race-conscious college admissions programs enhance educational opportunities for minorities, thus creating a pipeline for greater minority participation in law schools and then through all levels of the legal system. Consequently, race-conscious college admissions programs are integral to achieving a critical mass of minorities in law schools and promoting diversity throughout the legal profession, which is a compelling governmental interest.[4] Accordingly, the University of Texas's program should be upheld.

[4] *Grutter v. Bollinger*, 539 U.S. 306 (2003).

SUMMARY OF ARGUMENT

This Court has long held that there is a compelling governmental interest in achieving and maintaining diversity in our Nation's educational system, and accordingly it has upheld race-conscious admissions programs directed at obtaining a "critical mass" of minority students.[5] This Court has recognized that diversity in the educational system not only has significant benefits for both minority and non-minority students' educational experiences but also creates a necessary pipeline for diversity in the Nation's professional ranks.

In *Regents of the University of California v. Bakke*, for example, this Court's plurality opinion stated that "[t]he 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.'"[6] More recently, in *Grutter v. Bollinger*, this Court noted that "[e]ffective 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."[7]

There is no profession that benefits from diversity and civic engagement more than the legal

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[5] *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 269 (1978) (opinion of Powell, J.); *Grutter*, 539 U.S. at 343.

[6] 438 U.S. at 312 (opinion of Powell, J.) (quoting *United States v. Associated Press,* 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

[7] 539 U.S. at 332.

profession because "law schools represent the training ground for a large number of the Nation's leaders," and "legal learning and practice . . . cannot be effective in isolation from the individuals and institutions with which the law interacts." This Court left these holdings undisturbed in its decision in *Fisher v. University of Texas* ("*Fisher I*").[8] And the legal profession has relied on *Bakke*, *Grutter*, and *Fisher I*, to make great strides to diversify legal institutions, including private law firms and the judiciary.

Progress, though, should not be confused with success. Racial minorities continue to be woefully underrepresented in virtually all segments of the legal profession, with certain racial minorities continuing to have almost no representation. For example, while African Americans represent more than 12% percent of the population, only 1.72% percent of law firm partners are African American.[9] Similarly, Hispanic Americans represent approximately 17.3% of the population, but only 2.16% of law firm partners,[10] and Asian Americans account for 5.2% of the population, but only 2.74% of law firm partners.[11] Moreover, although Native Americans comprise nearly 1% of the

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[8] *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411, (2013).

[9] *ACS Demographic and Housing Estimates*, American Community Survey 1 Year Estimates, US Census Bureau (2014), http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_10_1YR_DP05&prodType=table ("2014 Population"); *NALP Bulletin, Women and Minorities in Law Firms – By Race and Ethnicity* (May 2015), *available at* http://www.nalp.org/0515research.

[10] 2014 Population, *supra*; *NALP Bulletin, supra*, at 1.

[11] 2014 Population, *supra*; *NALP Bulletin, supra*, at Table 2.

population, there are so few Native-American partners nationwide that the National Association of Law Placement ("NALP") is unable to include Native American partners in its study of minority legal employment.[12]

There is a similar lack of diversity in the judiciary. For example, in 2009, only 12.8% of judges sitting on state supreme courts nationwide were minorities.[13] And these statistics are even more dire when viewed at the individual state level. For example, in New Mexico, where minorities account for 57% of the population, minorities made up only 15% and 18% of intermediate and trial court judges, respectively.[14]

Because of the continuing need to foster diversity in the legal profession, programs that enhance the opportunities for members of racial minorities in higher education – like the one at the University of Texas – are absolutely necessary. Indeed, if such programs were abolished, the impact on diversity in higher education would be significant. The state of California abolished race-conscious admission programs and the population of racial minorities suffered as their admission into colleges and universities plummeted. In

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[12] 2014 Population, *supra*; *NALP Bulletin*, *supra*, at 1.

[13] Gregory L. Acquaviva & John D. Castiglione, *Judicial Diversity on State Supreme Courts*, 39 Seton Hall L. Rev. 1203, 1215 (2009).

[14] Ciara Torres-Spelliscy et al., *Improving Judicial Diversity*, Brennan Center for Justice 1, 49 (2010), *available at* http://brennan.3cdn.net/31e6c0fa3c2e920910_ppm6ibehe.pdf.

turn, the number of racial minorities entering into post-graduate education was disproportionately low, with fewer racial minorities ultimately entering the legal profession.

California's experience indicates that, if this Court were to overturn the University of Texas's race-conscious admissions program (and other similar programs), there likely would be a significant drop in the number of racial minorities admitted into colleges and universities, ultimately and necessarily reducing the number of racial minorities who enter law school and the legal profession. *Amici* thus support the constitutionality of the University of Texas's race-conscious admissions program, which furthers the compelling governmental interest in diversity both in education and in the legal profession.

ARGUMENT

I. ACHIEVING DIVERSITY IN EDUCATION IS A COMPELLING GOVERNMENTAL INTEREST.

In *Fisher I*, this Court recognized that its prior precedents establish that achieving diversity in college is a compelling governmental interest.[15] As this Court explained, the decisions from *Bakke* to *Grutter* establish that diversity is compelling in the educational context because diversity "serves values beyond race alone, including enhanced classroom dialogue and the

[15] *Fisher*, 133 S. Ct. at 2419.

lessening of racial isolation and stereotypes."[16] This Court also recognized that federal courts may give "some, but not complete, judicial deference" to a State or university in "the decision to seek to pursue the educational benefits that flow from student body diversity" through race-conscious college admissions programs.[17]

On remand, the Fifth Circuit followed this Court's precedents and did not reconsider whether the University of Texas had a compelling governmental interest in achieving diversity.[18] That question therefore is not properly before this Court and need not be resolved to answer the issues on which it granted review.

