No. 11-345

IN THE
Supreme Court of the United States

ABIGAIL NOEL FISHER,
Petitioner,
v.

UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,
Respondents.

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

BRIEF OF *AMICI CURIAE* THE AMERICAN JEWISH COMMITTEE, CENTRAL CONFERENCE OF AMERICAN RABBIS, AND UNION FOR REFORM JUDAISM IN SUPPORT OF RESPONDENTS

Richard C. Godfrey
Counsel of Record
Martin L. Roth
Vikas K. Didwania
KIRKLAND & ELLIS LLP
300 North LaSalle Street
Chicago, Illinois 60654
Telephone: (312) 862-2000
richard.godfrey@kirkland.com
Counsel for Amicus Curiae

August 13, 2012

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

The American Jewish Committee ("AJC") is a non-partisan, not-for-profit advocacy and human-relations organization. It was established in 1906 to protect the civil and religious rights of Jews. More than one-hundred years later, AJC now has roughly 170,000 members and supporters, and 26 regional offices, spread across the nation and throughout the world.

AJC recognizes that the best defense against anti-Semitism and other forms of bigotry is to promote mutual understanding and acceptance through interactions between peoples of diverse ethnic, national, racial, and religious backgrounds. Through its Arthur and Rochelle Belfer Center for American Pluralism, AJC draws on historical Jewish-American experiences to facilitate cross-cultural and cross-racial interactions that advance the principles of democracy, pluralism, diversity, and civic engagement. In practice, AJC has advanced these principles for decades by advocating on behalf of civil rights and civil liberties for people of all backgrounds. For example, AJC sponsored the study demonstrating the psychological impact of prejudice and discrimination on children cited by this Court in its landmark *Brown v. Board of Education* decision.[2]

---

[1] No counsel for any party has written this brief in whole or in part. This brief was prepared entirely by AJC's counsel on a *pro bono* basis; no other person made any monetary contribution to this brief. *See* Sup. Ct. R. 37.6. All parties have consented to the filing of this brief through universal letters of consent on file with the Clerk of the Court.

[2] *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 n. 11 (1954) (citing K. B. Clark, *Effect of Prejudice and Discrimination on*

In the context of admissions in higher education, AJC has long recognized the importance of evaluating each applicant holistically as an individual, rather than making prejudgments based solely on his or her race, religion, color, or creed. For this reason, AJC filed *amicus curiae* briefs in *DeFunis v. University of Washington Law School* and *Bakke v. University of California Board of Regents* opposing those institutions' separate admissions systems for minorities, which evoked the admission quotas used to restrict Jewish matriculation to colleges and universities in the earlier part of the Twentieth Century. Such quotas were born of bigotry, and AJC staunchly opposes any admissions system that similarly depends on predeterminations about the proper racial or ethnic composition of college and university campuses.

In 2003, AJC filed an *amicus curiae* brief in *Grutter v. Bollinger* in support of the University of Michigan Law School's efforts to achieve diversity in its student body, which did not discriminate against or grant a quantifiable preference to any race, but instead encouraged diversity through individualized, flexible analysis of each candidate. This Court sustained the University of Michigan Law School's policy and confirmed the importance of diversity in higher education in order to provide students with a richer educational experience and to better prepare them to participate as citizens in our pluralistic democracy. *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003).

Personality Development (Mid-century White House Conference on Children and Youth, 1950)).

Central to AJC's organizational mission is building coalitions across diverse religious, ethnic, and racial groups. AJC's ability to fulfill its mission depends greatly on diversity in colleges and universities. Without diversity in higher education, which presents individuals with differing viewpoints and backgrounds at a still-impressionable stage in life, organizations like AJC would be limited in their ability to foster relationships and build broad-based coalitions among the diverse citizens of our great Nation. AJC thus believes that it is imperative to reaffirm the twin holdings announced in *Grutter* and reject the invitation of petitioner and certain other *amici* to abandon educational diversity as a compelling state interest or to invalidate holistic admissions programs.

The Union for Reform Judaism, whose 900 congregations across North America includes 1.5 million Reform Jews, and the Central Conference of American Rabbis ("CCAR"), whose membership includes more than 1,800 Reform rabbis, share a deep commitment to the prophetic imperatives of our tradition and the creation of justice for all the people of our country. We have held that affirmative action aimed at correcting historic injustice in our society is a significant and successful vehicle for achieving such a goal. We have held that race-conscious remedies that use goals and timetables as opposed to quotas, which led to our support for affirmative action programs ranging from those in the *DeFunis* and *Bakke* cases to those in the *Grutter* case, are moral and effective means of addressing the impact of historic discrimination. We are particularly sensitive to the dangers that we face in a society where inequity is allowed to persist. The long-range

interests of all Americans are best served by the creation of a society that is truly just. Affirmative action fosters vibrant diversity and the full participation of minorities in all important aspects of society.

SUMMARY OF ARGUMENT

The diverse demographic composition of the United States makes it imperative for colleges and universities to create pluralistic campuses that will expose their students to an array of qualities and experiences, and differing viewpoints and values. Diversity in higher education is of vital importance not only to schools themselves, but also to our society, given the critical impact education has in shaping students to become involved citizens and leaders of our country.

