

No. 11-345

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**In the Supreme Court of the United States**

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ABIGAIL N. FISHER

*v.*

UNIVERSITY OF TEXAS AT AUSTIN, ET AL.

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

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**BRIEF FOR CALIFORNIA INSTITUTE OF TECHNOLOGY,  
CARNEGIE MELLON UNIVERSITY, CASE WESTERN  
UNIVERSITY, EMORY UNIVERSITY, GEORGE  
WASHINGTON UNIVERSITY, NORTHWESTERN  
UNIVERSITY, RICE UNIVERSITY, TULANE  
UNIVERSITY, UNIVERSITY OF ROCHESTER,  
AND THE WASHINGTON UNIVERSITY AS AMICI  
CURIAE IN SUPPORT OF RESPONDENTS**

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DOUGLAS HALLWARD-DRIEMEIER

*Counsel of Record*

ROPES & GRAY LLP

One Metro Center

700 12th Street, N.W., Suite 900

Washington, D.C. 20005

(202) 508-4600

*Douglas.Hallward-Driemeier*

*@ropesgray.com*

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## INTEREST OF AMICI<sup>1</sup>

This brief is submitted on behalf of amici curiae California Institute of Technology, Carnegie Mellon University, Case Western Reserve University, Emory University, George Washington University, Northwestern University, Rice University, Tulane University, University of Rochester, and The Washington University in support of respondents. Amici are among the most selective, well-regarded private research universities in the country, with strong undergraduate and graduate programs in the sciences, technology, engineering, and mathematics (“STEM”) fields.

Each amicus believes that diversity within its student body and across all academic programs is essential to fulfilling its academic mission to provide the best education to its students, who are future leaders in their communities and in the nation. Diversity of perspectives, backgrounds, socioeconomic status, race, and ethnicity, among other characteristics, creates a dynamic campus life that benefits all students and the university as an institution. This dynamic educational experience is at the foundation of the American higher education system’s sustained success, and a main reason amici attract the finest international students

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<sup>1</sup> The parties have consented to the filing of amicus curiae briefs in support of either party or of neither party, in letters on file with the Clerk. No counsel for any party authored this brief in whole or in part, and no person or entity, other than amici curiae or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

from around the world. Diversity within the university community also prepares students for life in a society of increasingly global dimension. Preparing students to succeed in an ever more competitive global economy—in which they will encounter and interact with persons of diverse races, ethnicities, and cultural backgrounds—is a core educational value of amici and is essential to the continued security and economic success of the United States.

Amici seek in their undergraduate admissions processes to achieve a broad range of diversity throughout their academic programs. Undergraduate admission at the amici universities is highly competitive, with many more well-qualified candidates applying than can be accepted. Amici undertake a holistic, individualized review of each candidate that takes into account many factors, of which race is only one, in order to determine how that candidate might contribute to the institution's learning environment. Because this Court's holding with respect to the constitutional parameters of the use of race as a factor in an individualized assessment of university candidates could later be applied to private colleges and universities under Title VI of the Civil Rights Act of 1964, amici have a considerable interest in the outcome of this case.

## SUMMARY OF THE ARGUMENT

A. Universities have a compelling interest in providing their students a diverse and challenging learning environment. This interest includes the university's interest in selecting a student body that reflects and will fulfill its academic mission. And, as this Court has previously recognized, such choices are at the core of universities' academic freedom, which has its roots in the First Amendment.

Like the University of Texas at Austin ("University of Texas") and many other universities, amici strongly believe that a rich diversity within their student bodies is essential to fulfilling their academic missions. The exchange of differing viewpoints and interaction between students of different backgrounds is a critical feature of the university experience that both enhances academic outcomes and better prepares students for success following graduation. The work environment into which today's students graduate is highly integrated, both locally and internationally. Graduates must be prepared to work collaboratively and productively with individuals from very different cultures and life experiences than their own.

The value of diversity within the student body lies not only in aggregate numbers of minorities attending the university as a whole, but also in the diversity that students experience within their chosen disciplines, where academic exchange is focused. Thus, universities have a compelling interest in achieving diversity in individual departments, schools, and colleges as well. This is perhaps best exemplified by the university's interest in diversity within the STEM fields of study,

where certain minority groups have been historically underrepresented and studies demonstrate that the relative absence of other minority students has caused significant problems retaining those minority students who do enroll. In these fields, which depend on creative insights to solve problems, and where graduates will work in a highly globalized market, a lack of the diversity among the student population detracts from the educational experience of both minority and non-minority students who are enrolled. Moreover, in light of the critical role that the STEM fields play in our national security and economic vitality and the high demand for graduates in those areas, the attrition of students from underrepresented minorities means that our society is losing the valuable contribution these students could make.

B. Consistent with this Court's precedent, the amici universities have adopted holistic, individualized admissions policies that consider race as only one, non-determinative factor in assessing an applicant's candidacy. The amici universities strive for a student body that is diverse along many dimensions and based on an assessment both of the applicant's potential for success and how the applicant will contribute to the educational experience of other students. These policies complement other, race-neutral policies of the amici that are designed to enhance diversity, such as outreach to potential applicants and financial aid to those who are economically disadvantaged. The amici universities have, in short, done precisely what this Court has instructed was required of them in pursuit of their compelling interest in student body diversity.

