No. 11-345

IN THE

Supreme Court of the United States

ABIGAIL NOEL FISHER,
Petitioner,
v.
UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF NEITHER PARTY

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The Equal Employment Advisory Council respectfully submits this brief *amicus curiae* pursuant to Rule 37 in support of neither party.[1]

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership includes nearly 300 of the nation's largest private sector companies that collectively employ roughly 20 million workers. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

EEAC's corporate members all are employers subject to Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended, and other laws against workplace discrimination. Most also are federal government contractors subject to the affirmative action requirements of Executive Order 11,246, 30 Fed. Reg. 12,319 (Sept. 24, 1965), as amended by Executive Order 11,375, 32 Fed. Reg. 14,303 (Oct. 13, 1967), Executive Order 12,086, 43 Fed. Reg. 46,501 (Oct. 5, 1978), Executive Order 13,279, 67 Fed. Reg. 77,141 (Dec. 12, 2002), and the implementing regulations under 41 C.F.R. ch. 60 (2012). In addition, many EEAC member companies have voluntary programs to ensure that their workforces are diverse with respect to race, gender, culture, background, and other characteristics. EEAC's member representatives typically are corporate officials charged with responsibility for implementing

and complying with these nondiscrimination and affirmative action mandates and diversity initiatives.

The question presented for review is whether this Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Grutter v. Bollinger*, 539 U.S. 306 (2003), permit the University of Texas at Austin's consideration of race in undergraduate admissions decisions. Petitioners seek reversal of the decision below holding that the University's actions are lawful.

Although the question before the Court does not directly involve an issue of law applicable to private sector employers, EEAC's member companies nevertheless have a direct and significant interest in the outcome of the case. Diversity in higher education is essential to the ability of employers to (1) comply with their federally-mandated affirmative action requirements for government contractors, and (2) further their business objectives by employing individuals with backgrounds that represent and reflect the variety of markets in which they compete. EEAC's brief thus brings to the attention of the Court relevant matters not already brought to its attention by the parties.

STATEMENT OF THE CASE

Petitioner Abigail Fisher, a white female Texas resident, applied to the Respondent University of Texas at Austin (UT) for undergraduate admission to the class entering in the fall of 2008. Pet App. 3a. The University denied her application. *Id.*

Since 1997, the Texas "Top Ten Percent" Law has mandated that high school seniors in the top ten percent of their high school class be admitted automatically to any Texas state university. Tex. Educ.

Code § 51.803 (1997 & Supp. 2012). Under UT's undergraduate admissions policy, 90% of available seats in the freshman class are reserved for Texas residents.[2] Pet. App. 25a. In 2008, the Top Ten Percent Law filled 88% of those seats. Pet. App. 26a. Applicants who did not qualify under the Top Ten Percent Law, including Fisher, competed for the remaining seats. *Id.*

UT's admissions policy screens these applicants using an Academic Index, a formula that combines standardized test scores and class rank, and a Personal Achievement Index, which combines essay scores and an evaluation of the applicant's file as a whole, including demonstrated leadership qualities, awards and honors, work experience, and involvement in extracurricular activities and community service, plus a "special circumstances" element that involves consideration of the applicant's socioeconomic status and that of his or her high school, family status and family responsibilities, and other background elements, including the applicant's race. Pet. App. 26a-28a.

Fisher sued UT and a number of university officials in their official capacities, contending that the UT admission policy violated her right to equal protection under the Fourteenth Amendment to the U.S. Constitution, U.S. Const. amend. XIV, § 1, by discriminating against her on the basis of race. Pet. App. 3a. The district court granted UT's motion for summary judgment. Pet. App. 170a.

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[2] A 2009 amendment to this statutory code section, not relevant here, specifically limits admission to UT at Austin under the Texas "Top Ten Percent" Law to "75 percent of the university's enrollment capacity . . . . " Tex. Educ. Code § 51.803(a-1).