Nonetheless, in her Opening Brief, Petitioner argues that the University failed to prove that its program was narrowly tailored in part because the University failed to define its compelling interest in diversity.[19] In so arguing, Petitioner invites this Court to do now what it refused to do in *Fisher I* – revisit the holdings in *Bakke* and *Grutter*. This Court should not accept Petitioner's invitation.

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[16] *Id.* at 2417-18; *see also Grutter*, 539 U.S. at 308; *cf. Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995) (remanding to lower court for a determination whether the race-based components of the program served a compelling governmental interest).

[17] *Fisher*, 133 S. Ct. at 2419.

[18] *Fisher v. Univ. of Texas at Austin*, 758 F.3d 633 (5th Cir. 2014), *cert. granted*, 135 S. Ct. 2888 (2015).

[19] Petitioner's Br. at 26-27, *Fisher v. Univ. of Texas at Austin*, No. 14-981, 2015 WL 5261568 (U.S. 2015).

As an initial matter, the question of whether a State has a compelling interest in diversity is a question of monumental public policy significance, and this case presents a deeply flawed vehicle for reconsidering that issue. This Court has already addressed the issue in *Bakke*, *Grutter*, and *Fisher I*, each time reaffirming that educational diversity is a compelling interest and refusing invitations to reverse that conclusion. Other cases presenting this issue are working their way through the federal courts, with the benefit of briefing on both sides.[20] Here, not only have the parties not briefed the issue, but the Fifth Circuit, which accepted this Court's instructions in *Fisher I,* did not consider or revisit the issue. Accordingly, this Court should not revisit the issue in this case.

Moreover, Petitioner has not established that she has a sufficient interest in challenging this Court's prior precedents. As the University contends, and as other A*mici* explain, Petitioner has failed to assert an injury sufficient to meet this Court's standing requirements. For this additional reason, the Court should not revisit this significant issue.

Even if Petitioner has standing, she concedes that her interest is, at most, a weak one.[21] Petitioner grounds her argument, in part, on her assertion that

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[20] *See* Civil Docket for Case #1:14-cv-00954-LCB-JLW, *Students for Fair Admissions. Inc. v. Univ. of North Carolina*; Civil Docket for Case #1:14-cv-14176-ADB, *Students for Fair Admissions. Inc. v. President and Fellows of Harvard College.*

[21] Pet. Br. at 47.

the University of Texas program affected admissions for only a "tiny" number of applicants, but she does not establish that she was among the affected applicants.[22] *Amici* do not accept Petitioner's factual assertions regarding the impact of the University's program, nor the legal conclusions she draws from them. But, Petitioner's own characterization of the program's impact shows why this case is not a suitable vehicle to reconsider this Court's prior precedents establishing that achieving educational diversity is a compelling governmental interest.

II. DIVERSITY IN COLLEGIATE ADMISSIONS IS A CRITICAL STEP TO CREATING AND MAINTAINING DIVERSITY IN THE LEGAL PROFESSION.

Diversity in collegiate admissions provides a critical pipeline to achieve diversity in other areas of society and government, and particularly in the legal profession.

Lawyers play a central role in our government and the administration of our judicial system. Because of the pervasive nature of the legal system and its impact on the Nation's citizenry and history, this Court has recognized that it is important to ensure the inclusion and success of minority attorneys in every facet of the legal profession.[23]

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[22] *Id*. at 46-47.

[23] *See*, *e.g.*, *Grutter*, 539 U.S. at 332.

The Court's recognition of the importance of diversity in the legal profession is well supported by academic studies.[24] Scholars have identified at least four distinct benefits of creating diversity in the legal profession.

First, providing racial minorities access to the legal profession brings to the bench their unique perspectives on the law. As Justice O'Connor said of former Justice Thurgood Marshall:

> Although all of us come to the court with our own personal histories and experiences, Justice Marshall brought a special perspective . . . . Justice Marshall imparted not only his legal acumen but

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[24] *See, e.g.*, David B. Rottman & Alan J. Tomkins, *Public Trust and Confidence in the Courts: What Public Opinion Surveys Mean to Judges,* Court Review, Fall 1999, at 24, 26; *see also* Michelle J. Anderson, *Legal Education Reform, Diversity and Access to Justice*, 61 Rutgers L. Rev. 1101 (2009); Christine Chambers Goodman, *Modest Proposal In Deference To Diversity*, 23 Nat'l Black L.J. 1 (2010); Anjali Chavan, *The "Charles Morgan Letter" And Beyond: The Impact Of Diversity Initiatives On Big Law*, 23 Geo. J. Legal Ethics 521 (2010); David A. Harvey, *A Preference for Equality: Seeking the Benefits of Diversity Outside the Educational Context,* 21 BYU J. Pub. L. 55 (2007); W. Anthony Jenkins, *Diversity Matters: Here and Now*, 90 Mich. B.J. 14 (2011); Kevin R. Johnson, *The Importance Of Student And Faculty Diversity In Law Schools: One Dean's Perspective*, 96 Iowa L. Rev. 1549 (2011); Nancy Scherer, *Diversifying The Federal Bench: Is Universal Legitimacy For The U.S. Justice System Possible?*, 105 Nw. U. L. Rev. 587 (2011); Carl Tobias, *Justifying Diversity in the Federal Judiciary*, 106 Nw. U. L. Rev. Colloquy 283 (2012); Denelle J. Waynick, *Diversity – Still a Business Imperative*, 272 N.J. Law. 66 (Oct. 2011).

