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 FORMER COMMISSIONERS AND GENERAL COUNSEL OF THE FEDERAL COMMUNICATIONS COMMISSION AND THE MINORITY MEDIA AND TELECOMMUNICATIONS COUNCIL, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

Michael Small
AKIN, GUMP, STRAUSS, HAUER & FELD LLP
Los Angeles,CA 90067
(310) 229-1000

John B. Capehart
AKIN, GUMP, STRAUSS, HAUER & FELD LLP
Dallas, TX 75201
(214) 969-2800

David Honig
Maurita Coley
MINORITY MEDIA & TELECOMM. COUNCIL
Washington, DC 20010
(202) 332-7005

Patricia A. Millett
Ruthanne M. Deutsch
Counsel of Record
AKIN, GUMP, STRAUSS, HAUER & FELD LLP
1333 New Hampshire Avenue, N.W.
Washington, DC 20036
(202) 887-4000
rmdeutsch@akingump.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

CONSTITUTION AND STATUTES:

OTHER AUTHORITIES:

In The
Supreme Court of the United States

No. 11-345

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 FORMER COMMISSIONERS AND GENERAL COUNSEL OF THE FEDERAL COMMUNICATIONS COMMISSION AND THE MINORITY MEDIA AND TELECOMMUNICATIONS COUNCIL, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI CURIAE[1]

Amici Andrew C. Barrett, Tyrone Brown, Michael J. Copps, Reed E. Hundt, Nicholas Johnson, and Gloria Tristani are a bipartisan group of former

[1] All parties have consented to the filing of this brief through universal letters of consent on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no person other than amici made a monetary contribution intended to fund the preparation or submission of this brief.

Commissioners from the Federal Communications Commission. Christopher Wright previously served as General Counsel of the FCC. These former officials join this brief in their individual capacities, but with the benefit of their years of experience at the FCC. They recognize the paramount interest in supporting diversity in higher education, an interest that serves as a necessary predicate to the equally strong governmental interest in media diversity.

The Minority Media and Telecommunications Council ("Council") is a nonprofit organization founded in 1986, dedicated to promoting racial diversity and equal opportunity in mass media, telecommunications, and broadband industries. The Council promotes FCC rules and private-sector initiatives aimed at increasing opportunities for minorities to own media and telecommunications facilities and at promoting a diversity of viewpoints in the media. In addition, the Council represents civil rights groups and other organizations interested in media diversity in proceedings before the FCC and in the federal courts.

The Council has also been an advocate before the FCC for state and local control of cable rates and conditions and for years has been a champion of local-access television, which provides public, educational, and governmental programming at the community level. Further, the Council serves as a member of the Subcommittee on Utility Market Place Access of the National Association of Regulatory Utility Commissioners, where it works with State Utility Commissions in their efforts to promote diversity.

Amici urge the Court to reaffirm that efforts by States to promote diversity in higher education on the terms prescribed by this Court in prior decisions and in reliance on this Court's directives are constitutionally permissible under *Grutter v. Bollinger*, 539 U.S. 306 (2003). What this Court said in *Grutter* remains true today: Diversity in higher education improves learning, promotes cross-cultural understanding, fosters equal access to academic institutions, and contributes to our national prosperity by producing leaders equipped to thrive in a globalized, multicultural marketplace. *Id*. at 330.

Amici have a strong interest in this case because the promotion of diversity in higher education is essential to the promotion of diversity in the mass media—an objective for which Amici have long strived. Amici share a commitment to the preservation of federal policies that seek to broaden the ethnic, racial, and cultural diversity of owners and managers of the nation's mass media and thereby contribute to "the widest possible dissemination of information from diverse and antagonistic sources," which this Court has said is "essential to the welfare of the public." *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

Diversity in the media, in turn, contributes to the robust exchange of ideas that is critical to civic engagement in this Country. But the possibility of building an inclusive public dialogue capable of engaging an increasingly diverse Country would itself be imperiled if the Nation's colleges and universities—the pipeline for opportunity in the mass media and the trainers of future media programmers and journalists—were themselves hamstrung in their

efforts to further the compelling governmental interest in diversity in higher education.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici urge the court to reaffirm that diversity in higher education is a compelling governmental interest, and to affirm that the State of Texas's admission program for the University of Texas is narrowly tailored to serve that interest.

1. Media companies serve as a critical vehicle for the exchange of information and ideas in this Country. Given the vital role they play, the public welfare depends on the ability of these purveyors of information to convey ideas and disseminate knowledge in a way that communicates effectively and fairly to all audiences, and encourages full participation in the civic discourse and public dialogue of this Country. Diversity in higher education allows not only for a robust exchange of ideas on campus; it is an essential predicate for ensuring a robust exchange of ideas in communication through mass media.