Amici therefore request that this Court reaffirm the holding of *Grutter v. Bollinger*, which allows colleges and universities to achieve campus diversity through admissions policies that consider ***all*** qualities of each individual applicant. Such policies do not discriminate or provide preferential treatment based on race alone, but instead acknowledge the reality that race and culture inherently play some role in shaping an applicant's life experience and character. Indeed, overturning *Grutter* would force academic institutions to turn a blind eye to important qualities that are often central to a student's experiences and persona.

As this Court held in *Grutter*, there is nothing unconstitutional about a race-conscious admissions policy that seeks to attain educational diversity through individualized, case-by-case admissions

decisions without resort to an inflexible quota system or racial balancing. The record makes clear that the University of Texas at Austin (the "University of Texas" or "UT") implements an individualized admissions policy that is not a quota, and is directly in line with the type of admissions policy that this Court sanctioned in *Grutter*.

As social science research and the previous thirty years of college admissions confirm, admissions policies such as the one at issue in this case provide important social and educational benefits. Further research has demonstrated that the Texas "Top Ten Percent" plan and other race-neutral affirmative action policies endorsed by petitioner simply do not effectively enroll a diverse group of underrepresented minorities because such policies fail to account for the unique and valuable experiences within minority groups. It is therefore reasonably clear that UT's plan is necessary to accomplish the compelling interest of educational diversity and is narrowly-tailored to advance that interest.

Amici request that the Court decline petitioner's and some of the other *amici*'s overtures intended to effect a reconsideration of *Grutter*. Revisiting *Grutter* would create unrest and confusion in the country's college and university admissions offices, which have relied on the principles first articulated by Justice Powell in *Bakke* more than three decades ago. It would deprive university administrators of their ability to provide their students with an enriching and diverse educational experience, and instead, force them to ignore essential qualities, challenges, and life experiences faced by their applicants. At the same time, invalidating this

Court's most recent guidance in *Grutter* ultimately will diminish the benefits to our pluralistic society arising from the full inclusion within the university community of students representing all of the qualities and values of our diverse citizenry.

ARGUMENT

I. This Court Should Reaffirm *Grutter*'s Holding That Obtaining The Benefits That Flow From Educational Diversity Is A Compelling State Interest.

Jewish leaders, institutions, and organizations have not always embraced race-conscious admissions policies. The first affirmative action programs were inflexible systems that allotted a set number of admissions slots to minority groups. Such programs were reminiscent of the bigoted numerical quota systems implemented by elite colleges and universities, including Harvard, Yale, Princeton, and Columbia, to curb Jewish enrollment during the first half of the Twentieth Century. *See, e.g.*, JEROME KARABEL, THE CHOSEN: THE HIDDEN HISTORY OF ADMISSION AND EXCLUSION AT HARVARD, YALE, AND PRINCETON, 88, 102, 130-31 (2005); DAN A. OREN, JOINING THE CLUB: A HISTORY OF JEWS AND YALE 46-47, 175-76 (1985); MARCIA GRAHAM SYNNOTT, THE HALF-OPENED DOOR: DISCRIMINATION AND ADMISSIONS AT HARVARD, YALE, AND PRINCETON, 1900-1970, 17-20 (1979).

While the Jewish quota systems were sometimes given paternalistic rationalizations, such as the supposed need to protect Jewish students on college campuses, *see* HENRY L. FEINGOLD, LEST MEMORY CEASE: FINDING MEANING IN THE AMERICAN JEWISH PAST 95 (1997), at bottom, they were rooted in anti-

Semitism and hatred. They sought to exclude Jews because of anti-Semitic prejudices about their character, and many promising Jewish students were deprived of important opportunities, despite their qualifications, simply because they were Jewish.

For this reason, among others, many members of the Jewish community, including AJC, have historically opposed any admissions system that resembles a quota. *See* Brief of the American Jewish Committee, et al. as Amici Curiae Supporting Respondent, *Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978) (No. 76-811), 1977 WL 188015, at *11-12 (Aug. 5, 1977). AJC believes that it was wrong for institutions to rigidly classify people based on race, gender, or ethnic origin. In this regard, AJC agrees with this Court's recognition over the last 35 years of the invidious nature of quotas and other racial balancing systems. *See, e.g.*, *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 723 (2007); *Grutter*, 539 U.S. at 330; *Freeman v. Pitts*, 503 U.S. 467, 494 (1992); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989); *Bakke*, 438 U.S. at 307. These decisions have forced a salutary recasting of affirmative-action programs.

As college and university admissions policies have evolved, so too has Jewish support for race-conscious admissions. After Justice Powell's landmark opinion in *Bakke*, colleges and universities largely abandoned quota systems and began to implement more flexible, individualized admissions policies that considered race as only one among many aspects of an applicant's file. As a result, many Jewish organizations, including AJC, have come to support

such admissions policies, which simply reflect the reality that, for some individuals, race is an essential component of their experience, personality, and character.

Indeed, AJC and other Jewish groups now recognize that flexible, race-conscious admissions policies like those at issue in this case and *Grutter* are beneficial to society because they ensure educational diversity and its attendant benefits. *See* Brief of the American Jewish Committee, et al. as Amici Curiae Supporting Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241) & *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516), 2003 WL 536749, at *2 (Feb. 14, 2003). Without educational diversity, many students would be ill-equipped to serve as culturally aware business and governmental leaders in our pluralistic society, and organizations such as AJC and other *amici* will be limited in their ability to reach people to advance cross-cultural understanding as a bulwark to bigotry.