> also his life experiences, constantly pushing and prodding us to respond not only to the persuasiveness of legal argument but also to the power of moral truth.[25]

Likewise, The Honorable Harry Edwards of the D.C. Circuit has recognized that "it is inevitable that judges' different professional and life experiences have some bearing on how they confront various problems that come before them."[26]

Legal scholars understand that "[n]ontraditional judges tend to include 'traditionally excluded perspectives' in their decision-making, 'and their presence enhances the appearance of impartiality for [both] litigants . . . and for the public at large."[27] "'[A] diverse bench provides decision-making power to formerly disenfranchised populations.'"[28] Additionally, "[o]nce we embrace the notion that different judges each bring a different set of assumptions and experiences to problem solving, it will become easier to see that diversity is a necessary tool to ensure unbiased, objective judging. Diversity operates as a

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[25] Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 Stan. L. Rev. 1217, 1217 (1992).

[26] Jonathan P. Kastellec, *Racial Diversity and Judicial Influence on Appellate Court*s, Princeton University, 1, 4 (Nov. 11, 2011), http://ssrn.com/abstract=1674052 (quoting Harry T. Edwards, *Race and the Judiciary*, 20 Yale L. & Pol'y Rev. 325, 329 (2002)).

[27] K.O. Myers, *Merit Selection and Diversity on the Bench*, 46 Ind. L. Rev. 43, 45-46 (2013) (internal citations omitted).

[28] Id.

diffusive mechanism that ensures that not all jurists will have a particular set of biases that cut only one way."[29]

Second, diversity in the legal profession is critical to ensuring the legitimacy of the judicial system because diversity fosters public confidence in the judicial system. The Honorable Marina Garcia Marmolejo of the U.S. District Court for the Southern District of Texas reasoned that "[p]eople are more likely to trust a legal system that embraces numerous perspectives and life experiences – a system that promotes inclusion and equality in a world with boundless potential, where each child grows up knowing that he or she can be a federal judge regardless of his or her background."[30] The Honorable Jimmie V. Reyna of the U.S. Court of Appeals for the Federal Circuit added: "The legal profession is the face and forerunner of the U.S. system of justice, the legitimacy of which depends on the people it serves, from whom it derives its authority. A diverse legal profession therefore ensures that the U.S. system of justice remains strong and viable into the future."[31]

The American Bar Association Presidential Initiative Commission on Diversity noted that "a

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[29] Carla D. Pratt, *Judging Identity*, 36 T. Jefferson L. Rev. 83, 85-86 (2013) (citing Sherrilyn Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 Wash. & Lee L. Rev. 405, 411 (2000)).

[30] Cynthia Mares, *Is Anybody Listening? Does Anybody Care? Lack of Diversity in the Legal Profession*, Fed. Law., June 2015, at 36, 39.

[31] *Id.*

diverse bench is important because it instills an invaluable sense of legitimacy and credibility for the Judiciary in the eyes of the community it serves."[32] According to the Bureau of Labor Statistics, law is one of the least racially diverse professions in the nation,[33] and ABA statistics show that more than 88% of lawyers in America are white.[34] An ABA report called the diversification of the legal profession the greatest challenge for the legal profession in the twenty-first century.[35]

The benefits of diversity are particularly important in the judiciary because judges are among the most visible representatives of the legal system. As one scholar put it: "Diversity on the bench is intimately linked to the American promise to provide equal justice for all. Judges are the lynchpins of our system of justice."[36] That is, "[j]udges are not the

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[32] Jhanice V. Domingo, *Seeking Greater Diversity in New Jersey's Bench and Bar*, N.J. Law., August 2013, at 11, 12.

[33] David J. Theising, *Law Is One of the Least Diverse Professions in America: The Forum Should Lead the Bar in Changing That*, Constr. Law., Fall 2015, at 5.

[34] Am. Bar Ass'n, *Lawyer Demographics: Year 2015* (2015) at http://www.americanbar.org/content/dam/aba/administrative/market_research/lawyer-demographics-tables-2015.authcheckdam.pdf

[35] Kevin Gooch, *Embracing the Opportunities for Increasing Diversity Into the Legal Profession: Collaborating to Expand the Pipeline (Let's Get Real),* ABA Post-Conf. Rep. 1, 6 2006 http://www.americanbar.org/content/dam/aba/migrated/2011_build/diversity/pipelinepostreport.authcheckdam.pdf ("*Embracing the Opportunities*").

[36] Torres-Spelliscy et al., *supra*, at 1.

exclusive providence of any one section of society . . . . [T]hey must provide justice for all."[37]

Third, diversity in the legal profession enhances the scope and quality of legal representation for many individuals who are racial minorities. Given this country's history of discrimination, it is crucial that a client have the ability to choose a lawyer with whom he or she feels comfortable. It is not simply that the availability of such lawyers affects the quality of representation that a minority client receives; it may determine whether that person seeks legal assistance at all. "Effective access to legal representation not only must exist in fact, it must also be perceived by the minority law consumer as existent so that recourse to law for the redress of grievance and the settlement of disputes becomes a realistic alternative to him."[38]

Fourth, access to the legal profession creates access to the Nation's government because this Nation's political leaders often are drawn from the ranks of the legal profession. As the ABA has noted, "[a]dvancing diversity and inclusion in the . . . government is especially important. These fields not only administer, but also represent democratic rule of law in our multicultural society. The absence of diversity and inclusion in . . . government can malign

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[37] *Id*. (quoting Jeffrey D. Jackson, *Beyond Quality: First Principles in Judicial Selection and Their Application to a Commission-Based Selection System*, 34 Fordham Urb. L.J. 125, 145 (2007)).