As set forth in this Court's decision in *Grutter v. Bollinger*, 539 U.S. 306 (2003), the compelling governmental interest in diversity in higher education is grounded in the recognition that a diverse student body enriches the academic environment for all students, by allowing a more robust exchange of ideas, overcoming stereotypes, and promoting cross-racial understanding. Graduates schooled in more diverse environments, whatever their race, are more likely to be effective leaders in a multicultural and multiracial global

economy. And, for those trained in journalism or communications, an environment that alerts them to the continued existence of racial bias and stereotypes, and affords them the opportunity, by living example, to dispel such biases, is doubly important.

Diversity in mass media is likewise a compelling governmental interest that has long been recognized by this Court, Congress, and the FCC as essential to the promotion of First Amendment values. That interest is directly served by the continued fostering of diversity in higher education. A more diverse pool of graduates will be better able to serve as future business leaders and leaders in communications, and to compete on an equal footing for scarce communication resources, including sharply limited broadcast licenses. More diverse media ownership can help to ensure that programming content serves all communities and will thereby encourage greater civic engagement. And journalists, programmers, and media owners—of all races—who have been educated in a diverse and culturally sensitive environment will be better able to avoid unconscious racial biases and to more effectively communicate in a way that fosters understanding across racial and ethnic divides, rather than exacerbating such divisions.

In short, a more diverse and diversity-conscious media, populated by a pool of well-trained graduates, can only strengthen the vital link between informed citizens and a healthy democracy that has been recognized since our Nation's founding.

2. Acting in reliance on *Grutter*, the University of Texas faithfully applied this Court's teachings in

shaping an admissions program where race is but a "factor of a factor of a factor," Pet. App. 159a, in an individualized and holistic assessment, that itself is a modest component of the admissions profile. This Court should affirm. In so doing, moreover, this Court should reaffirm *Grutter's* core holding that there is a compelling governmental interest in achieving diversity in higher education through appropriately and narrowly tailored means—a holding that is not even in dispute in this case. Principles of stare decisis, strengthened by the Constitution's assignment of primary responsibility for education to the States, command enhanced judicial fealty to precedent when States, as co-equal sovereigns, have relied on this Court's direction in formulating core governmental policies

ARGUMENT

I. GREATER DIVERSITY IN HIGHER EDUCATION IS ESSENTIAL TO A ROBUST PUBLIC DIALOGUE.

1. This Court in *Grutter* made three critical observations about diversity in higher education. First, the Court recognized that greater diversity among the student body in higher education leads to a more robust exchange of ideas and perspectives on campuses and thus enhances the academic environment for all students. *Grutter*, 539 U.S. at 328-330. In making this observation, the Court reaffirmed the foundational opinion of Justice Powell in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), which held that academic diversity was central to the education mission of our

colleges and universities. *Grutter*, 539 U.S. at 325, 328-329 (citing *Bakke*, 438 U.S. at 313 (opinion of Powell, J.)).

Second, the Court explained that greater diversity "promotes cross-racial understanding, [by] help[ing] to break down racial stereotypes" that students may bring with them to the campus. *Grutter*, 539 U.S. at 330 (internal quotation marks and citation omitted). Further, the Court expressed its agreement with the position of Fortune 500 companies and military leaders on the benefits of academic diversity, and concluded that exposure on campus to a cross section of society and across racial and ethnic groups leaves students better equipped to operate and thrive in the increasingly multicultural world they will encounter in business and other professions upon graduation. *Id*. at 330-331.

Third, the Court stressed that its acceptance of the asserted benefits of academic diversity was not itself premised on a rigid, stereotypical "belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue." *Grutter*, 539 U.S. at 333 (internal quotation marks and citation omitted). Rather, the Court stated that its decision rested on the common sense judgment that, "[j]ust 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 still matters." *Id*.

2. Similar conclusions apply to the critical role of diversity in the Nation's mass media. For one, this

Court, Congress, and the FCC, all have long recognized that greater diversity in the ranks of owners and managers of our radio and television networks and stations can contribute to dissemination of more diverse viewpoints on the Nation's airwaves and thus exposes society to a richer and wider variety of programming. *See Metro Broad., Inc. v. FCC*, 497 U.S. 547, 569-579 (1990), *overruled on other grounds by Adarand Constrs., Inc. v. Pena*, 515 U.S. 200 (1995); *FCC v. National Citizens Comm. for Broad.,* 436 U.S. 775, 780 (1978); 47 U.S.C. § 309(j)(3)(B); 47 U.S.C. § 309(i)(3)(A); *In the Matter of Promoting Diversification of Ownership in the Broad. Servs.*, 24 F.C.C.R. 5896, ¶ 12 (2009). "Recognizing the importance of ensuring that minorities have the opportunity to air their viewpoints through broadcast outlets, the Commission adopted its minority ownership policy [which serves to] enhance the diversity of views and information available over the airways by promoting ownership of broadcast stations by minorities."[2]

Through the proliferation of voices that it produces, diversity in the mass media also reinforces First Amendment values and the objectives of federal telecommunications policy, both of which seek "the widest possible dissemination of information from diverse and antagonistic sources [in order to serve] the welfare of the public." *Turner Broad. Sys., Inc. v.*

---

[2] *Minority Ownership of Broadcast Stations: Hearing Before the Subcomm. on Commc'ns of the S. Comm. on Commerce, Science, and Transp.*, 101st Cong. 1 (1989) (statement of Sen. Daniel K. Inouye, Member, S. Comm. on Commerce, Science, and Transp.).