A. Diversity In Academic Institutions Provides Important Educational And Societal Benefits.

Having students from a variety of backgrounds, cultures, and experiences enhances the learning within an undergraduate setting. Justice Powell stated it well in *Bakke*: "The atmosphere of speculation, experiment and creation—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body." *Bakke*, 438 U.S. at 312 (opinion of Powell, J.) (citation and internal quotation marks omitted). Justice Powell also acknowledged the view that students with different racial backgrounds, religious experiences,

extracurricular activities, and from different parts of the country and the world, will bring these varied experiences to campus. *Id.* at 313 (citation omitted). These students' experiences will inform the discussions inside and outside the classroom.

In fact, the positive benefits that racial diversity provides to the educational experience offered by colleges and universities, such as greater intellectual and social ability among students, have been verified by recent social science research. *See, e.g.*, Victor B. Saenz et al., *Factors Influencing Positive Interactions Across Race for African American, Asian American, Latino, and White College Students*, 48 RES. HIGHER EDUC. 1, 35-36 (February 2007) (cross-campus longitudinal research study concluding based on survey data that "the presence of diverse peers, along with opportunities for facilitated interactions that expand student knowledge about diverse others, perspectives and backgrounds, contributes to the development of important skills."); Mitchell J. Chang et al., *Cross-Racial Interaction Among Undergraduates: Some Consequences, Causes, and Patterns*, 45 RES. HIGHER EDUC. 529, 535-36 (August 2004) (noting correlation between campus diversity and higher intellectual ability, social ability, and civic interest among students); Jeffrey F. Milem, *The Educational Benefits of Diversity: Evidence from Multiple Sectors*, *in* COMPELLING INTEREST: EXAMINING THE EVIDENCE ON RACIAL DYNAMICS IN COLLEGES AND UNIVERSITIES 130-31 (Mitchell J. Chang et al. eds., 2003) (finding that campus diversity facilitated higher-order thinking skills, less racial stereotyping and more comfortable living, working, and socializing in integrated settings); Anthony Lising Antonio, et al., *Effects of Racial*

Diversity on Complex Thinking in College Students, 15 PSYCHOL. SCI. 507, 508-09 (2004) (finding that the presence of minority collaborators increased "integrative complexity," defined as "the degree to which cognitive style involves differentiation and integration of multiple perspectives and dimensions.").

This exposure to diverse cultures and experiences not only enriches the education of students, but also prepares them for a pluralistic democracy by creating cross-cultural understanding and an openness to new viewpoints. As this Court has recognized, the importance of diversity in education transcends the classroom and even the university campus. Justice Powell noted in *Bakke*, and this Court later reaffirmed in *Grutter*, that "nothing less than 'the nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples." *Grutter*, 539 U.S. at 324 (quoting *Bakke*, 438 U.S. at 313 (opinion of Powell, J.)).

In AJC's experience, Justice Powell's words ring true. Through its partnerships with a diverse range of racial and ethnic groups, including the NAACP, La Raza, and many other similar organizations, AJC has encouraged cross-cultural engagement and understanding. These efforts have been successful in advancing AJC's goals of eliminating anti-Semitism and other bigotry. AJC's relationship with the African-American community has been particularly fruitful, resulting in nearly one-hundred years of coalitional initiatives to promote civil rights for African-Americans. *See* American Jewish Committee, AFRICAN-AMERICAN JEWISH RELATIONS:

AN AJC HISTORY, available at: http://www.ajc.org/site/apps/nlnet/content2.aspx?c=ijITI2PHKoG&b=838459&ct=6451259 (last visited July 28, 2012). And these relationships are mutually beneficial: since 1982, AJC's Project Interchange has brought nearly 6,000 diverse world leaders from over 68 countries to Israel for weeklong seminars in order to introduce them to Israeli society and the unique issues faced by Jews in Israel. Project Interchange Website, http://projectinterchange.org/ (last visited July 28, 2012).

Without individuals open to diverse viewpoints and willing to accept new cultures because of their continued exposure to racial, ethnic, national, and other differences, such initiatives are severely hampered. Diverse college and university campuses provide precisely the learning environment essential to instilling intellectual curiosity and cross-cultural acceptance. College and university campuses are a breeding ground for future local and national leaders, and depend upon "'a robust exchange of ideas'" "to achieve a goal that is of paramount importance in the fulfillment of [their] mission." *Bakke*, 438 U.S. at 312-13 (opinion of Powell, J.) (quoting *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967)); *see also Grutter*, 539 U.S. at 329 ("Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School's proper institutional mission."); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) ("[E]ducation is the very foundation of good citizenship.").

Social science research supports this point. For example, one longitudinal field study of two student

groups, one group comprising students that had taken a course focusing on intergroup dialogue, and a second group that had not taken that course, demonstrated, among other findings, that students exposed to intergroup dialogue more frequently expressed democratic sentiments, showed greater motivation toward taking the perspective of others, became more mutually involved with other groups, and expressed a greater sense of commonality in values than the control group. Patricia Gurin et al., *The Benefits of Diversity in Education for Democratic Citizenship*, 60 J. SOCIAL ISSUES 17, 21-24 (2004). These findings have been echoed in other academic research called for by the College Board following the *Grutter* decision. *See* EMILY J. SHAW, COLLEGE BOARD RESEARCH REPORT NO. 2005-4: RESEARCHING THE EDUCATIONAL BENEFITS OF DIVERSITY 21 (2005), available at http://ec2-184-73-88-202.compute-1.amazonaws.com/sites/default/files/publications/2012/7/researchreport-2005-4-researching-educational-benefits-diversity.pdf (last visited August 8, 2012) (summarizing research on the benefits of educational diversity and calling for new work in the area).