[38] Erwin N. Griswold, *Some Observations on the DeFunis Case*, 75 Colum. L. Rev. 512, 517 (1975).

the legitimacy of not only lawyers, but also of the law itself."[39]

Indeed, of the forty-three men who have served as our Nation's president, twenty-five have been lawyers; of those, only President Obama is a racial minority.[40] Additionally, twenty-six of our Nation's current governors hold law degrees; of those, only two are minorities.[41] Further, lawyers have long been the single largest occupational group in Congress. In the 114th Congress, 51 senators and 151 representatives are lawyers.[42] Despite the small proportion of people of color serving in the United States Congress, many of these lawmakers also have legal backgrounds. Indeed, of the forty-eight African-American members of the 114th Congress, twenty hold law degrees.[43] Of the

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[39] Eli Wald, *A Primer on Diversity, Discrimination, and Equality in the Legal Profession or Who is Responsible for Pursuing Diversity and Why* 24 Geo. J. Legal Ethics, 1079, 1101 (2011) (quoting Am. Bar Ass'n, *Presidential Diversity Initiative, Diversity in the Legal Profession: The Next Steps* (2010), *available at* http://www.americanbar.org/content/dam/aba/administrative/diversity/next_steps_2011.authcheckdam.pdf ("*Presidential Diversity Initiative*")).

[40] *Presidential Occupations*, http://www.infoplease.com/ipa/A0768854.html (last visited October 15, 2015).

[41] *Governors of the American States, Commonwealths and Territories,* National Governors Association 1 (2015), *http://www.nga.org/cms/governors/bios.*

[42] Jennifer E. Manning, *Membership of the 114th Congress: A Profile*, Congressional Research Service 1, 3 (2014), http://www.senate.gov/CRSReports/crs-publish.cfm?pid=%260BL*RLC2%0A.

[43] *Black Americans in Congress*, History, Art & Archives, http://history.house.gov/People/Search?ret=True (last visited Oct. 14, 2015) (follow hyperlinks to individual members).

114th Congress, all three Hispanic-American members of the Senate and eight of the current thirty-four Hispanic Americans in the House of Representatives have law degrees.[44] And the only Asian Pacific-American Senator and three of the thirteen Asian Pacific-American Representatives are attorneys.[45] These statistics show that access to this Nation's leadership is substantially influenced by access to the legal profession.

Given the pervasive nature of the legal profession, ensuring diversity in the legal profession is a compelling governmental interest. As discussed below, race-conscious admissions programs at the collegiate level play a critical role in furthering this compelling interest.

III. DIVERSITY IN THE LEGAL PROFESSION HAS NOT YET REACHED "CRITICAL MASS."

Significant efforts have been made to achieve diversity in the legal profession. Private law firms have openly advocated for diversity in their ranks, and the judiciary has become more diverse with more racial

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[44] *Hispanic Americans in Congress*, History, Art & Archives, http://history.house.gov/People/Search?ret=True (last visited Oct. 14, 2015) (follow hyperlinks to individual members).

[45] Lorraine H. Tong, Asian Pacific Americans in the United States Congress, Congressional Research Service 21, 22 (2013), available at http://fas.org/sgp/crs/misc/97-398.pdf.; Biographical Directory of the United States Congress, http://bioguide.congress.gov/biosearch/biosearch.asp (last visited Oct. 14, 2015) (search individual members).

minorities being appointed or elected to the federal and state judiciaries.

Nonetheless, due in part to this Nation's long history of discrimination, minorities still have a disproportionately low level of participation in the legal profession. The result of such low participation is that a critical mass of racial minorities in the legal profession has not been reached. Reaching this critical mass requires educational pipelines of the sort created by race-conscious admissions programs like the University of Texas's program. Absent such pipelines, minority participation in higher education would dramatically decline, which would deplete diversity in the legal profession. As a result, there remains a compelling governmental interest in achieving and maintaining critical mass in the legal profession, and race-conscious admissions programs are a proper means to achieve that goal.

A. Minorities Historically Have Been Excluded From Educational Opportunities And The Legal Profession.

To understand the continuing need for programs that advance diversity, it is important to understand the historical context of minority participation in this Nation's educational system. Discrimination against African Americans, Hispanic Americans, Asian Americans, and Native Americans in education and other areas was pervasive in the formative years of this Nation. The lack of educational opportunity for minorities, including at the college level, meant that

few minorities could move through the ranks into law schools and, ultimately, into the legal profession.[46]

Historically, even long after the Civil War and emancipation, education of African Americans was permitted, but often only in segregated schools located in "old buildings, generally in filthy and degraded neighborhoods, dark, damp, small, and cheerless, safe neither for the morals nor the health of those who are compelled to go to them, if they go anywhere, and calculated to repel rather than to attract them."[47] Moreover, these schools received only 12% of public school funds despite being tasked with educating approximately one-third of the school-aged population.[48]

As a result of this discrimination, in 1940, only one-half of one percent of all attorneys in the United States were African American, and discrimination against those few attorneys was rampant.[49] For example, most racial minorities were excluded from bar associations. Until 1943, the ABA excluded African

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[46] *See* Floyd D. Weatherspoon, *The Status of African American Males in the Legal Profession: A Pipeline of Institutional Roadblocks and Barriers*, 80 Miss L.J. 259, 280, 285, 290 (2010); *Embracing the Opportunities*, *supra*.