FCC, 512 U.S. 622, 663 (1994) (internal quotation marks and citation omitted).

Further, diversity in the mass media dilutes the concentration of ownership that characterizes the national telecommunications industry and thereby promotes free market values. *See* Leonard M. Baynes, *Making the Case for a Compelling Governmental Interest and Re-Establishing FCC Affirmative Action Programs for Broadcast Licensing*, 57 RUTGERS L. REV. 235, 255 (2004) (because most minority broadcasters "operate a single commercial radio or television station," whereas "[a]ll broadcast networks are majority owned," efforts to increase media diversity will also increase the number of discrete media owners in a given market) (internal quotation marks and citation omitted); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) ("[T]he First Amendment * * * preserve[s] an uninhibited marketplace of ideas in which truth will ultimately prevail, [and does not] countenance monopolization of that market.").

As with diversity in higher education, diversity in broadcast programming helps to dispel unfortunate stereotypes about minorities that otherwise may be perpetuated in the media. *See* Baynes, 57 RUTGERS L. REV. at 247. Broadcast media, for example, has in the past cemented audience perceptions regarding crime and poverty in minority communities. *Id.* at 255-259. Indeed, an important recent study found that the majority of Black viewers and listeners believe that news coverage of Blacks is "too negative."

Pew Research Center, *Many Say Coverage of the Poor and Minorities Is Too Negative* (Aug. 19, 2010).[3]

The evidence shows that the coverage is often different, however, for stations that are minority-owned. As this Court noted, "[m]inority ownership does appear to have specific impact on the presentation of minority images in local news, inasmuch as minority-owned stations tend to devote more news time to topics of minority interest and to avoid racial and ethnic stereotypes in portraying minorities." *Metro Broad.*, 497 U.S. at 581 (internal quotation marks omitted). From 1948, when the first radio station to appeal to a Black audience was launched, to the present, where media outlets run a range of programming in a multitude of languages for a variety of audiences, diverse channels of communication are effective because they respond to the desire, of people of all backgrounds, "to see themselves reflected," in media coverage, "warts and all." Steve Waldman, Federal Communications Commission, *The Information Needs of Communities: The Changing Media Landscape in a Broadband Age*, 252 (2011) ("FCC INC Report").[4]

More diversity in media ownership is likely to increase the odds that all communities will be served with programming that reflects their reality and is tailored to their specific interests. *See, e.g.*, Joel Waldfogel, *Radio Station Ownership Structure and*

---

[3] *Available at* http://pewresearch.org/pubs/1703/views-of-news-coverage-of-poor-blacks-hispanics-gays-muslims-rich-middle-class.

[4] *Available at* http://transition.fcc.gov/osp/inc-report/The_Information_Needs_of_Communities.pdf.

the Provision of Programming to Minority Audiences: Evidence from 2005-2009, 1 (2011) (stating that the racial identity of radio station owners affects the target audience of those stations).[5] Thus, minority owners of independent television stations produce local news content at levels higher than non-minority independent station owners. FTC INC Report at 252-53; *see also* Fordham Univ., *The Case Against Media Consolidation: Evidence on Concentration, Localism and Diversity*, 14 (Mark N. Cooper, ed. 2007).[6]

And such diverse coverage makes a difference, not just in broadening the sources of critical information, but also in increasing the civic involvement of the target audience. *See* Felix Oberholzer-Gee & Joel Waldfogel, *Media Markets and Localism: Does Local News en Espanol Boost Hispanic Voter Turnout?*, 99 AM. ECON. REV. 2120 (Dec. 2009) (showing that Hispanic voter turnout increased by 5 to 10 percentage points, relative to non-Hispanic voter turnout, in markets where local Spanish language television news became available).

While owners of radio and television stations may not themselves be involved in day-to-day programming choices, there is empirical support for the proposition that minority-owned broadcasters succeed in hiring significantly increased numbers of minorities into managerial, staff, and reporting positions. *Metro Broad.,* 497 U.S. at 582 n.34; *see*

---

[5] *Available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-307480A1.pdf.