The undeniable implication of this research is that educational diversity serves an important function in our society. Many important social, governmental, and business initiatives, such as those undertaken by pluralistic organizations like AJC, involve building coalitions of a wide variety of individuals, groups, ideas and viewpoints. Without the foundation of a diverse college campus, these initiatives will suffer. *Amici* therefore request that this Court reiterate the holding of *Grutter* that diversity constitutes a compelling state interest that

may justify carefully constructed race-conscious admissions policies.

B. Race Is An Important Factor In Evaluating How An Applicant Will Contribute To Educational Diversity.

Like many other characteristics of a college applicant, such as family composition, involvement in extracurricular activities, and the quality of his or her high school, race may help predict the contributions the applicant will make to the university community, and ultimately to the pluralistic society the student will enter after graduation. Among researchers, there is little doubt about "differences in culturally related experiences of students from different racial and ethnic groups, especially in family, community, and peer settings." THE COLLEGE BOARD, REACHING THE TOP: A REPORT OF THE NATIONAL TASK FORCE ON MINORITY HIGH ACHIEVEMENT 17 (1999), available at http://professionals.collegeboard.com/profdownload/pdf/reachingthe_3952.pdf (last visited July 28, 2012). A scholar previously at the Harvard Graduate School of Education has written that "[s]tructural and cultural forces combine in complex ways to influence the formation of individual and collective identities." Pedro A. Noguera, *The Trouble with Black Boys: the Role and Influence of Environmental and Cultural Factors on the Academic Performance of African-American Males*, HARV. J. AFR. AM. PUBLIC POL'Y 23, 31 (Summer 2001).

The race discrimination and race consciousness experienced by a minority student in our society can be a singularly formative experience for that applicant that will directly impact what insights he

or she will bring to the classroom and the campus. This Court acknowledged as much in *Grutter*: "Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately matters." *Grutter*, 539 U.S. at 333. Justice O'Connor similarly reflected on the unique perspective that Justice Thurgood Marshall brought to this Court, particularly with respect to racial issues, by virtue of his own experiences. *See* Sandra Day O'Connor, *Thurgood Marshall: The Infuence of a Raconteur*, 44 STAN. L. REV. 1217, 1220 (1992).

Part of these experiences, for some students, includes overcoming racial discrimination. Judge Harry T. Edwards eloquently remarked:

> Because of the long history of racial discrimination and segregation in American society, it is safe to assume that a disproportionate number of blacks grow up with a heightened awareness of the problems that pertain to these areas of the law. Of course, not all blacks have the same exposure to these problems . . . . And not all blacks share the same views on the solutions to the problems. But, just as most of my Jewish colleagues have more than a fleeting understanding of anti-Semitism, the Holocaust, and issues surrounding Israel and Palestine, most blacks have more than a fleeting understanding of the effects of racial discrimination.

Harry T. Edwards, *Race and the Judiciary*, 20 YALE L. & POL'Y REV. 325, 328 (2002).[3]

Beyond invidious race discrimination, there are other "challenging cultural factors that influence the orientation students adopt toward school. . . . [Some black] students regard Blackness as being equated with playing basketball and listening to rap music

---

[3] Unfortunately, racial discrimination is not a thing of the past in this country. Researchers continue to find evidence of current discrimination against and stereotyping of minorities. *See, e.g.*, Ian Ayres & Peter Siegelman, *Race and Gender Discrimination in Bargaining for a New Car*, 85 AM. ECON. REV. 304, 304 (June 1995) (finding "large and statistically significant differences in prices quoted to test buyers of different races and genders"), available at http://islandia.law.yale.edu/ayers/Ayres%20Siegelman%20Race%20and%20Gender%20Discrimination%20In%20Bargaining%20%20for%20a%20New%20Car.pdf (last visited August 8. 2012); National Bureau of Economic Research, *Employers' Replies to Racial Names*, available at http://www.nber.org/digest/sep03/w9873.html (last visited August 9, 2012) (finding job applicants with African American names had a more difficult time getting a callback); Eric Lichtblau, *Profiling Report Leads to Demotion*, N.Y. TIMES (Aug. 24, 2005), available at http://www.nytimes.com/2005/08/24/politics/24profiling.html?pagewanted=all (last visited August 9, 2012) (discussing a 2005 Bureau of Justice Statistics report that "uncovered evidence of black drivers having worse experiences—more likely to be arrested, more likely to be searched, more likely to have force used against them—during traffic stops than white drivers"); Devah Pager & Hana Shepherd, *The Sociology of Discrimination: Racial Discrimination in Employment, Housing, Credit, and Consumer Markets*, 34 ANNU. REV. SOCIOL. 181, 181 (2008), available at http://www.princeton.edu/~pager/annualreview_discrimination.pdf (last visited August 9, 2012) (detailing the "[p]ersistent racial inequality in employment, housing, and a wide range of other social domains [that] has renewed interest in the possible role of discrimination").

but not with studying geometry and chemistry." Pedro A. Noguera, *Racial Politics and the Elusive Quest for Excellence and Equity in Education*, 34 EDUC. & URBAN SOCIETY 18 (Nov. 2001); *see also* Noguera, *The Trouble with Black Boys*, *supra* at 34 (noting that African-American males' "deviation from established patterns often places them under considerable scrutiny from their peers who are likely to regard their transgression of group norms as a sign of 'selling out'"). These negative influences come not only from the minority student's own peer group, but from whites as well: "Whites still harbor doubts about the educational potential of some minority groups" and these doubts "continue to take a toll on the academic performance of many minority students." REACHING THE TOP, *supra*, at 16.