The Court should reject petitioner’s contention that a university’s individualized consideration of candidates’ many characteristics, including race among other factors, is not narrowly tailored to its compelling interest in diversity if the university could obtain a minimum threshold quotient of minority students through formulaic criteria such as Texas’s “Top 10% Law.”<sup>2</sup> In stark contrast to the careful consideration amici give each applicant, it is petitioner’s approach that looks only at admitted students’ race to determine whether “diversity” has been achieved. Petitioner’s approach is the antithesis of the holistic, individualized assessment that this Court has heretofore required. Even if petitioner’s argument were valid as applied to a public university largely drawing from a single state, such an approach is entirely impossible for smaller schools with nationwide applicant pools like amici. The number of students who would qualify under any formula would exceed the number of students a smaller school could accommodate. Moreover, such non-individualized criteria do not guarantee the type of genuine diversity among their student bodies that amici believe is essential to their academic missions. Exclusive reliance on numerical criteria can produce a stark lack of diversity, such as if, due to statistical anomalies or common backgrounds, the minority students admitted based upon a single criteria were

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<sup>2</sup> Texas has amended its law, which no longer requires the University of Texas at Austin to admit all in-state students within the top ten percent of their high school graduating classes. See Tex. Educ. Code Ann. § 51.803 (as amended by S. 175, 2009 Leg., 81st Sess. (Tex. 2009)). To avoid confusion, we adopt petitioner’s terminology.

overwhelmingly of one gender or grouped among a few academic interests.

When universities employ the kind of individualized, holistic assessment of applicants that this Court's precedent endorses, their subjective determinations about the likely contribution of one candidate or another to the university's academic mission are entitled to deference. When student admissions are the product of such assessments, it is impossible for courts to say that a particular disappointed applicant should have been admitted and another denied admission. Those choices ultimately reflect the university's fundamental First Amendment interest in academic freedom.

Petitioner's argument, if adopted, would have a dramatic adverse impact on the educational experience of amici's students. Petitioner offers no guidance for smaller, national schools, if they are precluded from considering race as one of many factors in a holistic assessment of individual candidates. Purely numeric approaches are infeasible for such schools, and petitioner offers no alternatives. Without the ability to consider race among other factors in selecting a diverse student body, diversity will be inevitably suffer, as will the educational experience of all students at the university.



## ARGUMENT

### I. A UNIVERSITY HAS A COMPELLING INTEREST IN SELECTING A DIVERSE STUDENT BODY TO FULFILL ITS ACADEMIC MISSION

#### A. A University's Selection Of Its Student Body Is A Critical Feature Of Its Academic Mission, Protected By The First Amendment

Since this country's Founding, in cases such as *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat) 518 (1819), this Court has acknowledged that academic freedom in the university setting is "a special concern of the First Amendment." *Grutter v. Bollinger*, 539 U.S. 306, 324 (2003) (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 314 (1978) (Powell, J., concurring)). "[G]iven the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment," the Court has recognized that "universities occupy a special niche in our constitutional tradition." *Id.* at 329. Indeed, this Court has often "extoll[ed] the unique, and uniquely important, role played by universities in the accumulation and advancement of knowledge and in contributing to public debate." Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 U.C.L.A. L. Rev. 1497, 1513 (2007).

Although the concept of "academic freedom" is often associated with the rights of individual faculty members, another aspect of that freedom is the "First Amendment right of the university itself \* \* \* largely to be free of government interference in the

performance of core educational functions.” J. Peter Byrne, *Academic Freedom: A Special Concern of the First Amendment*, 99 YALE L.J. 251, 311 (1999). Justice Frankfurter, for example, famously warned of the “grave harm resulting from governmental intrusion into the intellectual life of a university” and suggested that First Amendment protection of universities was needed to assure “the exclusion of [such] governmental intervention.” *Sweezy v. New Hampshire*, 354 U.S. 234, 261-262 (1957) (Frankfurter, J., concurring).

A university’s fulfillment of its academic mission, and therefore its protected realm of academic freedom, permeates all aspects of university life, including admissions decisions. As two South African universities struggling against government-imposed segregation eloquently stated, “[i]t is the business of a university to provide an atmosphere which is conducive to speculation, experiment, and creation.” *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring) (quoting Albert Van de Sandt Centlivres, *The Open Universities of South Africa* 5 (1957)). Academic freedom therefore depends upon “four essential freedoms’ of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and *who may be admitted to study*.” *Ibid.* (emphasis added).

Because academic freedom is grounded in the First Amendment, this Court has shown considerable respect and deference to the university’s exercise of academic judgment. In *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000), for example, the Court upheld a university’s decision to impose a mandatory student activity fee in deference to

the university's chosen means to fulfill its mission. The University was free to "determine that its mission is well served if students have the means to engage in dynamic discussions of philosophical, religious, scientific, social, and political subjects in their extracurricular campus life outside the lecture hall." *Id.* at 233. And, "[i]f the University reaches this conclusion, it is entitled to impose a mandatory fee to sustain an open dialogue to these ends." *Ibid.* Likewise, the Court has stressed that "[w]hen judges are asked to review the substance of a genuinely academic decision, such as [the expulsion of a student], they should show great respect for the faculty's professional judgment." *Regents of the Univ. of Michigan v. Ewing*, 474 U.S. 214, 225 (1985). Such decisions, which implicate the realization of a university's educational mission, deserve deference because they involve "complex educational judgments" over a discipline that "lies primarily within the expertise of the university." *Grutter*, 539 U.S. at 328.