[6] *Available at* http://www.fordham.edu/images/undergraduate/communications/caseagainstmediaconsolidation.pdf.

also Christine Bachen et al., *Diversity of Programming in the Broadcast Spectrum* 7 (1999) (noting that minority-owned radio stations employ significantly more minorities in their news and public affairs staffs).[7]

Diverse perspectives of managers, staff, and reporters derive not only from their own racial and ethnic backgrounds, but also from their exposure to cross-cultural training and education in a diverse setting. Such exposure serves to build awareness of patterns of racial bias, and to generally inform programming and content choices. In training journalists, in particular, higher education has a critical role to play in ensuring that implicit racial biases do not infect reporting. Thus, the Columbia University Graduate School of Journalism has developed "The Authentic Voice" project, a multimedia teaching tool based on a series of 15 case studies. The project aims to "help[] journalists, educators and the public get better at handling one of the country's most profound and challenging issues -- relations between people of different races and ethnicities."[8] Assuredly, the more diverse the environment in which such training occurs, the more effective it will be.

The connection between greater diversity among owners and managers of mass media organizations and greater diversity of programming does not rest on a reflexive presumption that all members of a particular racial or ethnic group think alike and that

---

[7] *Available at* http://transition.fcc.gov/opportunity/meb_study/content_ownership_study.pdf.

[8] *See* http://www.theauthenticvoice.org.

their programming choices will be dictated by their background. In some cases, individual choices and market forces may render the programming content of a minority-owned station no different from the programming content of a majority-owned station, *Metro Broad.*, 497 U.S. at 580; *id.* at 619, 626 (O'Connor, J., dissenting). In the aggregate, however, diversification of the ranks of owners and managers of mass media is bound to make a difference in programming, just as the diversification of the ranks of students on campuses is bound to make a difference in the perspectives that are conveyed in higher education. In both the academic and mass media setting, and in the workplace at large, this link reflects the continued salience of race and ethnicity in shaping views and perspectives and how they are communicated to others. *Id.* at 580; *see, e.g.*, Daphne A. Jameson, *Reconceptualizing Cultural Identity and Its Role in Intercultural Business Communication*, 44 J. BUS. COM. 199, 215-16 (2009) (arguing that racial and ethnic identity inform conceptions of cultural identity, which influences the nature and manner of intercultural business communications).

The need for *all* media industry participants to be able to identify implicit racial bias and to be attuned to cross-cultural issues is all the more acute in an industry that is frequently criticized for unfair reporting, and in a world where cultural and racial divides contribute to so much conflict. *See, e.g.*, Riddi Shah, *Sikh Temple Shooting: Why Do the Media Care Less About this Attack?*, THE HUFFINGTON POST, Aug. 7, 2012 (contrasting media coverage of movie theatre shooting in Aurora, Colorado, with that of

Sikh temple shooting in Wisconsin)[9]; The Opportunity Agenda, *Opportunity for Black Men and Boys: Public Opinion, Media Depictions, and Media Consumption*, 2 (2011) (noting that one of the "best-documented themes in the research is that the overall presentation of Black men and boys in the media is a distortion of reality in a variety of ways")[10]; Carmen T. Joge et al., National Council of La Raza, *The Mainstreaming of Hate: A Report on Latinos and Harassment, Hate Violence, and Law Enforcement Abuse in the '90s*, 31 (1999) (noting that "Latinos rarely appear in the media, but when they do appear, they are consistently portrayed more negatively than other ethnic groups")[11]; Children Now, *Prime Time Diversity Report: Fall Colors 2003-04*, 12 (2004) ("The vast majority of programs shown on prime time – especially those most watched by youth audiences – depicted a world where people primarily associate with members of their own racial group, where some racial groups remain non-existent and where males significantly outnumber females.")[12]; Andrew M. Carton and Ashleigh Shelby Rosette, *Explaining Bias against Black Leaders: Integrating Theory on Information Processing and Goal-Based Stereotyping*, 54 ACAD. OF MGMT. J. 1141 (2011) (study finding that media coverage rarely gave African American quarterbacks credit for leadership,

---

[9] *Available at* http://www.huffingtonpost.com/riddhi-shah/sikh-temple-shooting_b_1749866.html.

[10] *Available at* http://opportunityagenda.org/black_male.

[11] *Available at* http://www.nclr.org/images/uploads/publications/1377_file_HateCrimesRpt.pdf.

[12] *Available at* http://www.childrennow.org/uploads/documents/fall_colors_2003.pdf.

blaming them more for losses but given less credit for success, and finding disturbing implications for hiring and promotion in the workplace).

Such biases are all the more difficult to dispel, in an industry where minority ownership and employment are on the decline, FCC INC Report at 248, and where the ranks of minority journalists, in particular, have significantly decreased in recent years. *Id.* at 253 ("Minority journalists have lost ground in terms of employment in recent years, and industry experts doubt that the trend will reverse any time soon.").