Each minority student brings these experiences into the classrooms, cafeterias, and dormitories, adding vital and unique points of view that are translated to his or her peers. *See Bakke*, 438 U.S. at 312-13 n. 48 ("A great deal of learning occurs informally. It occurs through interactions among students of both sexes; of different races, religions, and backgrounds . . . who are able, directly or indirectly, to learn from their differences and stimulate one another to reexamine even their most deeply held assumptions about themselves and their world."). The other students learn and benefit from being exposed to and understanding these experiences, preparing them to be compassionate, understanding, tolerant, and successful professionals. The minority student excelling in geometry, or the sciences, for example, challenges in a direct and forceful manner the stereotypes referred to by Professor Noguera. *See Grutter*, 539 U.S. at

330 (noting the law school's race-conscious policy "promotes cross-racial understanding, helps to break down racial stereotypes, and enables students to better understand persons of different races" (internal quotations and alteration omitted)); *id.* (noting the "real" benefits of diversity, as "the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints").

This is not to say that all African-Americans or members of other minority groups experience overt discrimination or will bring a uniform perspective, but that a student from another racial background inevitably will be unable to provide the same type of perspective. This Court has recognized precisely this fact in cases underscoring the need to include African-Americans and women in the jury pool. *See Peters v. Kiff*, 407 U.S. 493, 503-04 (1972) (explaining that the effect of excluding African-Americans from the jury "is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable"); *Ballard v. United States*, 329 U.S. 187, 193-94 (1946) (rejecting the argument that an all-male jury was representative because the reality was that neither men nor women act as a single class, and the two sexes are not fungible).

Simply put, race may be a critical component of a college applicant's experience and character that should not be completely ignored. Only by considering race in some circumstances can a university build the diverse campus that prepares its students for a pluralistic society and lessens bigotry.

II. This Court Should Also Reaffirm *Grutter*'s Holding That Individualized, Race-Conscious Admissions Are Narrowly Tailored To Achieve Educational Diversity.

As petitioner implicitly acknowledges by asking this Court to overturn *Grutter*, prohibiting the individualized consideration of race to attain educational diversity would constitute a radical departure from precedent that would greatly reshape American society through judicial fiat. (Pet'r Br. 53 (seeking to overturn *Grutter v. Bollinger*, 539 U.S. 306 (2003), and by implication *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978), because they allow "'holistic' review coupled with avoidance of express quota or point systems"); Brief of Amicus Curiae The Louis D. Brandeis Center for Human Rights Under the Law et. al., ("Brandeis Br."), at 4 (advocating the invalidation of all admissions systems that are "based on 'diversity' and 'holistic' or 'comprehensive' review")).

This Court has frequently noted the importance of *stare decisis* for preserving the legitimate expectations of citizens and institutions in our country. *See Dickerson v. United States*, 530 U.S. 428, 443 (2000). Overturning *Grutter* and *Bakke* would unsettle those expectations, which have yielded decades of admissions policies for a large swath of colleges and universities. *See* Akhil Amar Reed and Neal Kumar Katyal, *Bakke's Fate*, 43 U.C.L.A. L. REV. 1745, 1769 (1996) ("An entire generation of Americans has been schooled under *Bakke*-style affirmative action, with the explicit blessing of—indeed, following a how-to-do-it manual from—U.S. Reports."); *Bakke*, 438 U.S. at 287

(suggesting that any rule fashioned under the Equal Protection Clause will apply, through Title VI, to nearly every *private* school as well).

In *Bakke*, Justice Powell extolled the virtues of the individualized admissions systems used by highly selective colleges such as Harvard and Princeton. *Bakke*, 438 U.S. at 316-19. He explained that such a program "is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant," so that a "black applicant may be examined for his potential contribution to diversity . . . with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism." *Id*. at 317. After *Bakke*, many admissions programs at colleges and universities implemented the holistic review encouraged by Justice Powell. In fact, "Justice Powell's opinion announcing the judgment of the Court has served as the touchstone for constitutional analysis of race-conscious admissions policies." *Grutter*, 539 U.S. at 323. Given the continued need for and benefits reaped from educational diversity, there is no reason to depart from these considered precedents here.

UT's narrow consideration of race fits the constitutional purpose announced in *Grutter* of understanding what the applicant could contribute to the learning community. For some applicants, race inevitably will be an integral part of their experience and thus important to what they will contribute to the campus environment. As petitioner concedes, UT considers race for only a very small number of minority applicants. (Pet'r Br. 39-40).

This conforms to the University's claim, and the district court's factual finding, that race is used by UT to place an individual applicant's file in context. *Fisher v. Univ. of Texas at Austin*, 645 F. Supp. 2d 587, 597 (W.D. Tex. 2009). To require universities to ignore this significant aspect of some applicants' experiences when conducting a holistic review is unduly limiting. It severely encroaches on the University's core freedom to determine which applicants to admit based on complex educational judgments that lie outside the Court's expertise. *See Grutter*, 539 U.S. at 328.