[47] August Meier & Elliot Rudwick, *From Plantation to Ghetto* 109-14 (1966).

[48] Louis R. Harlan, *Separate and Unequal: Public School Campaigns and Racism in the Southern Seaboard States, 1901-1915* 9-15 (1958).

[49] Derek Bok et al., *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* 1 (1998).

Americans from membership.[50] And as late as 1950, a representative of the ABA testified in opposition to an attempt by African Americans to secure admission to the all-white University of North Carolina School of Law.[51] Indeed, *Amicus* the National Bar Association was founded in 1925 because African Americans were excluded from the ABA.[52] It was not until 1943 that the ABA allowed African Americans to join its ranks.[53]

Like schools for African Americans, schools for Hispanic Americans "were usually segregated, overcrowded, and lacked adequately trained teachers."[54] The segregation of Hispanic Americans often was "justified" because of language differences.[55]

Similarly, Asian Pacific Americans faced racial discrimination in education. For example, in segregation era Mississippi, authorities treated Chinese Americans as "colored" and therefore prohibited them from attending all-Caucasian

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[50] Am. Bar Ass'n, 68 *Annual Report of the American Bar Association* 110 (1943).

[51] *See Epps v. Carmichael*, 93 F. Supp. 327, 329 (M.D.N.C. 1950).

[52] *National Bar Association (1925-)*, BlackPast.com, http://www.blackpast.org/?q=aah/national-bar-association-1925 (last visited October 15, 2015).

[53] *Id*.

[54] Guadalupe San Miguel, Jr., "*Let All of Them Take Heed": Mexican Americans and the Campaign for Educational Equality in Texas, 1910-1981* 11 (1987).

[55] *See, e.g.*, Robert Alvarez, Jr., *Familia: Migration and Adaptation in Baja and Alta California, 1800-1975* 154 (1987).

schools.[56] The Mississippi Supreme Court upheld the prohibition, reasoning that the word "colored" should be construed broadly to include children of "yellow" races.[57] Courts affirmed, applying the separate-but-equal doctrine of *Plessy* v. *Ferguson*[58] and other similar decisions.[59]

Native Americans fared no better in education. The few schools established for their benefit sought to "assimilate," rather than educate.[60] This discrimination took place in spite of the United States's pledge in more than 100 treaties to provide educational services and facilities to Native Americans, in exchange for land.[61]

This Court first began to break down these discriminatory barriers in public legal education – and thereby move toward recognizing diversity as a compelling interest – in the 1940s. In *Sweatt v. Painter*, the Court ordered the admission of African Americans to the University of Texas Law School on

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[56] *See* Joyce Kuo, *Excluded, Segregated and Forgotten: A Historical View of the Discrimination of Chinese Americans*, 5 Asian L.J. 181, 202 (1998); *see also* Sucheng Chan, *Asian Americans: An Interpretive History* 58 (1991).

[57] *Rice v. Gong Lum*, 104 So. 105, 110 (1925).

[58] 163 U.S. 537 (1896).

[59] *See, e.g.*, *Gong Lum v. Rice,* 275 U.S. 78, 86-87 (1927).

[60] L. Tsianina Lomawaima, *They Called It Prairie Light: The Story of the Chilocco Indian School* 4 (1994).

[61] Donna Dehyle & Karen Swisher, *Research in American Indian and Alaska Native Education: From Assimilation to Self-Determination*, 22 Review of Research in Education 113, 114 (1997).

the ground that the quality of the education available there was "superior" to that available at Texas's law school for African Americans.[62] Since *Sweatt*, the Court repeatedly has approved the constitutionality of state efforts that actively seek to ensure diversity in educational institutions for the benefit of all students – minority and non-minority alike.[63] And these decisions by the Court have spurred other institutions to make efforts to address discrimination.

Understanding the value of diversity in the legal profession, law schools have made efforts to diversify both their student bodies and their faculties. Like the University of Texas, many law schools have instituted race-conscious admissions programs.[64] Further, law schools have "sought to hire racial minorities . . . and [are] more committed to the success of their diverse faculty members both in terms of promotion to tenure . . . and in terms of appointments in leadership positions such as appointments as Associate Deans and Deans . . . ."[65]

Likewise, the ABA has made efforts to promote diversity in the legal profession. Since 1980, the ABA has required all law schools to "demonstrate by concrete action a commitment to diversity and inclusion by providing full opportunities for the study

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[62] 339 U.S. at 633-34.

[63] *See, e.g.*, *Bakke*, 438 U.S. at 315; *Grutter*, 539 U.S. at 330.

[64] *See, e.g.*, *Grutter*, 539 U.S. 306.