Without question, "[t]he freedom of a university to make its own judgments as to education includes the selection of its student body." *Bakke*, 438 U.S. at 312 (opinion of Powell, J.). Indeed, a university's decision of whom to admit is fundamental to the university's self-definition and therefore lies at the core of its First Amendment interest in academic freedom. As Justice Frankfurter observed more than 50 years ago, "who may be admitted to study" is one of the "four essential freedoms' of a university" necessary for a university to have sufficient independence to pursue its educational goals as it sees fit. *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring) (quoting Albert Van de

Sandt Centlivres, *The Open Universities of South Africa* 10-12). “[A] university must have wide discretion in making the sensitive judgments as to who should be admitted” so that the student body contributes to achieving the university’s educational mission. *Bakke*, 438 U.S. at 314 (opinion of Powell, J.).

**B. Universities Have A Compelling Interest In Achieving A Diverse Student Body, Which Improves The Educational Experience Of All Students**

In the exercise of their First Amendment rights, amici have concluded that diversity, including racial diversity, among their student bodies is essential to accomplishing their educational mission. The exchange of differing viewpoints, which grow out of students’ distinct backgrounds and experiences, is a foundational value of American universities. That diversity, and the dynamic environment it creates, has made the American higher education system the envy of the world. It is a common tenet among the amici universities that “[a] diverse university is a strong university.” Scott Cowen, Tul. Univ., *From the President: Strength Through Diversity*, [http://tulane.edu/news/releases/archive/2001/from\\_the\\_president\\_strength\\_through\\_diversity.cfm](http://tulane.edu/news/releases/archive/2001/from_the_president_strength_through_diversity.cfm) (last visited Aug. 9, 2012). Such diversity not only enhances students’ experience while at the university, it also better prepares them for success in the world beyond. This Court’s decisions rightly recognize the genuine “educational benefits \* \* \* [that] flow from student body diversity,” *Grutter*, 539 U.S. at 330, and that an educational institution therefore “may consider it a compelling interest to achieve a diverse student population,” *Parents Involved in Cmty. Schs. v.*

*Seattle Sch. Dist. No. 1*, 551 U.S. 701, 797-798 (2007) (Kennedy, J., concurring).

The facilitation of interaction between students of diverse viewpoints and experiences is a fundamental educational value of most American universities, including amici. Carnegie Mellon, for example, understands that “[i]n the classroom, studio, laboratory, office and residence hall, a multitude of experiences, perspectives and beliefs will enrich all that we do.” Jared Cohon, Carnegie Mellon, *President’s Statement on Diversity* (2011), <http://www.cmu.edu/enrollment/summerprogramsfordiversity/sams-president-stmt.html> (last visited Aug. 9, 2012). Likewise, Northwestern University believes a diverse community is essential to its mission “because only by exploring issues with people of different backgrounds and viewpoints can we challenge our assumptions, test our ideas and broaden our understanding of the world.” Daniel Linzer, Nw. Univ., *Diversity Statement from the Provost* (2011), <http://www.northwestern.edu/about/diversity/statement-from-the-provost.html> (last visited Aug. 9, 2012).

The amici universities’ commitment to diversity in their student bodies reflects not only their values, but their common experience that a diverse environment enhances learning outcomes. The educational experience of every student is enriched through discussion in classrooms and interactions in the university community with people from varied backgrounds with different life experiences. All students benefit as “productive inquiry best takes place when individuals can explore and share their experience and thoughts as equal members of our community, uninhibited by

prejudice or discrimination.” Univ. of Rochester, *Statement of Educational Philosophy*, <http://www.rochester.edu/diversity/philosophy.html> (last visited Aug. 9, 2012). Research supports this conclusion. For example, a University of Michigan study analyzing the relationship between undergraduate students’ experiences with diverse peers and their educational outcomes concluded that “diversity experiences would have a positive relationship with the learning outcomes.” Patricia Gurin, et al., *Diversity and Higher Education: Theory and Impact on Educational Outcomes*, 72 Harv. Educ. Rev. 330, 351 (2002). In particular, the study showed that “informal interactional diversity was especially influential in accounting for higher levels of intellectual engagement and self-assessed academic skills.” *Ibid.* As George Washington University explains, “[b]y incorporating a broad range of human experiences and a rich variety of human perspectives, we enlarge our capacity for learning, enrich the quality and texture of campus life, and better prepare for life and leadership in a pluralistic society.” Geo. Wash. Univ., *Diversity and Inclusion*, <http://ci.gwu.edu/LifeatGW/DiversityInclusion/> (last visited Aug. 9, 2012).

In addition to promoting better learning outcomes, a diverse university community better prepares students for success in our increasingly diverse, even international, society. It is imperative to the academic mission of amici that they be able to offer a diverse academic and community experience for their undergraduate and graduate students, in order to prepare them for life outside of the university. The Washington University, for example, considers it one of

the university's principal goals to "educat[e] students to live and work in an increasingly diverse world." Mark S. Wrighton, Wash. Univ., *Chancellor's Statement on Diversity and Inclusiveness*, <http://diversity.wustl.edu/chancellorstatement/Pages/default.aspx> (last visited Aug. 9, 2012). Indeed, this Court has likewise acknowledged that "student body diversity \* \* \* better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals." *Grutter*, 539 U.S. at 333.