3. Not only are the benefits of diversity in mass media similar to the benefits of diversity in higher education, diversity in mass media actually depends on diversity in higher education. This interconnection stems from the fact that higher education institutions serve as "the training ground for a large number of our Nation's leaders." *Grutter*, 539 U.S. at 332. Simply put, if "th[is] path to leadership [is] open to talented and qualified individuals of every race and ethnicity," *id.*, then there will be greater diversity among the ranks of key decision-makers in our Country's businesses, including in mass media organizations. But if the higher education pipeline to leadership positions is less diverse, corporations will become less diverse and, in the case of mass media, television and radio stations will look and sound less diverse, and less like the public that broadcasters have been charged with serving. For this reason, race-conscious admissions policies that ensure diversity in higher education are essential to programming diversity in mass media. A diverse, and diversely trained, pool of graduates will

yield future communicators that can more effectively convey information in a manner that better reflects, and engages with, this Country's increasingly multi-racial, multi-ethnic, and multicultural citizenry.

The need for diversity in higher education as a means of promoting diversity in mass media is particularly pronounced because minorities are profoundly underrepresented as owners of mass media outlets. According to a 2009 study, ethnic minorities owned only 7.24% of the 11,249 commercial radio stations in the Country. Catherine J. K. Sandoval et al., *Minority Commercial Radio Ownership in 2009: FCC Licensing and Consolidation Policies, Entry Windows, and the Nexus Between Ownership, Diversity and Service in the Public Interest*, 5 (2009).[13] Similarly, a 2007 study by the FCC found that ethnic minorities owned only 0.96% of the Country's television stations. Kiran Duwadi et al., Federal Communications Commission, *Media Ownership Study Two: Ownership Structure and Robustness of Media*, 17 (2007).[14] And the trends in minority ownership and employment in traditional media are not promising. FCC INC Report at 248.[15]

---

[13] *Available at* http://mmtconline.org/download/law_and_policy/Minority_Commercial_Radio_Broadcasters_Sandoval%20_MMTC_2009_final_report.pdf.

[14] *Available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-07-3470A3.pdf.

[15] Minority representation in the media has been waning at the same time that the population of the United States is becoming increasingly diverse. Between 2000 and 2010, the Black population in the United States increased by 15% to roughly 13.6% of the population. U.S. Census Bureau, *The Black Population: 2010*, 3 (2011), *available at*

Inroads into newer media outlets, although more positive, also face challenges. By a recent estimate, only one percent of Internet company founders are Black; eighty-seven percent are White, and Asian/Pacific founders account for 12% of start-ups. FCC INC Report at 256. Although that gap is narrowing, racial inequalities persist not only there, but also in the use of the Internet and adoption of high speed broadband connections in the home. *See* Aaron Smith, Pew Internet & American Life Project, *Commentary: Technology Trends Among People of Color* (Sept. 17, 2010).[16]

In sum, a more diverse, and diversely schooled, pipeline of future media leaders can contribute to more effective dialogue, not only on campus, but also through all media outlets and all aspects of public

---

http://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf. During the same time period, the Hispanic population increased by 43% to roughly 16.3% of the population. U.S. Census Bureau, *The Hispanic Population: 2010*, 2-3 (2011), *available at* http://www.census.gov/prod/cen2010/briefs/c2010br-04.pdf. Finally, the Asian population increased during that period by 45.6% to roughly 5.6% of the population. U.S. Census Bureau, *The Asian Population: 2010*, 4 (2011), *available at* http://www.census.gov/prod/cen2010/briefs/c2010br-11.pdf. Between 1980 and 2007, the percentage of the U.S. population that spoke a language other than English at home increased by 140.4%, to roughly 55 million people. U.S. Census Bureau, *Language Use in the United States*, 6 (2010), *available at* http://www.census.gov/hhes/socdemo/language/data/acs/ACS-12.pdf.

[16] *Available at* http://www.pewinternet.org/Commentary/2010/September/Technology-Trends-Among-People-of-Color.aspx.

communication. Graduates who have been educated in an environment where they were constantly challenged to understand and value the racial and ethnic differences that permeate the Nation's population are better positioned to ensure that all voices are heard, and that this Country's increasingly rich mosaic of ethnic, racial, linguistic, and cultural communities are fairly served by broadcast media. Furthering the higher education of students from all backgrounds will yield a pool of diverse—and diversity-attuned—graduates who can more fully contribute to building a social and political dialogue that bridges and heals racial divides.

II. TEXAS'S FAITHFUL ADHERENCE TO THIS COURT'S DIRECTIONS SHOULD BE UPHELD, AND *GRUTTER'S* CORE HOLDING SHOULD BE REAFFIRMED.

Texas's university admissions program is a "faithful application of *Grutter's* teachings," Pet. App. 98a (Garza, J., concurring), and a sovereign State's adherence to this Court's constitutional judgments should be sustained. In language that closely hews to *Grutter*, the June 2004 *Proposal to Consider Race and Ethnicity in Admissions* explained the compelling interest in race-based admissions by recognizing that a "comprehensive college education requires a robust exchange of ideas, exposure to differing cultures, preparation for the challenges of an increasingly diverse workforce, and acquisition of competencies required of future leaders." Pet. App. 23a (internal quotation marks and citation omitted); *see Grutter*, 539 U.S. at 332 ("In order to cultivate a set of leaders with legitimacy in the eyes of the

citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.")