[65] Eli Wald, *A Primer on Diversity, Discrimination, and Equality in the Legal Profession or Who is Responsible for Pursuing Diversity and Why*, 24 Geo. J. Legal Ethics 1079 (2011).

of law and entry into the profession by members of underrepresented groups, particularly racial and ethnic minorities, and a commitment to having a student body that is diverse with respect to gender, race, and ethnicity."[66]

Similarly, private law firms have made significant efforts to diversify their ranks. Members of several prominent law firms have "spoken of diversity as one of their core values or as part of the firm's identity. A number of individuals stressed that it was not just the 'right thing to do,' but also critical to firms' economic success."[67] Most law firms have implemented recruiting policies that foster diversity in their associate and partner ranks. Indeed, one of the benchmarks employed to measure a law firm's success is the ability to hire a diverse group of attorneys.[68]

B. Critical Mass Has Not Been Achieved In The Legal Profession.

Despite these efforts to diversify the legal profession, a critical mass of racial minorities still does not exist. Legal scholars have confirmed the continuing lack of a critical mass and continue to

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[66] Am. Bar Ass'n, *Standards and Rules of Procedure for Approval of Law Schools* 12-13, Standard 206 (2015-16).

[67] Deborah L. Rhode & Lucy Buford Ricca, *Diversity in the Legal Profession: Perspectives from Managing Partners and General Counsel*, 83 Fordham L. Rev. 2483, 2486-87 (2015).

[68] *See Vault Law Firm Rankings 2015: The Best Law Firms For Diversity*, *available at* http://www.vault.com/company-rankings/law/best-law-firms-for-diversity/?sRankID=36&rYear=2015. (last visited Oct. 28, 2015).

advocate for race-conscious admissions programs as a means to provide a stronger pipeline of minorities into the legal profession.

Stanford Law School professor Deborah Rhode, for example, recently wrote:

One irony of this nation's continuing struggle for diversity and gender equity in employment is that the profession leading the struggle has failed to set an example in its own workplaces. In principle, the bar is deeply committed to equal opportunity and social justice. In practice, it lags behind other occupations in leveling the playing field.[69] Similarly, University of Louisville law professor Laura Rothstein noted the same trend, connecting it with the need to build a stronger pipeline for minorities:

> A century of legalized racism, followed by decades of institutionalized racism, has resulted in the underrepresentation of minorities . . . in the legal profession . . . . Recognition of the need to open the door, give a chance, and provide opportunities that can make a difference highlight the value of institutional efforts to "shape the tributary" or "build the pipeline."[70]

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[69] Deborah L. Rhode, *From Platitudes to Priorities: Diversity and Gender Equity in Law Firms*, 24 Geo. J. Legal Ethics 1041, 1041 (2011).

[70] Laura Rothstein, *Shaping the Tributary, the Why, What and How of Pipeline Programs to Increase Diversity in Legal*

Carmen G. González, a professor of law at Seattle University School of Law, also discusses this problem:

> If the legal profession is to keep pace with the nation's rapidly changing demographics, it is essential for law schools to strive for greater inclusion and representation. The good news is that the number of students of color graduating from law school has been steadily increasing, from 12.6 percent in 1991-1992 to 24.1 percent in 2011-2012 (although the *proportion* of African-American and Mexican-American students entering law school has been declining). However, the culture of law schools has lagged behind. Studies show that students from underrepresented groups often feel like outsiders in predominantly white law schools and regard the law school culture as inhospitable to their experiences and perspectives. These students report isolation, discomfort expressing their views, and daily "micro-aggressions" in the form of subtle and not-so-subtle sexist and racist affronts. Students of color often

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Education and the Legal Profession, 40 J.L. & Educ. 551, 552 (2011).

> have higher attrition rates and lower academic outcomes than white students.[71]

The statistics regarding the representation of minorities in the legal profession bear out these scholars' conclusions. Overall, while minorities are over 33% of the U.S. population, they comprise only about 11% of attorneys, "which amounts to a gross underrepresentation of minorities as a whole in the legal profession and with respect to each individual minority group."[72]

According to a May 2015 NALP bulletin, the number of Native American associates in private practice nationwide is too low to be reported. The National Native American Bar Association confirms that the extent of Native Americans' underrepresentation in the law is extreme: Native Americans comprise nearly 1%[73] of the U.S. population, but only 0.3% of U.S. attorneys.[74] The law school student and leadership pipeline is similarly limited. Native students make up well under one percent of

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[71] Carmen G. González, *Women of Color in Legal Education Challenging the Presumption of Incompetence*, Fed. Law., July 2014, at 48, 50.

[72] Jason P. Nance & Paul E. Madsen, *An Empirical Analysis of Diversity in the Legal Profession*, 47 Conn. L. Rev. 271, 286-87 (2014).

[73] 2014 Population, *supra.*

[74] National Native American Bar Association, *The Pursuit of Inclusion: An In-Depth Exploration of the Experiences and Perspectives of Native American Attorneys in the Legal Profession*, 10 (2015), available at: http://www.nativeamericanbar.org/wp-content/uploads/2014/01/2015-02-11-final-NNABA_report_pp6.pdf.

enrolled law students. Moreover, across all accredited law schools, there are currently fewer than 30 Native American law professors, and only one Native American law school dean."[75]

NALP further reported that African Americans comprise only 4.01% of associates nationwide.[76] Even in geographic locations where African Americans represent a larger segment of the overall population, they are still underrepresented in the associate ranks. For example, African Americans represent approximately 16.76% of the associates in the Detroit area (where 82.7% of the population is African American) and 1.64% of the associates in San Diego, California (where 6.7% of the population is African American).[77]

Hispanic Americans have similarly low participation in the associate ranks, representing only 3.95% of associates.[78] For example, Hispanic Americans represent less than 2% of the associate ranks in fifteen of the forty-one markets surveyed by NALP.[79] This includes legal markets where there is a relatively high Hispanic population, such as San Diego,

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[75] *Id.* at 18.