A. The University Of Texas's Holistic *Grutter*-Modeled Admissions Policy Is Not A Quota.

As this Court explained in *Grutter*, "Properly understood, a 'quota' is a program in which a certain fixed number or proportion of opportunities are "reserved exclusively for certain minority groups."" *Grutter*, 539 U.S. at 335 (quoting *J.A. Croson Co.*, 488 U.S. at 496); *see also Sheet Metal Workers v. EEOC*, 478 U.S. 421, 495 (1986) ("[Quotas] impose a fixed number or percentage which must be attained, or which cannot be exceeded.") (O'Connor, J. concurring in part and dissenting in part). Distinct from a quota is "a permissible goal . . . [which] require[s] only a good-faith effort . . . to come within a range demarcated by the goal itself." *Grutter*, 539 U.S. at 335. The distinction between unconstitutional quotas and permissible goals is commonplace in this Court's affirmative-action jurisprudence. *See, e.g.*, *Grutter*, 539 U.S. at 324-25; *Bakke*, 438 U.S. at 314.

Unlike a quota or racial balancing plan, the UT approach of individualized review tracks almost exactly the Harvard plan cited approvingly by Justice Powell, as well as the University of Michigan plan upheld in *Grutter*. Within the individualized approach used for Texas residents, the University employs an academic index and a personal achievement index. *Fisher v. Univ. of Texas at Austin*, 631 F.3d 213, 227 (5th Cir. 2011). The personal achievement score is based on a thorough, holistic review by experienced members of the admissions staff. The review assesses "an applicant's demonstrated leadership qualities, awards and honors, work experience, and involvement in extracurricular activities and community service." *Id.* at 228. The staff also attempts to learn more about the individual as a person and place these achievements in context by looking at the applicant's special circumstances, including socioeconomic status, family status, family responsibilities, race, and test scores compared to the average of the applicant's high school. *Id.* (*See also* Resp't Br. 13-14.) These two goals of learning more about the applicant to understand his likely contribution to the educational environment and to place the applicant's achievements in context are commendable and can be achieved only through an individualized process that considers race where appropriate.

The University of Texas does not provide an automatic "plus" to any applicant because of the applicant's race. *See Fisher*, 645 F. Supp. 2d at 597. None of the elements evaluated in the University's holistic review is considered individually. Rather, they are considered together "to provide a better

understanding of the student as a person and place her achievements in context." *Id.* at 597. The University acknowledges that its consideration of race can assist an applicant of any race, including Caucasian applicants, and a minority applicant's race may have no impact whatsoever. *Id.* The race of an applicant is used to reveal the applicant's "sense of cultural awareness" and what that applicant will contribute to the University community. *Id.* at 597, 609. In fact, UT's individualized race-conscious process is even narrower than the system approved in *Grutter*. Unlike in *Grutter*, the admissions officers do not monitor the ethnic or racial composition of the admitted students throughout the process. *Compare Fisher*, 645 F. Supp. 2d. at 598, *and Grutter*, 539 U.S. at 391-92. This buttresses the University's position that it looks at the race of each applicant only to understand his character and experiences.

B. The Evidence Does Not Establish Invidious Discrimination.

Petitioner suggests, despite the stated aims of UT's admissions policy, that its holistic review is a covert method of racial balancing that directly discriminates against Asian Americans. (Pet'r Br. 55.) One *amicus* brief even takes the argument a step further and compares the alleged effect of UT's race-conscious admissions policy on Asian Americans to the Jewish quotas of the 1920s. (Brandeis Br. 20-33.) The basis for petitioner and *amici*'s abhorrence for holistic review is the apparent belief that universities are filled with untrustworthy, racist administrators. According to *amici*, "school administrators, as a class, are clever and persistent

people" who "will invoke any excuse, and employ any mechanism, to keep discriminating on the basis of race." (*Id.* at 34.)

Given the history of racial quotas in higher education, it is not irrational to worry that race-conscious admissions could harden into inflexible quota systems. But as this Court recognized in *Grutter*, it is insufficient merely to speculate that today's universities employ holistic review as a pretext for discrimination. "[G]ood faith on the part of a university is presumed absent a showing to the contrary." *See Grutter*, 539 U.S. at 329 (internal quotation marks and citation omitted); *see also Bakke*, 438 U.S. at 319 n.53 ("Universities . . . may make individualized decisions, in which ethnic background plays a part, under a presumption of legality and legitimate educational purpose.").

That presumption cannot be so strong as to in effect preclude judicial scrutiny of affirmative action plans, *cf. Ashcroft v. Iqbal*, 556 U.S. 662, 682 (2009), especially because, in some cases, relevant facts will be known only to school officials. But where, as here, a case is fully litigated, the presumption is sufficiently weighty to overcome petitioner's speculation that allowing consideration of race inevitably leads to abuse.

Petitioner has not made any showing of invidious discrimination here. To the contrary, UT's policy and the historical discrimination against Jews are entirely dissimilar. Unlike the quotas and anti-Semitic policies of the 1920s, which specifically targeted Jews in an effort to limit their placement in colleges and universities, there is no evidence that the University of Texas has used its race-conscious

admissions policy, which is designed to achieve diversity, to exclude Asian Americans or any other group.