On appeal, the U.S. Court of Appeals for the Fifth Circuit affirmed. Pet. App. 71a. Interpreting this Court's decision in *Grutter v. Bollinger*, 539 U.S. 306 (2003), the Fifth Circuit ruled that UT's admissions policy consisted of "narrowly-tailored . . . procedures," and that "the University's decision to reintroduce race-conscious admissions was adequately supported by the 'serious, good faith consideration' required by *Grutter*." Pet. App. 71a.

Petitioner sought a writ of certiorari, which this Court granted on February 21, 2012.

SUMMARY OF ARGUMENT

Neither EEAC nor its member companies are public institutions of higher education. Accordingly, the Court's ruling on the specific admissions standards at issue in this case are of less importance to EEAC's members than are the resulting *consequences* of that ruling. Any decision that prevents our nation's public universities from utilizing race- or gender-conscious measures to attract, admit, educate and graduate diverse student bodies will have a direct, negative impact on the ability of federal contractors to satisfy their federally-imposed affirmative action mandates, and will pose significant hurdles for all employers seeking to derive a competitive business advantage by matching the diversity of their skilled workforces to the diversity of their customers and markets.

Being able to recruit qualified minority and female candidates is a key factor to the success of these efforts, and for positions requiring current college degrees is almost totally dependent upon the availability of diverse college and university graduates. Accordingly, whether or not this Court affirms or

reverses the decision below with respect to the specific admissions formula used at UT Austin, we respectfully request that the Court weigh carefully the impact its decision will have on private sector employers, and allow public institutions of higher education some measure of latitude to ensure that their graduating classes have the diversity of skills, experiences and backgrounds required by U.S. employers.

ARGUMENT

REGARDLESS OF THE OUTCOME OF THIS CASE, THIS COURT SHOULD BE COGNIZANT OF THE POTENTIAL EFFECT OF ITS DECISION ON PRIVATE SECTOR EMPLOYERS

A. This Court's Decision Should Not Make It More Difficult For Federal Contractors To Comply With Federally-Mandated Affirmative Action Requirements

1. Companies That Contract with the Federal Government Must Meet Rigorous Affirmative Action Compliance Standards

Many businesses that contract with the federal government are subject to rigorous nondiscrimination and affirmative action obligations under Executive Order No. 11,246 (E.O. 11246).[3] The Executive Order is enforced by the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP), pursuant to regulations promulgated at 41 C.F.R. ch. 60 (2012). Nearly all EEAC member companies are federal contractors subject to E.O. 11246 and its implementing regulations.

[3] 30 Fed. Reg. 12,319 (Sept. 24, 1965).

E.O. 11246 contains a dual mandate. It requires federal contractors to refrain from discriminating against any employee or applicant for employment on the basis of their race, color, religion, sex or national origin. In addition, it obligates such contractors to undertake affirmative action (*i.e.*, positive, proactive steps) to ensure that no such discrimination exists in any term, condition or privilege of employment. In the words of the Order, covered contractors:

> will not discriminate against any employee or applicant because of race, color, religion, sex, or national origin, . . . [and] *will take affirmative action* to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin.

Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 24, 1965) (quoting subpart B, § 202(1)) (emphasis added). *See also* 41 C.F.R. § 60-1.4(a)(1).[4] Examples of required affirmative action include such steps as proactively recruiting in geographic areas and at institutions likely to yield diverse candidate pools; monitoring the demographic patterns of actual selections made from those diverse pools; comparing the demographic profiles of the workforce to those of the labor markets from which they have been selected; and determining whether employees chosen for training programs, promotions, and other developmental opportunities reflect the diversity of the workforce segments from which they have been drawn.

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[4] Covered federal contractors also have a responsibility to take affirmative action to hire and promote individuals with disabilities, 29 U.S.C. § 793 and 41 C.F.R. § 60-741.5, and certain veterans, 38 U.S.C. § 4211 *et seq.* and 41 C.F.R. § 60-300.5.