The benefits of diversity accrue to all students, not only minority students. Through discourse and interactions in a broadly diverse community, students learn and develop the pluralistic skills that are essential for success in today's global marketplace, such as perspective-taking, conflict negotiation, and leadership skills. See Uma M. Jayakumar, *Can Higher Education Meet the Needs of an Increasingly Diverse and Global Society? Campus Diversity and Cross-Cultural Workforce Competencies*, 78 Harv. Educ. Rev. 615 (2008). "These benefits are not theoretical but real, as 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*, 539 U.S. at 333-334; see *id.* at 387-388 (Kennedy, J., dissenting) ("[P]recedent \* \* \* provide[s] a basis for the Court's acceptance of a university's considered judgment that racial diversity among students can further its educational task.").

Amici universities thus have a dual mission: They must ensure that their students are "achieving academic excellence," while also preparing their

students “for life and work in a global society.” Emory Univ., *College Statement on Diversity*, <http://college.emory.edu/home/about/mission.html> (last visited Aug. 9, 2012). Diversity within the student body is indispensable to fulfilling both aspects of their academic mission. As the California Institute of Technology affirms, “a multitude of perspectives is essential to all we do.” Cal. Inst. of Tech., *Statement of Community*, <http://diversitycenter.caltech.edu/statement.html> (last visited Aug. 9, 2010).

**C. A University Has A Compelling Interest In Diversity Throughout Its Academic Programs, Including Science And Technology Fields In Which Certain Minority Groups Are Particularly Underrepresented**

In addition to crafting a diverse student body in the university as a whole, universities have a compelling interest in fostering diversity within individual academic programs and their classes. In a diverse classroom, “classroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds.” *Grutter*, 539 U.S. at 330. Studies have shown that heterogeneous groups are able to achieve greater insight in class discussions than homogeneous groups. Anthony Lising Antoni et al., *Effects of Racial Diversity on Complex Thinking in College Students*, 15 *Psychol. Sci.* 507, 507-510 (2004). Because the heart of a student’s academic experience and intellectual exchange is centered around classes in his or her academic program, a university with a student body that is diverse in the aggregate may, nonetheless, fail



to achieve the benefits of this exchange if the individual academic programs lack diversity.

The benefits of diversity are not limited to certain disciplines, such as those in which social interaction is the focus, but extend as well to the hard sciences, where students may be seeking a single answer subject to scientific proof. As a leading physicist noted, “[a]lthough there may be one answer to a physics, chemistry or mathematics problem (based on the current state of knowledge), there are often multiple paths for arriving at that answer. In a broadly diverse classroom, all students thus benefit from hearing the different questions posed in the educational arena.” S. James Gates, Jr., *Thoughts On Creativity, Diversity and Innovation in Science and Education* 3, 4 (2009), available at [http://php.aaas.org/programs/centers/capacity/documents/Gates\\_Essay.pdf](http://php.aaas.org/programs/centers/capacity/documents/Gates_Essay.pdf). Seemingly intractable questions in the fields of science, technology, engineering, and math (the “STEM fields”) are answered by approaching old problems in a new way. The creativity that is essential to the STEM fields is enhanced through the exchange of diverse perspectives from students of different backgrounds. Exposure to different perspectives can influence both how students approach a problem and what problems they will tackle, such as diseases that disproportionately affect a particular group. Thus, diversity supports “the development of innovation in thinking of students in addition to enhancing each student’s mastery of existing science.” *Ibid.*

A diverse educational environment also fosters greater success in the STEM fields after graduation. The STEM fields increasingly require international

collaboration. In 2010, for example, 32% of published academic STEM articles in the United States were internationally co-authored. Nat'l Sci. Bd., *Science and Engineering Indicators 2012, ch. 5-32, Outputs of S&E Research: Articles and Patents*, available at <http://www.nsf.gov/statistics/seind12/pdf/seind12.pdf>.

A diverse STEM academic program is essential for students who will inevitably be required to work with a diverse group of colleagues on international teams, seeking global funding and business opportunities.

Universities have a particular interest in pursuing diversity in STEM fields, in which certain minority groups are distinctly underrepresented. According to one study, Underrepresented Minorities (“URMs”), which include individuals who self-identified as African-American, Hispanic, or Native American/Alaska Native, comprise just 11% of those who are employed in STEM occupations, which is only one-third of their representation in the school-age population (33%). Lisa Tsui, *Effective Strategies to Increase Diversity in STEM Fields: A Review of the Research Literature*, 76 J. Negro Educ. 555 (2007). This underrepresentation is even more pronounced among the newest entrants to those fields. Even though the number and proportion of doctoral degrees in STEM fields awarded to underrepresented minorities increased in both number and proportion from 2000 to 2009, African Americans, Hispanics, and American Indians/Alaska Natives still accounted for only 7% of all STEM doctoral degrees awarded during that period. Nat'l Sci. Bd., *Science and Engineering Indicators 2012, ch. 2-16, Undergraduate Education, Enrollment, and Degrees in the United States*, available at <http://www.nsf.gov/statistics/>

seind12/pdf/seind12.pdf. This problem persists in the STEM workforce. The National Science Foundation recently found that African Americans, Hispanics, and American Indians/Alaska Natives continue to be under-represented in STEM fields compared with their proportions in the U.S. population. Nat'l Sci. Found., *Diversity in Science and Engineering Employment in Industry* (Mar. 2012), available at <http://www.nsf.gov/statistics/infbrief/nsf12311/nsf12311.pdf>.