These objectives, moreover, were especially important for Texas to implement at its University in light of the University's public mission and flagship role of preparing students to be leaders in the State. Given Texas's increasingly diverse population profile, the State realized that its future leaders must be prepared to helm a multicultural workforce, to formulate programs and businesses that meet the needs of multiple racial and ethnic communities, and to communicate policy to a diverse electorate. Pet. App. 23a.

Texas acted in reliance on *Grutter* in crafting an admissions policy for its flagship university that was uniquely designed to serve its sovereign interests. Texas's approach was properly upheld by the Fifth Circuit as a faithful application of *Grutter's* teachings. Principles of stare decisis, strengthened by the federalism interests implicated here, provide ample ground for affirmance.

1. With an eye trained on *Grutter*, Texas crafted a narrowly tailored admissions process in which race is only a "factor of a factor of a factor of a factor," Pet. App. at 159a—the very antithesis of an inflexible quota. *Compare Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) (striking down quota-like Michigan undergraduate admissions policy giving applicants points based on minority status). More specifically, in setting the personal achievement score of applicants—which is just one of multiple scores factored into admissions decisions—Texas gave race

no rigid or dispositive weight. To the contrary, Texas undertakes a comprehensive, holistic, and individualized assessment, in which race is but one factor weighed alongside other factors such as whether the applicant was the first in their family to attend college, had lived or traveled widely abroad, grew up in a non-English speaking home, or had unusual family responsibilities. Pet. App. 28a. Thus, Texas's program properly "focus[es] on each applicant as an individual, and not simply as a member of a particular racial group." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 722 (2007). Texas, in short, has done only what this Court has said it could do for the last three and a half decades since *Bakke*.

The Fifth Circuit, moreover, properly accorded good-faith deference to the academic judgment made by Texas's University administrators regarding the imperative of racial and ethnic (as well as experiential) diversity on campus. To be sure, this Court has applied a more rigorous, substantial-basis-in-evidence standard to determine whether historical practices justify race-conscious corrective measures. *See, e.g.*, *City of Richmond v. J.A. Croson Co.,* 488 U.S. 469, 500 (1989); *see also* Pet. App. 40a (higher standard applied to "backward-looking attempt[s] to remedy past wrongs.").

But Texas's University admissions program is a different endeavor. Its aim is not to remediate past discrimination, but to implement "complex educational judgments," *Grutter*, 539 U.S. at 328, about how to best assemble a varied student body in order to achieve, in the training of future leaders,

those very real but hard-to-quantify educational and societal benefits that arise from diversity.

Because judges are far less equipped to make those predictive judgments than professional university administrators, a greater level of deference under the good-faith formulation is warranted. *See, e.g.*, *Board of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 232, 234 (2000) (deferring to university administrators on distribution of mandatory student fees); *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985) ("Considerations of profound importance counsel restrained judicial review of the substance of academic decisions."). This Court's deference is particularly strong in the realm of higher education, because universities serve as laboratories of speech and thought, and thus occupy a "special niche in our constitutional tradition." *Grutter*, 539 U.S. at 329.

In any event, Texas's *Grutter*-tailored program withstands the strictest of scrutiny. Months of careful study preceded the State's adoption of a program where race was considered only as a factor thrice removed, Pet. App. at 159a, and operates as just one component of a comprehensive and individualized assessment of personal achievement, that itself is only one out of two composite scores considered in the overall admissions portfolio for each applicant. Such a carefully tailored program is a far cry from adoption of an "unyielding racial quota" to address an "amorphous claim" of past discrimination. *Croson*, 488 U.S. at 499.

The University's studied approach, grounded solidly in this Court's precedents, also sharply

contrasts with *Ricci v. DeStefano*, 557 U.S. 557 (2009), a case in which this Court applied the more demanding substantial-basis-in-evidence standard. There, the Court rejected attempts by New Haven, Connecticut to justify remedial race-based action in fire department promotions. *Compare id.* at 591 (the City cannot justify race-based action based on a "few stray (and contradictory) statements"), with Pet. App. 34a ("[I]t is evident that the efforts of the University have been studied, serious, and of high purpose.").[17]

In sum, the Court should resist petitioner's invitation to convert the narrow-tailoring test into a trump card that invariably would result in federal courts overriding the judgments of state education officials. Public institutions of higher learning, as well as private ones, would be shackled in their pursuit of the benefits of a racially diverse learning environment, and the innovation, accountability, and educational excellence that are fostered by local control of public education—and by federalism principles generally—would be undermined.