The E.O. 11246 obligation to refrain from intentional discrimination can be implemented on a race and gender neutral basis – simply refrain from considering one's race or gender in making any employment decision. Affirmative action, in contrast, is an inherently race or gender "conscious" concept. It is simply not possible to take positive, proactive measures to ensure there is no race or gender discrimination without being conscious of the race and gender impact of the employment decisions that have been made.

While the affirmative action requirements under E.O. 11246 may be inherently race and gender "conscious," they are not "preferential." OFCCP has gone to great lengths to emphasize that nothing in its regulations should be interpreted as requiring or encouraging the use of quotas, set-asides or any other form of preferential treatment based upon an individual's race or gender. 41 C.F.R. § 60-2.16(e). Federal contractors' affirmative action obligations instead require taking positive, proactive measures to ensure that there is a "level playing field" for all individuals with respect to employment and career opportunities – in effect, that there are no intentional or unintentional organizational or attitudinal barriers that serve as artificial headwinds for certain racial or gender groups.

OFCCP's affirmative action regulations use both static and dynamic measures of whether a federal contractor is maintaining a level playing field. The static measure evaluates employee "representation" patterns – do the contractor's workforce demographic representation patterns reflect what might reasonably be expected given the race and gender composition of the qualified labor force from which the

employees have been drawn? *See* 41 C.F.R. § 60-2.15(a). Current employment below expected levels could suggest to OFCCP the absence of a level playing field. This measure is often referred to as a contractor's "utilization" pattern.

The dynamic measure evaluates the relative rates at which different gender and race groups are selected for such things as hires, promotions, terminations, benefits, and training programs. *See* 41 C.F.R. § 60-3.4. Statistically significant disparities in selection rates between certain groups over a given period of time also could suggest to OFCCP the absence of a level playing field. This is often referred to as determining whether a contractor's employment decisions have an "adverse impact" against any particular race or gender group. *Id.*

A federal contractor's ability to demonstrate to OFCCP that it maintains a level playing field through the absence of underutilization in its representation patterns, and the absence of statistically significant adverse impact in its selection decisions, is dependent upon the contractor being able to identify and attract diverse pools of candidates with the skills and experiences necessary to perform its jobs successfully. As described below, the absence of a skilled and diverse labor pool to draw upon will not only make it difficult for federal contractors to avoid underutilization and adverse impact in the first instance, but will also make it difficult for contractors to satisfy OFCCP's expectations to address such patterns once discovered.

a. *The Static Measure of Affirmative Action – Evaluating Utilization Patterns*

OFCCP's regulations require covered federal contractors to prepare and annually update for each of its establishments written affirmative action programs (AAPs). 41 C.F.R. § 60-2.1. One component of each AAP is a "utilization analysis" which requires a contractor to:

- Segment its workforce into groups of employees having similar job content, wage rates, and promotional opportunities ("job groups") [41 C.F.R. § 60-2.12];
- Calculate the number and percentage of women and minorities currently employed in each job group ("current representation") [41 C.F.R. § 60-2.13];
- Calculate the theoretical availability of women and minorities for the jobs in each job group based upon the demographic composition of the internal and external sources from which job group incumbents have been drawn in the past ("availability estimate") [41 C.F.R. § 60-2.14]; and
- Compare the current representation and availability estimate percentages to determine whether women and minorities are currently employed at levels that would reasonably be expected given their availability for the jobs ("utilization analysis") [41.C.F.R. § 60-2.15(a)].

If women and minorities are currently employed at reasonably expected levels, the contractor is deemed to be "utilized" for that job group, and nothing further is required. On the other hand, if current employ-

ment is below reasonably expected levels for either women or minorities, the contractor is deemed to be "underutilized" for that job group and must establish an annual placement rate goal (for either women and/or minorities as the case may be) that is set at the level of estimated availability. 41 C.F.R. §§ 60-2.15(b), 2.16(c).