The University has never established any specific number or percentage of minority enrollment it seeks to attain or awarded a number of points to students from a particular racial background. As the Fifth Circuit explained:

> UT has not admitted students so that its undergraduate population directly mirrors the demographics of Texas. Its methods and efforts belie the charge. The percentage of Hispanics at UT is less than two-thirds the percentage of Hispanics in Texas, and the percentage of African-Americans at UT is half the percentage of Texas's African-American population, while Asian-American enrollment is ***more than five times*** the percentage of Texas Asian-Americans.

Fischer, 631 F.3d at 235 (emphasis added).

Given the individualized manner in which race and national origin plays a role in the admissions process in highlighting students' potential contribution to diversity, there is no reason why an Asian American student could not benefit from the diversity policy in this case. Indeed, the lower court's factual findings suggest that they may have, and that this argument regarding harm to Asian Americans finds no support in the actual operation of this program. *Id.* at 224.

To be sure, if the UT policy on its face, or as applied, discriminated against or set a quota

disadvantaging Asian-Americans, AJC would join in objecting to it. But the record does not permit that conclusion; to the contrary, the record reflects that UT both as a policy and in fact has narrowly crafted a holistic approach fully consistent with and approved by the precedents of this Court.

Universities, based on their experience and expertise, are best able to judge the impact of complex racial and cultural factors on the ability of a student to succeed at their institution. UT does precisely this because no student is rejected simply because of low academic scores. These students, regardless of race, are evaluated holistically to understand the context in which these scores were earned. Sometimes the context involves being a single parent, and sometimes it involves the race and culture of the applicant.

The University should be allowed to continue to use this holistic process that includes race as a factor to better understand the applicant and judge his or her likely success, and to build a class of students with a variety of characteristics. To Justice Powell, such individualized admissions processes were ideal because they allowed institutions to evaluate an applicant's "exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important." *Bakke*, 438 U.S. at 317.

C. The Top Ten Percent Plan And Other Race-Neutral Methods Of Achieving Diversity Are Inadequate Substitutes For Individualized, Race-Conscious Admissions.

Several social science studies have concluded that "percent plans are inferior alternatives to affirmative action as a strategy to diversify college campuses." MARTA TIENDA ET AL., AFFIRMATIVE ACTION AND THE TEXAS TOP 10 % ADMISSION LAW: BALANCING EQUITY AND ACCESS TO HIGHER EDUCATION, 18 (February 2008), available at http://theop.princeton.edu/reports/wp/AffirmativeAction_TopTen.pdf (last visited July 30, 2012); *see also* Angel L. Harris & Marta Tienda, *Hispanics in Higher Education & the Texas Top Ten % Law*, 4 RACE & SOC. PROBL. 57, 65-66 (2012) (finding that application and admission rates for Hispanic students fell when the Top Ten Percent Plan operated without race-conscious admissions); Mark C. Long, *College Applications and the Effect of Affirmative Action*, 121 J. OF ECONOMETRICS 319, 340-41 (2004) (concluding that minority students shifted SAT score reports to lower quality colleges after higher caliber schools eliminated affirmative action plans while white and Asian American students did the opposite). One study concludes that minority and low-income students who are admitted pursuant to the Top Ten Percent law often face difficulties enrolling at UT. *See* Tienda et al., AFFIRMATIVE ACTION, *supra*, at 18. Thus, the recent research and data compiled regarding percentage plans reflects that they often do not effectively increase minority enrollment and indeed, have just the opposite effect.

In addition, there are reasons to believe that, despite the matriculation of some minority students pursuant to the Top Ten Percent plan, such a plan is less effective than individualized determination in achieving educational diversity. The Top Ten Percent plan indiscriminately admits a number of minorities; it does not ascertain the unique ways in which an individual's race has affected his or her experiences. In arguing that race-conscious individualized review is unnecessary because there are already many African-Americans, Hispanics, and Native Americans at UT due to the Top Ten Percent plan, (Pet'r Br. 34-35), petitioner proposes that universities should only be concerned with racial diversity for its own sake. This proposition was soundly rejected by the Court in *Bakke* and *Grutter*. As Justice Powell explained, a university's interest in ethnic diversity "is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups." *Bakke*, 438 U.S. at 315.

Rather, the university has an interest in diversity that encompasses "a far broader array of qualifications and characteristics" of which race is an important element. *Id.* This broad array creates an atmosphere of "speculation, experiment and creation" that is essential to higher education. *Id.* at 312. Similarly, in *Grutter*, this Court explained that one benefit of a race-conscious policy that admits a variety of minorities is to break down stereotypes that all minorities are the same. *Grutter* 539 U.S. at 332-33. As this Court held in *Grutter*, percentage plans "may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially

diverse, but diverse along all the qualities valued by the university." *Id.* at 340. In some instances, race is inextricable from the applicant's experiences, such as in the instance of an applicant who has overcome significant racial discrimination. Thus, the Top Ten Percent plan, by itself, cannot provide the unique tailoring that has been praised repeatedly by the Court over the past thirty years.