While the narrow-tailoring test ensures that the means chosen closely fit the stated goal of race-conscious action, *Croson*, 488 U.S. at 493 (plurality opinion), it is not a mechanism by which courts get to second-guess politically accountable State officials at

---

[17] Even if the Court were to find that the Fifth Circuit was overly deferential, the proper course would be to remand, so that the district court could determine, in the first instance, whether Texas had nonetheless satisfied its burden of demonstrating that its admissions program was sufficiently narrowly tailored.

every conceivable turn. This Court has not applied the narrow-tailoring test in that fashion in other contexts. *See Grutter*, 539 U.S. at 326 ("Strict scrutiny is not 'strict in theory, but fatal in fact.'") (quoting *Adarand Constrs., Inc. v. Pena*, 515 U.S. 200, 237 (1995)); *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC,* 518 U.S. 727, 741 (1996) (plurality opinion) (The least restrictive means component of strict scrutiny in First Amendment cases should be applied "without imposing judicial formulas so rigid that they become a straitjacket that disables government from responding to serious problems."). To do so here in the context of higher education would compromise the paramount interests of States in designing their higher education systems to serve the unique needs and interests of their jurisdiction.

2. Petitioner does not challenge *Grutter's* strong endorsement of the principle, first set forth in *Bakke*, 438 U.S. 265, that "student body diversity is a compelling state interest that can justify the use of race in university admissions," 539 U.S. at 325. The question presented by petitioner, in fact, assumes *Grutter's* correctness, asking only whether the University of Texas's policies are permissible under this Court's existing precedent, including *Grutter*. *See* Pet. at i. This Court, therefore, has no occasion to revisit *Grutter's* central holding. *See Yee v. City of Escondido*, 503 U.S. 519, 535 (1992).

Considerations of stare decisis provide further reason for leaving *Grutter*—and States' faithful application of that decision in their education programs—untouched. This deep-rooted rule of standing by prior resolutions "promotes the

evenhanded, predictable, and consistent development of [the law]" and "fosters reliance on judicial decisions." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). Although stare decisis is not an inflexible command, it carries "such persuasive force" that the Court requires a "special justification" to depart from it. *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (internal quotations omitted). Moreover, the "policies [at the heart of] the doctrine—stability and predictability—are at their strongest when the Court is asked to change its mind, though nothing else of significance has changed." *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 144 (2008) (Ginsburg, J., dissenting); *see also CBOCS West, Inc. v. Humphries,* 553 U.S. 442, 457 (2008) (principles of stare decisis "demand respect for precedent" even when judicial methods of interpretation change, because otherwise "those principles would fail to achieve the legal stability that they seek and upon which the rule of law depends").

This case presents no special justification to depart from *Grutter's* essential holding affirming the constitutionality of State officials' consideration of race as part of individualized, holistic university admissions practices intended to promote a diverse learning environment at institutions of higher education. "Nothing else of significance" related to race-based admission policies has occurred in the years since *Grutter* was decided. Furthermore, *Grutter's* holding (a) has proved workable in practice, *Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004); (b) has engendered significant reliance interests by States, who have configured important governmental programs around it, *see Dickerson*, 530 U.S. at 443;

(c) remains consistent with current legal doctrine, *see Neal v. United States*, 516 U.S. 284, 295 (1996) and (d) has not been deprived of its force by changed factual circumstances, *see FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 534 (2009) (Thomas, J. concurring).

a. *Grutter* has not proved unworkable, or "incapable of principled application." *Vieth*, 541 U.S. at 306. To the contrary, just as law enforcement agencies were able to adjust their practices based on *Miranda's* guidance, *Dickerson*, 530 U.S. at 443, state university officials have been able to adjust their admissions policies to follow *Grutter's* directive.

Nor has *Grutter* proven difficult for courts to apply. This is hardly surprising because *Grutter's* standards are judicially manageable and involve familiar constitutional principles. Application of strict scrutiny to assess whether a compelling governmental interest has been served by an appropriately narrowly tailored means is a test employed in a wide range of contexts. *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793 (2006) (providing a systematic empirical study of strict scrutiny in the federal courts, at all levels, between 1990 and 2003, noting its use not only in suspect class analyses, but also in the areas of free speech, religious liberty, fundamental rights, and freedom of association).

b. *Grutter*'s guidance has become "embedded" in the education and admissions policies of the Nation's universities. *Dickerson*, 530 U.S. at 443. And supplanting that guidance with new directives now

would only throw those policies into disarray. *See id.*; *see also Martinez v. Ryan*, 132 S. Ct. 1309, 1319 (2012) (citing concern over "upsetting reliance interests protected by *stare decisis* principles"). For more than three decades, under *Grutter* and its forerunner, Justice Powell's opinion in *Bakke*, States have invested extensive resources in complying with this Court's constitutional judgment and relied on its guidance in fashioning constitutionally permissible race-conscious admissions programs.