Contractors having placement rate goals are required to undertake "good faith efforts" to place women and/or minorities into the job groups at the prescribed rates through future hires, promotions or transfers. *See* 41 C.F.R. § 60-2.16(a). Placement rate goals are not deemed to be inflexible quotas that must be met, but rather are "objectives or targets reasonably attainable by means of applying every good faith effort to make all aspects of the entire affirmative action program work." *Id.*; *see also* 41 C.F.R. § 60-2.16(e)(1).

Contractors having placement rate goals in their AAPs are not deemed to be in violation of E.O. 11246 or out of compliance with OFCCP's implementing regulations so long as they can demonstrate that they are undertaking good faith efforts to address and eliminate the underutilization. On the other hand, a pervasive or prolonged pattern of placement rate goals in certain job groups often serves as indicator to OFCCP that the contractor may not be maintaining a level playing field for all, and thus may not be undertaking sufficient affirmative action to do so. In such situations the result often is an OFCCP investigation for statistically significant adverse impact in selections adverse to race and gender groups for which goals have been established.

b. *The Dynamic Measure of Affirmative Action – Evaluating Potential Adverse Impact*

OFCCP's regulations provide that when the selection rate for one group (say minorities or women) is less than 80% of the selection rate for a comparison group (say, non-minorities or men), "adverse impact" is said to exist against the disadvantaged group. 41 C.F.R. § 60-3.4. When the selection disparity not only exceeds 80% but also exceeds two standard deviations, the adverse impact is said to be "statistically significant." 41 C.F.R. § 60-3.14(B)(5). Statistically significant adverse impact in selection rates can give rise to an inference of unlawful discrimination under E.O. 11246. But even non-significant adverse impact in selection rates can be used by OFCCP to conclude that contractors are not meeting their affirmative action obligations to maintain a level playing field for all. Accordingly, adverse impact can serve as a dynamic measure of compliance with respect to both the nondiscrimination and affirmative action mandates of E.O. 11246.

In the context of hires, selection rates are calculated by dividing the number of individuals of a particular group that are selected for hire by the number of individuals of that same group that were considered for hire. Ten male applicants selected from a candidate pool of 100 qualified male candidates yields a 10% male selection rate. Traditionally, OFCCP has required contractors to compare for each AAP job group the selection rates of females to males and all minorities to non-minorities. Office of Fed. Contract Compliance Programs, U.S. Dep't of Labor,

Fed. Contract Compliance Manual § 2O01.[5] Increasingly, OFCCP is requiring contractors to compare minority selection rates not only in the aggregate, but by minority subgroup as well – Black, Asian/Pacific Islander, American Indian, and White.

Avoidance of adverse impact in selections is dependent upon federal contractors being able to find, recruit and select from diverse pools of candidates having the skills and experience necessary to perform the job. For positions requiring baccalaureate or more advanced degrees, federal contractors must rely primarily upon our colleges and universities to provide those qualified candidate pools.

According to data for the year 2010 compiled by the Equal Employment Opportunity Commission (EEOC) from statistical reports filed by private sector employers,[6] more than 9.2 million of the nearly 47.5 million employees covered by the reports, or more than 19%, were in jobs that fell within the "professionals" category, [7] defined as those requiring a college degree or equivalent experience.[8] In the EEOC's own

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[5] *Available at* http://www.dol.gov/ofccp/regs/compliance/fccm/ofcpch2.htm#2O01 (last visited May 25, 2012).

[6] The Equal Employment Opportunity Employer Information Report (EEO-1) is required annually by the Equal Employment Opportunity Commission from employers with 100 or more employees. 29 C.F.R. § 1602.7.

[7] U.S. Equal Employment Opportunity Commission, Job Patterns For Minorities And Women In Private Industry (EEO-1), *available at* http://www1.eeoc.gov/eeoc/statistics/employment/jobpat-eeo1/index.cfm (last visited May 25, 2012).