More generally, there is, as yet, no race-neutral method that can replace race as a factor that provides insight into the applicant's experiences and potential contributions to diversity. Social scientists have learned that a variety of cultural factors have an impact on the educational experiences of minorities: "the way family members and friends interact with one another and the outside world"; "how much parents talk to their children, deal with their children's questions, how they react when their child learns or fails to learn something"; and "psychological and cultural differences." CHRISTOPHER JENCKS & MEREDITH PHILLIPS, EDS., THE BLACK-WHITE TEST SCORE GAP 43 (1998). According to this research, African-American children, regardless of socioeconomic status, receive less cognitive stimulation and emotional support. *See id.* at 126-27. Yet, "[a] great many students with lower test scores or high school grade-point-averages succeed in college." Brief of Amicus Curiae of the College Board as Amicus Curiae Supporting Respondents, *Gratz v. Bollinger*, 539 U.S. 244 2003) (No. 02-516), 2003 WL 402218, at *12. These successful minority students share their cultural experiences with their university peers, enriching the education of all.

The use of a system that requires admissions only "on the basis of objectively demonstrated academic merit" as advocated by some *amici* supporting petitioner (Brandeis Br. 37), ignores these important cultural issues and would mire federal courts in managing the intricacies of the college admissions process. These *amici*'s plan would involve perennially adjudicating disputes about "objective" factors for merit: Is the quality of an applicant's high school an objective, academic factor? Are factors such as socioeconomic status and geographic location truly objective and academic?[4] If not, do academic institutions have any ability to recognize the special achievements and qualities of those applicants who excelled despite these and other potential hurdles to academic achievement?

Only by considering race as a factor can school administrators evaluate the social and cultural factors that sometimes are profoundly important in

---

[4] To the extent that these factors have historically been labeled "race neutral," recent census data and academic research casts some doubt on this classification. *See, e.g.*, UNITED STATES CENSUS BUREAU, 2012 STATISTICAL ABSTRACT TABLE 711, available at http://www.census.gov/compendia/statab/cats/income_expenditures_poverty_wealth/poverty.html (last visited August 3, 2012) (socioeconomic status may be correlated with race because 32% of blacks but only 10% of whites are below the poverty line); JOHN ICELAND ET AL., RACIAL AND ETHNIC RESIDENTIAL SEGREGATION IN THE UNITED STATES: 1980 - 2000: CENSUS 2000 SPECIAL REPORTS 4 (United States Census Bureau August 2002), available at http://www.census.gov/hhes/www/housing/housing_patterns/pdf/censr-3.pdf (last visited August 3, 2012) (geographic location may be correlated with race because African Americans experience the highest degree of residential segregation of any 12 racial or ethnic groups in the country).

placing a student's application within the necessary context. Similarly, race can provide useful context to a minority applicant's non-academic achievements. A passion for studying history, for example, may have arisen from introspection about the applicant's own race and its role in American society. The sustained commitment to community engagement inevitably may be flavored by role of race in that community. The extracurricular involvement may be more impressive if it is outside that applicant's comfort zone due to his or her race. In other words, taking race into account allows school officials to fully learn the experiences that these students will be able to share with their classmates.

Petitioner and her supporting *amici* have not pointed to any other race-neutral means that would allow the University to identify applicants who, for example, lived through the peer effects of being an academically successful minority. While it may be possible for the University to create a very lengthy application that asks detailed questions about the applicant's characteristics and experiences, and thus avoids explicitly any consideration of race, a university is not required to exhaust "every conceivable race-neutral alternative." *Grutter*, 539 U.S. at 339. In addition, this Court historically has been adverse to directly managing the affairs of a university, which would be necessary if only an "objective" application process were allowed. *See Bakke*, 438 U.S. at 312 (noting who may be admitted to study is one of the "four essential freedoms" of a university and that safeguarding these freedoms is "[o]ur national commitment"); *Grutter*, 539 U.S. at 328 (explaining the Court's holding "is in keeping with our tradition of giving a degree of deference to a

university's academic decisions" to take "into account complex educational judgments in an area that lies primarily within the expertise of the university").

UT has given "serious, good faith consideration" to workable race-neutral alternatives. *Fisher*, 645 F. Supp. 2d at 610. It uses race-neutral processes to admit the vast majority of its students, employing a race-conscious process for only the narrowest of circumstances in the narrowest possible manner: to evaluate the unique experiences of a specific applicant and place that applicant's achievements in context. Petitioner has no evidence of a race-neutral alternative that can similarly achieve this goal, much less achieve the goal in a superior manner. The University of Texas's narrow use of race in these circumstances is thus constitutional.

CONCLUSION

American colleges and universities have relied on this Court's guidance in formulating individualized admissions policies for nearly three and a half decades since Justice Powell's landmark opinion in *Bakke*. In *Grutter*, this Court reaffirmed the principles espoused by Justice Powell. Petitioner and her *amici* should bear a heavy burden before persuading this Court to undo the wisdom of those important precedents. *Amici* believe that the role of diversity in education continues to be critical to the Nation. So is the role of the courts in ensuring these programs remain benign. The program at issue in this case, however, comports with the narrowly-tailored programs already endorsed by this Court. For this reason *amici* respectfully requests that the Court affirm the decision of the Fifth Circuit and uphold UT's admissions policy.

Respectfully submitted,

Richard C. Godfrey
Counsel of Record
Martin L. Roth
Vikas K. Didwania
KIRKLAND & ELLIS LLP
300 North LaSalle Street
Chicago, Illinois 60654
Telephone: (312) 862-2000
richard.godfrey@kirkland.com
Counsel for Amicus Curiae

August 13, 2012