The failure to attract URMs to the STEM fields threatens the nation's economic well-being and strength. “[STEM] workers drive our nation's innovation and competitiveness by generating new ideas, new companies, and new industries.” David Langdon, et al., U.S. Dep't of Commerce, *STEM: Good Jobs Now and for the Future* 1 (2011), available at <http://www.esa.doc.gov/sites/default/files/reports/documents/stemfinaljuly14.pdf>. Yet there is an inadequate “supply and availability of STEM workers,” *ibid.*, because “the U.S. education system too frequently fails to identify and develop our most talented and motivated students who will become the next generation of innovators.” Nat'l Sci. Bd., *Preparing the Next Generation of STEM Innovators: Identifying and Developing Our Nation's Human Capital* 5 (2010), available at <http://www.nsf.gov/nsb/publications/2010/nsb1033.pdf>. It is therefore critical to the future economic strength of our country that we “extend STEM educational and career opportunities to women and minority groups that are underrepresented in these areas, so that all Americans can find quality jobs and lead our innovative economy in the decades ahead.” Nat'l Econ. Council et al., *A Strategy for American Innovation* 15 (2011), available

at <http://www.whitehouse.gov/sites/default/files/uploads/InnovationStrategy.pdf>. Indeed, as noted by the recent National Security Strategy, “America’s long-term leadership depends on educating and producing future scientists and innovators” and to do so we must “expand STEM education and career opportunities for underrepresented groups.” Obama Administration, *National Security Strategy* 9, 29 (2010), available at [http://www.whitehouse.gov/sites/default/files/rss\\_viewer/national\\_security\\_strategy.pdf](http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf).

Underrepresentation of URMs in the STEM fields threatens, however, to become a self-perpetuating crisis for the entire nation. At the very time we most need the talents of all our most gifted science students, traditionally underrepresented minority students are avoiding, or even leaving, STEM fields. URMs disproportionately leave the college science pipeline because of a lack of “academic and social integration.” Nat’l Acad. of Scis. et al., *Expanding Underrepresented Minority Participation* 130 (2011). Among other factors, the lack of “support from other minorities” and a feeling of being “academically and socially isolated,” which is “more prevalent within STEM,” contributes to the departure of minority students from STEM fields. *Id.* at 133-134. In other words, a lack of diversity in STEM academic programs serves as a self-reinforcing barrier to entry into or continuance in those programs by URM students.

Universities therefore have a compelling interest in selecting and retaining a diverse student body throughout their academic programs, including in the STEM fields. While petitioner urges less focus on diversity within individual academic departments, the

lack of success in retaining URMs in the STEM fields suggests that even greater attentiveness must be given to achieving sufficient diversity within the STEM fields to end the feeling of academic and social isolation that currently exists. Without such efforts the universities—and society at large—will lose the benefit of these potential scientists’ contribution.

**II. HOLISTIC AND INDIVIDUALIZED ADMISSIONS POLICIES, LIKE THOSE OF AMICI, ARE NARROWLY TAILORED TO ACHIEVE A SCHOOL’S COMPELLING INTEREST IN DIVERSITY**

**A. To Be Narrowly-Tailored, Race-Conscious Admissions Programs Must Evaluate Applicants On An Individualized Basis, Not Merely By Racial Classifications As Petitioner’s Reliance on Texas’s Top 10% Law Does**

This Court’s precedent makes clear that a race-conscious admissions program *must* consider the applicant holistically and *as an individual*. The kind of diversity that the Court has recognized as a compelling state interest “encompasses a \* \* \* broad[] array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.” *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 315 (1978) (opinion of Powell, J.). As the Court explained in *Grutter v. Bollinger*, “[t]ruly individualized consideration demands that race be used in a flexible, non-mechanical way.” 539 U.S. 306, 334 (2003). And, though he differed in his assessment of the Michigan program, Justice Kennedy agreed that, “[t]o be constitutional, a university’s compelling interest in a

diverse student body *must be achieved* by a system where individual assessment is safeguarded through the entire process.” *Id.* at 392 (Kennedy, J., dissenting) (emphasis added). The admissions policies of amici do precisely that. Here, it is petitioner who argues for a rule that, insofar as diversity is concerned, looks no further than applicants’ race.

Petitioner argues that consideration of race in a holistic admissions process is not narrowly-tailored whenever aggregate numerical diversity, looking only at race, reaches a threshold quota by other means. See Pet. Br. 38-40. Specifically, petitioner contends that those students admitted under Texas’s Top 10% Law satisfy the minimum necessary quotient of African Americans and Hispanics in Texas’s student body. *Id.* at 40.<sup>3</sup> Therefore, petitioner concludes, the University of Texas has no further compelling interest in considering the race of the remaining applicants as a factor in deciding which additional individuals to admit. Petitioner’s reliance on Texas’s Top 10% Law reduces students to simply representatives of a race and treats diversity as merely a question of whether students of a particular race have reached a minimum threshold.