[8] The "professionals" category is defined in the EEOC's instructions for the report as "Occupations requiring either college graduation or experience of such kind and amount as to provide a comparable background." U.S. Equal Employment Oppor-

words, these jobs include "accountants and auditors, airplane pilots and navigators, architects, artists, chemists, designers, dietitians, editors, engineers, lawyers, librarians, mathematicians, natural scientists, registered professional nurses, personnel and labor relations specialists, physical scientists, physicians, social scientists, teachers, surveyors [and the like]."[9]

Another reporting category covers "[o]fficials and managers," defined as "[o]ccupations requiring administrative and managerial personnel who set broad policies, exercise overall responsibility for execution of these policies, and direct individual departments or special phases of a firm's operations," including "officials, executives, middle management," and others.[10] Companies also reported 798,117 employees in the Executive/Senior Level Officials and Managers category and more than 4.3 million workers in the First/Mid Level Officials and Managers category in 2010, at least some of whom would have college degrees.[11]

For positions requiring a baccalaureate degree or higher, and particularly for future corporate leaders, the best and most qualified candidates are likely to come primarily from the graduating classes of our nation's colleges and universities. Accordingly, America's corporations look to these institutions to

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tunity Commission, Job Patterns For Minorities And Women In Private Industry: A Glossary, *available at* http://www1.eeoc.gov/eeoc/statistics/employment/jobpat-eeo1/glossary.cfm (last visited May 25, 2012).

[9] *Id.*

[10] *Id.*

[11] *Id.*

provide candidates with the skills necessary to succeed in today's business environment, including the ability to navigate diverse markets and customers.

c. *Federal Contractors Must Address Potential Problem Areas – Action-Oriented Programs*

The utilization and adverse impact analyses described above are two components of federal contractors' affirmative action obligations to analyze their workforces to identify problem areas. When such problem areas are revealed, contractors have a corresponding obligation to develop and execute "action-oriented programs" to address them. 41 C.F.R. § 60-2.17(c). These programs typically involve policies and initiatives designed to stimulate minority and female employment. Thus, as part of their written AAPs, contractors must describe the affirmative action efforts they have undertaken, or plan to undertake, to address statistical imbalances in the representation or selection of minorities and women, including the means they will use to monitor progress towards the accomplishment of any affirmative action placement rate goals.

Ensuring that the company's recruiting efforts reach out to a diverse talent pool has been the cornerstone of such action-oriented affirmative action programs for many years. 41 C.F.R. § 60-2.10(a)(1), (3). For this reason, federal contractors frequently undertake targeted recruiting from such organizations as the National Society of Black Engineers,[12] the Society of Hispanic Professional Engineers,[13] the American

[12] http://www.nsbe.org/ (last visited May 25, 2012).

[13] http://www.shpe.org/ (last visited May 25, 2012).

Indian Science and Engineer Society,[14] the National Association of Black Accountants,[15] local affiliates of the National Urban League,[16] the NAACP,[17] and many others. Federal contractors also engage in targeted outreach through their college and university recruitment programs. In support of these efforts, EEAC in 2004 developed and made available to EEAC member companies a recruiting tool called the "Educational Attainment Benchmarks." This service provides access to college and university graduate diversity statistics collected annually through the U.S. Department of Education's Integrated Postsecondary Education Data System (IPEDS).[18]

Detailed figures on the race, ethnicity, and gender demographics of the nation's graduates are available on a national level by 39 broad degree families, by detailed degree, and by institution. In addition, EEAC members can focus their college campus recruitment programs by identifying specific colleges and universities that have graduated the greatest numbers (or percentages) of a specific race, ethnicity or gender group with a specific degree and award level – for example, those that have conferred the greatest number of MBA degrees to women or minorities.