[76] *NALP Bulletin*, *supra*, at Table 1.

[77] *Id.*; United States Census Bureau, *State & County Quick Facts – Detroit (city), Michigan*, http://quickfacts.census.gov/qfd/states/26/2622000.html (last revised September 30, 2015); United States Census Bureau, *State & County Quick Facts – San Diego (city), California,* http://quickfacts.census.gov/qfd/states/06/0666000.html (last revised September 24, 2015).

[78] *NALP Bulletin*, *supra*, at Table 3.

[79] *Id.*

California (where Hispanic Americans constitute 31.5% of the population, but only 1.18% of associates).[80]

Although Asian Americans have stronger representation in associate ranks – nationwide, they account for approximately 5.2% of the population but 10.8% of associates[81] – this average is skewed by the high percentage of Asian-American associates in cities with high Asian-American populations. For example, in San Jose, California, where 32% of the population is Asian American, there is a correspondingly high percentage of Asian-American associates: 28.75%.[82] Even in some cities that have a significant Asian-American population, the percentage of Asian-American associates is comparatively low. For example, although 33% of the population in San Francisco, California, is Asian American, only 16.66% of associates are Asian American.[83]

These statistics are even lower at the partner level. Racial minorities comprise only approximately 7.33% of partners at law firms nationwide, with many markets having no minority partners at all in any

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[80] *Id.*; *State & County Quick Facts – San Diego (city), California, supra.*

[81] 2014 Population, *supra*; *NALP Bulletin*, *supra*, at Table 2.

[82] *NALP Bulletin*, *supra*, at Table 3; *State & County Quick Facts – San Jose (city), California,* United States Census Bureau, http://quickfacts.census.gov/qfd/states/06/0668000.html (last revised September 24, 2015).

[83] *NALP Bulletin*, *supra*, at Table 2; *State & County Quick Facts – San Francisco (city), California,* United States Census Bureau, http://quickfacts.census.gov/qfd/states/06/0667000.html (last revised September 24, 2015).

reviewed law firms.[84] Indeed, only 1.72% of partners at the law firms surveyed by NALP are African American; and in only eleven of the forty-one legal markets surveyed by NALP did the percentage of partners that are African American exceed 2%.[85] Similarly, Hispanic Americans comprise only 2.16% of partners at the law firms surveyed by NALP; and in only twelve of the forty-one markets surveyed did the percentage of Hispanic-American partners exceed 2%.[86] In twelve of those markets, the percentage of Hispanic-American partners was below 1%.[87] Finally, Asian Americans represent only 2.74% of partners at the law firms surveyed by NALP, and in only twelve of the forty-one markets surveyed did the percentage of Asian-American partners exceed 2%.[88] Again, the number of Native-American partners is too low for NALP to report.[89] The situation is even worse in some cities. In Boston in 2013, "of the 693 partners of the top 10 firms, there were four blacks (0.6 percent), seven Latinos (0.9 percent) and 10 Asians (1.4 percent)."[90]

With regard to judicial diversity, since the implementation of race-conscious admissions programs, judicial diversity has increased, but the percentages

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[84] *NALP Bulletin*, *supra*, at Table 2.

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] *Id.* at 1.

[90] Mark Roellig et. al., *Fixing What's Broken: Strategies for Increasing Diversity in Law Firms*, ACC Docket, March 2015, at 68, 75 (citing Colman M. Herman, *"Diversity Lacking at Boston Law Firms,"* Commonwealth, Fall 2013).

still fail to achieve a level of diversity that would constitutionally mandate ending the pipeline that has fed this progress. In 2009, the total percentage of minority judges sitting on state supreme courts was 12.8%.[91] Even this representation of racial minorities, though, is disproportionally low. Where minorities represent the majority of the population, they are still severely underrepresented.[92] For example, while only two-thirds of Alabama's population is white, 100% of its appellate court judges are white.[93] Similarly, in New Mexico, where 57% of the population was non-Caucasian in 2010, only 40% of state Supreme Court judges were minorities, and only 15% and 18% of intermediate and trial court judges, respectively, were non-Caucasian.[94] Similarly, racial minorities are underrepresented in the federal judiciary.[95]

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[91] Acquaviva & Castiglione, *supra*, at 1215.

[92] *Id*.

[93] Center for American Progress, *More Money, More Problems: Fleeting Victories for Diversity on the Bench*, October 2015 , p. 4 (citing Am. Bar Ass'n Judicial Division, "Judicial Database") Upcoming report on file with authors.

[94] *Id*.

[95] *See* Michelle Olson, *Federal Appellate Judges: Gender and Race Stats*, Appellate Daily (Oct. 1, 2011), https://docs.google.com/file/d/0B9afsss8C6tWN2M4Mzk5MTctOGYzMi00MGU4LTgwODEtMDMzYjg2NTYzOTE3/edit?hl=en; Russell Wheeler, *The Changing Face of the Federal Judiciary* 11 (2009).