This is antithetical to the individualized evaluation of students required by this Court in *Grutter* and *Bakke*. True diversity requires, as this Court’s precedent provides, that students be assessed

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<sup>3</sup> Petitioner does not disclose what percentage she believes is the minimum diversity quotient. Rather, she says only that “the reliably high level of minority enrollment produced by the Top 10% Law, already has” achieved Texas’s compelling interest. Pet. Br. 40.

individually based on their likely contribution to the university's academic mission. Texas's Top 10% Law and similar formulaic rules do not allow for the kind of individualized assessment that the Court has required and that amici undertake in their admissions programs.

The Top 10% Law and similar numeric criteria are no guarantee of genuine diversity, even when the students admitted under those criteria are, in the aggregate, racially diverse. Such numerical criteria can produce a student body in which admitted students of one race are not diverse from one another in terms of other characteristics. They might, for example, be overwhelmingly female (or male) or overwhelmingly of the same socio-economic background.<sup>4</sup> Moreover, due either to statistical anomalies or common backgrounds, students of a particular minority group admitted under a formulaic process might be unduly concentrated in

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<sup>4</sup> In 2004, for example, 80% of the valedictorians in Boston public schools were girls. Anand Vaishnav, *Lopsided at the Top, Girls Outnumber the Boys Among Valedictorians*, Boston Globe, June 6, 2004, available at [http://www.boston.com/news/education/k\\_12/articles/2004/06/06/lopsided\\_at\\_the\\_top/?page=full](http://www.boston.com/news/education/k_12/articles/2004/06/06/lopsided_at_the_top/?page=full). On the other hand, in 2011, among those who took the SAT—the most prominent standardized national metric—there were nearly twice as many men (9,120) as women (4,683) who scored a perfect 800 in the mathematics portion of the test, even though more women than men took the exam. College Board, *SAT Percentile Ranks for Males, Females and Total Group* (2011), available at [http://media.collegeboard.com/digitalServices/pdf/SAT-Mathematics\\_Percentile\\_Ranks\\_2011.pdf](http://media.collegeboard.com/digitalServices/pdf/SAT-Mathematics_Percentile_Ranks_2011.pdf). There is also a substantial socio-economic gap in SAT scores indicated by a strong positive correlation between family income and SAT score. College Board, *Total Group Profile Report*, tbl. 11 (2001), available at [http://professionals.collegeboard.com/profdownload/cbs2011\\_total\\_group\\_report.pdf](http://professionals.collegeboard.com/profdownload/cbs2011_total_group_report.pdf).

their academic interests, leaving individual departments, schools, or colleges within the university lacking in any diversity among their students.

**B. Even If Reliance On Strictly Numerical Criteria Were Appropriate For A Public University Drawing From A Single State, It Would Be Infeasible For Selective National Schools With Smaller Entering Classes**

Adoption of a “Top 10%” rule or similar strictly numerical criteria would be particularly infeasible for smaller, private universities like amici. Smaller schools like amici could not possibly accommodate the top 10%, or even the top 1% of students of all graduating high school classes. Universities like amici draw students from across the nation, and foreign countries, and enroll only a few if any students from most localities. Each amicus university receives applications from far more qualified applicants than it can accommodate. For example, the California Institute of Technology received 5,225 total applications for the class of 2015, but accepted only 667 applications for a 12.8% admission rate. Caltech Undergraduate Admissions, *2011 Incoming Class Profile*, <http://www.admissions.caltech.edu/applying/profile> (last visited Aug. 9, 2012).

Moreover, because the student bodies are smaller in universities like amici, narrow reliance on any purely numeric selection criteria would frustrate diversity by making it the product of mere happenstance. Purely numeric selection criteria may, for example, produce certain areas of study, such as STEM fields, with very few URMs or women. While that would be a concern even for a larger school, see *supra* Part I.C, when the



numbers of student slots involved are smaller, the likelihood that URM students admitted based on a single criterion will be concentrated in a few fields of study or will be otherwise non-diverse as a group is even greater. Only individualized consideration of all factors, including race, allows educators to select a student body that is truly diverse and contributes to the fulfillment of the university's academic mission. Reliance on purely numeric criteria is not only infeasible; it would fundamentally threaten the educational mission of small universities where every admissions decision takes into account the individual's potential contribution to the university community.

**C. When Making Admissions Decisions, Amici Consider Applicants Holistically—Including Their Experience, Academic Interests, Socio-Economic Status, And Race—To Determine How Each Might Contribute To The Academic Mission**

Amici evaluate each applicant holistically to determine how well the individual would help the university fulfill its academic mission. At Rice University, for example, applicants are considered both “individually and collectively,” in order to determine who “will take fullest advantage of what [the school] ha[s] to offer, contribute most to the educational process \* \* \*, and be most successful in their chosen fields and in society in general.” Rice Univ., *Undergraduate Admission, Philosophy and Evaluation*, [http://futureowls.rice.edu/futureowls/Philosophy\\_and\\_Evaluation.asp](http://futureowls.rice.edu/futureowls/Philosophy_and_Evaluation.asp) (last visited Aug. 9, 2012). The university thus “seek[s] students \* \* \* of keen intellect and diverse backgrounds who not only show potential

for success at Rice, but who will contribute to the educational environment of those around them.” *Ibid.* Diversity within a student body is important because it helps to create a “culture of inclusion that encourages relationships and interactions among people of different backgrounds, a culture that enhances human dignity, actively diminishes prejudice and discrimination and improves the quality of life for everyone in our community.” Case W. Res. Univ., *CWRU Diversity Statement*, <http://www.case.edu/diversity/about/administration.html> (last visited Aug. 9, 2012). Those sentiments are common among the amici universities.