EEAC member reliance upon the Educational Attainment Benchmarks underscores just how crucial the diversity of our nations graduates is to the ability

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[14] http://www.aises.org/ (last visited May 25, 2012).

[15] http://www.nabainc.org/ (last visited May 25, 2012).

[16] http://www.nul.org/ (last visited May 25, 2012).

[17] http://www.naacp.org/ (last visited May 25, 2012).

[18] http://nces.ed.gov/ipeds/ (last visited May 25, 2012).

of federal contractors to satisfy their affirmative action compliance obligations and to compete successfully on a global basis.

2. OFCCP Is Increasing Its Scrutiny of Contractors' Affirmative Action Compliance Efforts

Over the past year and a half, OFCCP has proposed a series of changes to its implementing regulations and has initiated an aggressive enforcement program designed to enhance the agency's ability to scrutinize federal contractor affirmative action compliance efforts. The enforcement pressure applied by OFCCP for federal contractors to engage in more aggressive outreach and recruitment efforts than in the past has already increased and is likely to increase even further once these proposals are finalized.

In addition to enforcing the nondiscrimination and affirmative action obligations in E.O. 11246, OFCCP also enforces the nondiscrimination and affirmative action obligations pertaining to protected veterans under the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA)[19] and individuals with disabilities under Section 503 of the Rehabilitation Act of 1973 (Section 503).[20] Under pending VEVRAA and Section 503 regulatory proposals, federal contractors would for the first time be required to establish numeric hiring goals for veterans and individuals with disabilities similar to those required under E.O. 11246 for women and minorities.[21] In addition, the

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[19] 38 U.S.C. § 4211 *et seq*.

[20] 29 U.S.C. § 793.

[21] 76 Fed. Reg. 23,358-425 (Apr. 26, 2011) (VEVRAA); 76 Fed. Reg. 77,056-105 (Dec. 9, 2011) (Section 503).

proposals require mandatory postings of job openings with state employment agencies, establishment of "linkage" agreements with designated employment referral agencies, and sweeping new recordkeeping requirements including the number of referrals from each recruitment source.[22]

Once these regulations are finalized, it is reasonable to expect that OFCCP will seek to impose similar job listing and recordkeeping requirements under Executive Order 11246, potentially converting current regulatory guidance and recommendations into highly prescriptive mandates, and rejecting "good faith efforts" as a measure of compliance in favor of extensive recordkeeping and accomplishment of numerical benchmarks.

In addition to these and other regulatory initiatives, OFCCP has also recently taken a significantly more aggressive posture in its compliance evaluations. Compliance evaluations are OFCCP-initiated investigative proceedings used by the agency to review a federal contractor's compliance status. Approximately 4,000 compliance evaluations are conducted each year.[23] During such reviews OFCCP typically examines the contractor's AAPs, including job groups where placement rate goals have been established; looks for evidence of adverse impact in selections; evaluates compensation patterns for pay equity; and otherwise evaluates the contractor's

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[22] *Id.*

[23] FY 2013 Congressional Budget Justification, Office of Fed. Contract Compliance Programs, at 19, *available at* http://www.dol.gov/dol/budget/2013/PDF/CBJ-2013-V2-10.pdf (last visited May 25, 2012).

outreach, recruitment and other affirmative action efforts. 41 C.F.R. § 60-1.20(a)(1).

OFCCP's intention to conduct more thorough affirmative action compliance evaluations in the future is reflected in the agency's pending request to the federal Office of Management and Budget (OMB) for permission to collect expanded applicant flow information from contractors at the outset of compliance evaluations.[24] Currently, federal contractors must submit to OFCCP information on applicants, hires, promotions and terminations (1) by gender and minority/nonminority status, (2) for each AAP job group or each job title. This is the source information that OFCCP traditionally has used to determine whether there are any suggestions of statistically significant adverse impact in selections.