IV. ELIMINATING RACE-CONSCIOUS COLLEGE ADMISSIONS WOULD SIGNIFICANTLY REDUCE DIVERSITY IN THE LEGAL PROFESSION.

To ensure the creation and maintenance of a critical mass of racial minorities in the legal profession, a pipeline must be maintained to allow qualified minorities the opportunity to earn admission to college and then law school and ultimately to enter the legal profession. When states have eliminated race-conscious admissions programs entirely, the results have been disastrous. Without race-conscious admissions programs, racial minorities' college enrollment plummeted, and, by extension, minority law school admissions fell dramatically. This resulted in a narrowing of the pipeline into the legal profession, which significantly reduced the number of racial minorities who became lawyers.

In July of 1995, the Regents of the University of California adopted Resolution SP-1, which eliminated "race, religion, sex, color, ethnicity, or national origin as criteria for admission" to the university system.[96] In November of 1996, California voters approved Proposition 209, which amended California's state constitution to prohibit the consideration of race,

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[96] University of California – Office of the President, *Undergraduate Access to the University of California After the Elimination of Race-Conscious Policies* 7 (March 2003). Resolution SP-1 was rescinded in May 2001. *Id.* at 7 n.7.

religion, sex, color, ethnicity, or national origin in admissions.[97]

The impact of these policies was immediate. Between 1995, when Resolution SP-1 was adopted, and 1998, when both Resolution SP-1 and Proposition 209 took effect, the number of in-state African-American, Hispanic-American, and Native-American students admitted to the University of California, Berkeley dropped 58%.[98] When Proposition 209 officially took effect for the entering class of Fall 1998, the admission rates of minorities on all California campuses declined, including by as much as 50% at the University of California, Berkeley and the University of California, Los Angeles.[99]

Admissions numbers continue to drop steadily. For example, just between 2002 and 2003, admissions rates fell 15% for African Americans, 3% for Hispanic Americans, 9.2% for Native Americans, and 2% for Asian Pacific Americans.[100]

To this day, the percentage of minorities admitted to and enrolled in California law schools remains materially lower than the percentage admitted

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[97] *Id*. at 7.

[98] Erica Perez, *Despite Diversity Efforts, UC Minority Enrollment Down Since Prop. 209*, California Watch 1, (Feb. 24, 2012) http://californiawatch.org/dailyreport/despite-diversity-efforts-uc-minority-enrollment-down-prop-209-15031.

[99] *Id*. at 2.

[100] *See* Carl G. Cooper, *Increasing Pipeline Opportunities in the Legal Profession for Minorities*, The Metropolitan Corporate Counsel (Vol. 15, No. 3, March 2007).

and enrolled before the implementation of Proposition 209.[101] This decrease in minority enrollment has had a corresponding effect on the legal profession in California, with fewer attorneys of color entering the ranks. In fact, one study determined that the elimination of race as a factor in admissions would result in at least a 50% net loss of new minority attorneys.[102]

California's experience shows that eliminating race-conscious admissions programs for racial minorities has immediate and significant effects,

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[101] Perez, *supra*, at 1. This decrease in enrollment applies to Asian Pacific Americans, as well as African Americans, Hispanic Americans, and Native Americans. That Asian Pacific Americans have seen a decrease in admissions following the passage of Proposition 209 refutes the "model minority" myth, which contends that Asian Pacific Americans stand to gain the most from the demise of race as a factor in college and law school admissions. *See* Stephen Thernstrom & Abigail Thernstrom, *Reflections on the Shape of the River*, 46 UCLA L. Rev. 1583, 1629 (1999) (asserting that Asian Pacific Americans derive the greatest benefit when race-conscious admissions policies are eliminated); *see also* Frank Wu, *Yellow: Race in America Beyond Black and White* 49, 74-77 (2001) (describing the "model minority" myth generally). In fact, only one racial group showed marked increases in enrollment following the passage of Proposition 209; Caucasian Americans accounted for 59.8% of law school enrollment during the three years before Proposition 209; they made up 71.7% of law school students in California after the ban. *See* William C. Kidder, *Situating Asian Pacific Americans in the Law School Affirmative Action Debate: Empirical Facts About Thernstrom's Rhetorical Acts*, 7 Asian L.J. 29, 43-45 (2000).

[102] *See* Jesse Rothstein & Albert H. Yoon, The National Bureau of Economic Research, *Affirmative Action in Law School Admissions: What Do Racial Preferences Do?* 4 (2008).

reducing the number of people of color entering the legal profession. Without a robust pipeline, fewer racial minority candidates obtain access to college and, in turn, law school and the legal profession. This results in a lack of diversity in the legal profession. Thus, given the continuing need to foster diversity, there continues to be a compelling governmental interest in collegiate diversity as a means to further a pipeline to achieve diversity in the legal profession.

V. CONCLUSION

Diversity is of paramount importance in law schools because they "represent the training ground for a large number of the Nation's leaders" and "legal learning and practice . . . cannot be effective in isolation from the individuals and institutions with which the law interacts."[103] Moreover, diversity strengthens the legal system as a whole: it ensures that numerous perspectives will be heard; it ensures that the legal system has legitimacy in the eyes of society; it increases access to legal representation for all; and it prepares our Nation's leaders. Diversity in the legal profession can only be fed by the flow of talented and qualified students through college and law school; and this pipeline is maintained, in part, by race-conscious college and law school admissions. Accordingly, race-conscious admissions programs remain a necessary and compelling governmental interest.

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[103] *Grutter*, 539 U.S. at 332 (citing *Sweatt*, 339 U.S. at 634).

Amici therefore respectfully join Respondents in requesting this Court uphold the University of Texas's program.

October 30, 2015

Respectfully submitted,

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