While amici share a commitment to diversity, they differ in how they evaluate the way individual candidates will contribute to their academic mission. All the amici agree that diversity within the student body is critical to providing students the best educational experience and prepare them for a diverse and globally integrated world. Among universities, diversity may take somewhat distinct forms, and different universities will evaluate a student’s qualities and experiences differently, depending on the university’s unique character. The kind of student body diversity that a particular school seeks will depend on factors such as its size, geographic location, historical or religious affiliations, and the nature and relative strengths of its academic programs. Within their schools’ unique priorities, admissions officers must also consider the composition of the particular class to ensure that there are a wide range of matriculants of all types to enrich the learning environment and improve the quality of education for all students.

While amici agree that racial and ethnic diversity is an important part of overall educational diversity, and consider such diversity in their admissions decisions, race and ethnicity are only two of many factors in the construction of the academic community. When making admissions decisions, amici universities also consider, among other characteristics, diversity of background, sex, gender, gender identity, socioeconomic status, religion, nationality, sexual orientation, age, disability, and marital and family status. No single characteristic is dispositive for admission. As Rice University explains, the goal of its admissions process is to “craft a residential community that fosters creative, intercultural interactions among students, a place where prejudices of all sorts are confronted squarely and dispelled.” Rice Univ., *Undergraduate Admission, Philosophy and Evaluation*, *supra*. Diversity helps the university to achieve these educational goals and to prepare its students for success beyond the university.

That amici take the race of applicants into account in selecting their incoming student bodies does not mean that amici favor or advantage one or more races over others. Rather, the race of an applicant is considered along with the candidate’s other characteristics to determine the contribution that student would likely make to the university community. For example, a white student from a majority-minority high school might write an essay that illustrates how this combination of race and experience would make a particularly interesting addition to the dialogue on campus. The race of an applicant may place into context the applicant’s other experiences or characteristics, and suggest whether the candidate will

make a valuable contribution to the university's mission and the experience of other students.<sup>5</sup>

Admissions officers at the amici universities consider a wide range of information that provides them a sense of the student as an individual. Each of the amici universities has an admissions process that provides “truly individualized consideration” of its applicants. *Grutter*, 539 U.S. at 334. By way of example, all applicants to Case Western Reserve University must submit the “Common Application” (which includes a personal essay and a list of extracurricular and work activities), the “CWRU Supplement to the Common Application,” an official high school transcript, a “Secondary School Report” (including a guidance counselor recommendation), an SAT or ACT score, and two teacher recommendations. Case W. Res. Univ., *Undergraduate Admission: Application and Checklist*, [http://admission.case.edu/apply/application\\_instructions.aspx](http://admission.case.edu/apply/application_instructions.aspx) (last visited Aug. 9, 2012). Applicants may supplement their applications with additional letters of recommendation, SAT II subject test scores, and an interview with a Case Western admissions counselor. If an applicant did not follow a traditional path to college, Case Western provides alternate application instructions for transfer, international, and home-schooled students. *Ibid.* Increasingly, amici utilize the online resources to allow applicants an opportunity to express their individual

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<sup>5</sup> Cf. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 788-789 (2007) (Kennedy, J., concurring) (distinguishing “race-conscious measures to address” the issue of diversity from “treating each student in different fashion solely on the basis of a systematic, individual typing by race”).

potential to contribute to academic and extra-curricular life. At the University of Rochester, for example, an applicant can submit “electronic media,” including links to websites and online videos. Univ. of Rochester, *Apply to Rochester*, <http://enrollment.rochester.edu/admissions/apply/freshmen/> (last visited Aug. 9, 2012).

Admissions officers at the amici universities conduct a holistic review of everything submitted in an application. Amici “treat every application individually, taking great care to make our admission decisions fair, thorough and sensitive.” Carnegie Mellon, *Especially for High School Seniors: What Do We Want to See?*, [http://my.cmu.edu/portal/site/admission/persp\\_hss#our-site](http://my.cmu.edu/portal/site/admission/persp_hss#our-site) (last visited Aug. 9, 2012). Amici expend substantial time and considerable expense in order to understand the applicant and how the individual would contribute to the university. At George Washington University, for example, “[e]very completed application is carefully reviewed by the Admissions Committee, which looks for students who have the academic preparation, personal qualities and motivation to thrive in GW’s blend of classroom, campus and city experiences.” Geo. Wash. Univ., *Freshman Admission*, <http://www.gwu.edu/apply/undergraduateadmissions/applytogw/freshmanadmission> (last visited Aug. 9, 2012). Under such a system, “individual assessment is safeguarded through the entire process.” *Grutter*, 539 U.S. at 392 (Kennedy, J., dissenting).

Amici strive to create a diverse and dynamic learning environment both at the university-wide level and within the various academic programs. In contrast to petitioner, who measures diversity only through aggregate numbers of minorities at the university level,

amici recognize that much of the most intensive interaction and exchange of ideas takes place within academic disciplines. Thus, it is critical that diversity not be compartmentalized within a few departments, but rather that throughout the university's academic programs students can benefit from meeting and working with other individuals whose backgrounds, talents, life experience, beliefs, and world views differ from (and thereby challenge) their own. In order to facilitate this vigorous exchange, amici seek to admit a diverse group of students, including sufficient numbers of underrepresented minority students to reduce the feeling of isolation and permit these diverse voices to be heard. This diversity enriches the experience and benefits all students in the programs. Without it, students' educations would be less enlightening, and they would graduate into a heterogeneous and international economy without the tools to succeed.