OFCCP is now seeking OMB approval to require contractors to submit applicant information (1) by job group *and* job title (rather than by job group *or* job title); and (2) by individual race/ethnicity categories (rather than by minority/non-minority status).[25] The granularity of this information will enable OFCCP in the future to apply its affirmative action standards by individual job title for each one of the four minority subgroups.

In addition to the prospect of more stringent regulatory requirements in the future, contractors are today already experiencing more aggressive OFCCP scrutiny of their affirmative action outreach and recruiting efforts. In Fiscal Year 2011, 28% of compli-

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[24] http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201104-1250-001 (last visited May 25, 2012).

[25] http://www.reginfo.gov/public/do/DownloadDocument?documentID=271526&version=0 (last visited May 25, 2012).

ance evaluations conducted by OFCCP ended in a finding of noncompliance, up from 18.6% in FY 2010, a 48% increase, according to EEAC's analysis of OFCCP enforcement data posted in the Department of Labor's online enforcement database.[26] Despite the fact that OFCCP closed roughly 900 fewer compliance evaluations in FY 2011 than FY 2010, nearly 200 more (for a total of 1,109) ended with a finding of noncompliance. More than half (53.7%) of the cited violations concerned recruiting, which topped the list of cited violations. *Id.*

B. This Court's Decision Should Not Make It More Difficult For Employers To Maintain Successful Voluntary Diversity Initiatives

Many federal contractors are motivated to diversify their workforces less by OFCCP-imposed legal mandates than by business prerogatives. Compliance with OFCCP regulatory requirements often is inadequate for such companies to achieve the desired workforce diversification.

This disconnect is due in part to the fact that the concept of AAP job groups, which lies at the core of OFCCP's regulatory scheme, is inconsistent with the way many companies manage their businesses. For such companies, demographic statistical analyses of workforce representation and selection patterns by AAP job group have little practical value. The disconnect between legal mandates and diversity objectives may also be reflective of the fact that

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[26] U.S. Dep't of Labor, Data Enforcement, OFCCP Compliance Evaluation and Complaint Investigation Data, Dataset Summary (Apr. 7, 2010), *available at* http://ogesdw.dol.gov/ (last visited May 25, 2012).

OFCCP's legal requirements do not address the "cultural" or "environmental" issues inherent in workforce diversification – those practices that serve to nurture a welcoming and hospitable environment in the workplace for individuals of all backgrounds.

In part because of this disconnect, many employers voluntarily have instituted "diversity" initiatives to supplement their legally-mandated affirmative action programs. The business justification for such initiatives is typically threefold. First, U.S. companies increasingly are participating in the global marketplace, creating a need for employees at all levels that are sensitive to and skilled in dealing with the cultures of the countries in which they operate. Second, changing national demographics require companies to fill key management positions with diverse candidates in order to facilitate communication with potential customers and to manage effectively a diversified workforce. Third, companies have recognized that individuals from diverse backgrounds bring valuable differences in perspective and experience to all aspects of corporate decisionmaking, from operations, to marketing, to communications and human resources.

U.S. firms increasingly are expanding their markets beyond our nation's borders. According to statistics compiled by the World Trade Organization, the United States was the second leading world exporter of merchandise in 2010, with nearly a 9% market share, surpassed only by China at 10.4%.[27]

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[27] World Trade Org., Int'l Trade Statistics 2011,Table I.8, *Leading exporters and importers in world merchandise trade, 2010*, at 24, *available at* http://www.wto.org/english/res_e/statis_e/its2011_e/its11_world_trade_dev_e.pdf (last visited May 25, 2012).

U.S. exports were valued at nearly $1.28 trillion.[28] Approximately $364 billion dollars of U.S. merchandise was sold in Asia, $276 billion in Western Europe, $137 billion in Latin America, and almost $49 billion in the Middle East.[29]

Such global expansion requires an understanding of the unique customs, mores and traditions in each chosen market, as well as an ability to communicate effectively with customers and business partners. The identification and development of marketable products and services, the establishment of marketing plans, the creation of effective advertising, and the implementation of a strategy for interacting with customers all must be undertaken with local needs in mind. Employees having experience with these other cultures thus constitute a key component of a successful global operations plan.

Equally important in the development of corporate diversity initiatives is recognition that the U.S. workforce is itself becoming increasingly diverse. In 2000, 72.0% of the civilian work force was White, 11.5% Black, 11.7% Hispanic, 4.0% Asian, and 1.0% "All Other Groups", which includes Multiple Race, American Indian/Alaska Native, and Native Hawaiian/Other Pacific Islander.[30] Ten years later in

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[28] *Id.* at Table I.13, *Merchandise trade of the United States by origin and destination, 2010*, at 29, *available at* http://www.wto.org/english/res_e/statis_e/its2011_e/its11_world_trade_dev_e.pdf (last visited May 25, 2012).

[29] World Trade Org., Int'l Trade Statistics 2002,Table III.17, *Merchandise trade of the United States by region and economy, 2001*, *available at* http://www.wto.org/english/res_e/statis_e/its2002_e/section3_e/iii17.xls (last visited May 25, 2012).

[30] U.S. Dep't of Labor, Bureau of Labor Statistics, Employment Projections – Civilian Labor force by age, sex, race, and

2010, the minority percentages had increased to 11.6% Black, 14.8% Hispanic, 4.7% Asian, and 2.4% All Other Groups, while the percentage of Whites had decreased to 67.5.%. *Id.* at n.31. This trend has continued and as of 2020, the U.S. Department of Labor's Bureau of Labor Statistics predicts that only 62.3% of the U.S. workforce will be White, while minority percentages will increase to 12.0% Black, 18.6% Hispanic, 5.7% Asian, and 2.9% All Other Groups. *Id.*

Finally, companies have developed diversity initiatives based upon actual experience that where there is diversity of background and experience, there often flows a variety of perspectives and opinions that lead to more informed judgments.

Corporate diversity initiatives invariably extend well beyond legally mandated compliance efforts. They typically address a much broader range of demographic characteristics, encompassing such differences as age, cultural background, family responsibilities, sexual orientation and religion, in addition to race and gender. Specific components vary from one company to another but often include diversity education for managers and employees, "affinity groups" that provide forums for employees to discuss issues of common interest, work-life balance programs such as flexible work arrangements, onsite day care, elder care assistance, and establishment of diversity "councils" consisting of executives, managers and employees responsible for providing program direction and oversight.

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ethnicity, Table 3.4, *available at* http://www.bls.gov/emp/ep_table_304.htm (last visited May 25, 2012).

Diversity initiatives thus encompass a wide variety of programs that serve to advance a company's strategic business objectives by positioning it as a preferred employer for individuals of all backgrounds.

As with the affirmative action efforts that are mandatory for federal contractors, voluntary diversity initiatives are dependent upon the availability of qualified candidates who have not only the requisite degrees from American educational institutions, but also the diversity of experience that many of these institutions provide.

CONCLUSION

This Court observed in 2003 that "major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003). In the intervening nine years that need has only increased, as witnessed by the explosion in voluntary corporate diversity initiatives.

In addition, the intervening years have witnessed heightened OFCCP scrutiny of federal contractors' compliance with their affirmative action mandates – mandates that seek to maintain level playing fields for individuals of all backgrounds through monitoring utilization and selection patterns and proactively addressing instances of underutilization and adverse impact.

Now as much as in 2003, our nation's colleges and universities – by attracting, educating and graduating individuals with the skills, backgrounds and experiences required for today's global competitive en-

vironment – play a key role in facilitating employers' ability to satisfy their legal obligations and accomplish their business objectives. Accordingly, regardless of the specific disposition of this case, we respectfully request the Court to be cognizant of these business needs and announce clear standards that allow colleges and universities some means of continuing to supply America's business with qualified diverse candidates.

Respectfully submitted,

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