**D. If A University Employs An Individualized Approach To Admissions That Treats Race As Only One Non-Determinative Factor, The First Amendment Requires Deference To The School's Assessment Of Individual Students**

A university's decision of whom to admit is an exercise of its First Amendment rights of academic freedom. The decision whether to admit one student or another is therefore entitled to deference by the courts when that decision is made on the basis of the kind of individualized assessment of which student will better advance the university's academic mission that this Court has previously endorsed. Each of the amici expends considerable resources and effort to comply

with this Court's instruction that race can be considered in a "flexible, nonmechanical way," *Grutter*, 539 U.S. at 334, that "encompasses a \* \* \* broad[] array of qualifications and characteristics of which racial or ethnic origin is but a single though important element," *Bakke*, 438 U.S. at 315 (opinion of Powell, J.). When a university has followed that instruction, the school's individual determinations of which students will best contribute to diversity within the student body and fulfillment of the university's academic mission are entitled to deference as an exercise of the university's First Amendment rights.

It is a fundamental precept of the American educational system that, "[t]he freedom of a university to make its own judgments as to education includes the selection of its student body." *Bakke*, 438 U.S. at 312 (opinion of Powell, J.). "[B]y claiming 'the right to select those students who will contribute the most to the "robust exchange of ideas,' a university seeks 'to achieve a goal that is of paramount importance in the fulfillment of its mission.'" *Grutter*, 539 U.S. at 329 (quoting *Bakke*, 438 U.S. at 313 (opinion of Powell, J.)). This "educational autonomy" is "grounded in the *First Amendment*," and its exercise is entitled to "a degree of deference." *Id.* at 328-329 (emphasis added).

This Court's precedent establishes a workable framework that respects both the university's First Amendment interests and the rights of students not to be excluded or categorized as no more than a representative of their race. The amici universities have adhered to that framework. They pursue numerous race-neutral methods of attracting a diverse student body, including outreach efforts to encourage

applications and financial aid to assist those who are economically disadvantaged. In addition, they expend substantial time, effort, and resources to evaluate applicants for admission. They seek to understand the individual applicant's talent and potential contribution to the university. They consider many characteristics of the applicant, of which race is only one, non-determinative, part. See *Bakke*, 438 U.S. at 315 (opinion of Powell, J.); *Parents Involved*, 551 U.S. at 798 (Kennedy, J., concurring) ("Race may be one component of that diversity, but other demographic factors, plus special talents and needs, should also be considered.").

When a university has employed an individualized, holistic approach to selecting its student body, consistent with this Court's precedent, the First Amendment requires deference to the school's subjective weighing of the likely contribution of individual students. When no single factor is determinative in a candidate being admitted or denied admission, it is difficult, perhaps even impossible, to say who among the disappointed applicants would have been the next admitted if one or another of the successful candidates had not been. For example, if the hypothetical last admitted student were a minority engineering student who plays violin and field hockey, it is difficult to know whether, if that student had not been admitted, the spot would have been filled by a majority engineering student who plays field hockey, a minority engineering student who organized charity events, or a majority English major from a disadvantaged home who was first violin in her summer orchestra. Each of these factors, and others, would



have been considered in evaluating the candidate individually and in the context of the overall class. Under such an admissions program, virtually any disappointed candidate could make a claim that he or she would have been the next admitted, yet it would be nearly impossible for a court to decide that a particular plaintiff would have been admitted instead of another student but for the consideration of racial diversity. When a school has chosen its students individually, based not on racial quotas but on a holistic assessment of how each individual will contribute to the university, judicial review of those individual determinations directly implicates the “essential freedom[]’ of a university—to determine for itself \* \* \* who may be admitted to study.” *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (quoting Albert Van de Sandt Centlivres, *The Open Universities of South Africa* 5).<sup>6</sup>

Directing a university to employ a blind numerical system that precludes evaluation of applicants’ individual characteristics would be no less an intrusion on the university’s First Amendment rights. An arbitrary “Top 10%” rule, such as Texas’s, is the antithesis of the individualized selection of students and assembly of a student body that is at the core of a university’s academic freedom. Petitioner would have the Court forbid precisely the kind of holistic,

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<sup>6</sup> Whether a university is engaging in a holistic assessment of individual candidates, as provided in this Court’s precedent, is, of course, subject to judicial review. Deference is appropriate to the university’s determination of *which* individual students will, individually and collectively, best further the school’s academic mission.

individualized assessment of students that amici were previously told they “must” utilize in order to achieve their “compelling interest in a diverse student body.” *Grutter*, 539 U.S. at 392 (Kennedy, J., dissenting). When a university adopts, as amici have, a procedure that “safeguard[s]” individual assessment “through the entire process,” *ibid*, the courts should defer to the university’s specific determination of which students will best promote, individually and collectively, the school’s academic mission.

### CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

DOUGLAS HALLWARD-DRIEMEIER  
*Counsel of Record*  
ROPES & GRAY LLP

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