Indeed, as this Court noted in *Grutter*, "Justice Powell's opinion announcing the judgment of the Court has served as the touchstone for constitutional analysis of race-conscious admissions policies. Public and private universities across the Nation have modeled their own admissions programs on Justice Powell's views on permissible race-conscious policies." *Grutter*, 539 U.S. at 323; *see also* Brief from American Council on Education and 19 Other Higher Education Organizations in Support of Respondents, *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 2006 WL 2882689, at *3 ("Relying on the [Court's] constitutional analysis * * * the nation's colleges and universities have included race and ethnicity among the traditional range of diversity-enhancing factors used in their admissions policies."). *Grutter's* endorsement of this approach assured them they were on the right track. In a constitutional system of federalism, a necessary counterpart of *Cooper v. Aaron*, 358 U.S. 1 (1958), is a firm recognition by the federal judicial system of the heavy reliance States place on court decisions in organizing their programs, investing taxpayer resources, and developing policies. A profound

incursion on comity principles, disruption to governance, unsettling of state governmental programs, and loss of scarce resources can result whenever the constitutional rules are changed.

This reliance interest is well demonstrated by the history of Texas's efforts to comply with federal court decisions about its admissions practices. Texas was already forced to reverse course once, jettisoning its previous race-conscious admissions practice following the Fifth Circuit's 1996 decision in *Hopwood v. University of Texas*, 78 F.3d 932 (1996). *See* Pet. App. 17a-18a. Eight years later, in response to *Grutter*, Texas devoted more than a year to studying and analyzing the decision and formulating an admissions policy that complied with it by "adopt[ing] a policy to include race as one of many factors considered in admissions." *Id.* at 23a. Respondents were not alone in this regard. Countless institutions of higher education nationwide revised their admissions policies to meet *Grutter's* standards. *See, e.g.*, Peter Lehmuller & Dennis E. Gregory, *Affirmative Action: From Before* Bakke *to After* Grutter, 42 J. OF STUDENT AFF. RES. AND PRAC. 430, 451-456 (2004) (describing universities' efforts to stay true to *Grutter's* teachings).

Stare decisis concerns, moreover, are at their apex when publicly accountable state actors, such as respondents here, have shaped policies and invested significant public resources in reliance on this Court's precedents. An abrupt shift in the law or reformulation of *Grutter* less than a decade after it was decided would require Texas and other States to again switch gears, to again wipe the higher education admissions slate clean, and to again spend

scarce resources reconfiguring vital state policies and programs. Such whipsawing of sovereign States and constant revision of rules in a context like education for which stability and long-term planning is particularly vital is deeply disruptive to State governments and their citizens. And in the context of public universities in particular, it raises concerns about undue federal interference in educational policymaking, a sphere traditionally ceded to the States. *See Interstate Consol. St. Ry. Co. v. Massachusetts*, 207 U.S. 79, 87 (1907).

While this Court, of course, has the constitutional duty to enforce the Constitution's commands, federalism principles are equally grounded in the Constitution and demand that stare decisis principles apply with particular force when States across the Nation have invested so much time and resources in complying with this Court's directives. *See* Wendy Parker, *Connecting the Dots:* Grutter*, School Desegregation, and Federalism*, 45 WM. & MARY L. REV. 1691 (2004) (arguing that principles of federalism and a recognition of the limits of judicial competency justify *Grutter's* idea of deference). Nothing in either *Marbury* principles or federalism principles should countenance a scheme in which the States find themselves subject to litigation and liability under 42 U.S.C. § 1983 for taking the steps prescribed by this Court and availing themselves of the programmatic opportunities authorized by this Court. In short, abandonment of *Grutter* would place universities in an untenable dilemma: risk budget-straining and resource-diverting litigation or abandon the diversity goals that are vital to enriching campus dialogue and improving the quality

of higher education—goals that this Court expressly licensed States to pursue.

Businesses, too, have built up strong reliance interests based on *Grutter*, long recognizing that race-conscious admissions policies intended to promote a diverse learning environment in higher education yield a workforce that is better trained and equipped to thrive in a multicultural, globalized economy. *Grutter*, 539 U.S. at 330-331 ("[M]ajor 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."); *see also generally Br. for Amici Curiae General Electric Co. and other Fortune-100 and Leading American Businesses in support of Respondents*.

In short, businesses and governments—both of which amicus Minority Media and Telecommunications Council works with and supports in its efforts to improve diversity in the media—are counting on institutions of higher learning being able to admit and train students from all walks of life and backgrounds to thrive in a society where ethnic, racial, and cultural boundaries are increasingly and necessarily blurred. Thus trained, a diverse pool of graduates will be better able to "compet[e] on an equal footing in [their] quest" to contribute to the Country. *Northeastern Fla. Chapter of Assoc'd. Gen. Contractors of America v. City of Jacksonville*, 508 U.S. 656, 667 (1993).

Whether competing for government contracts, political office, scarce spectrum resources, venture capital, or employment, those with higher education

will be better positioned to achieve their goals. Retrenchment in or reversal of *Grutter* will indisputably limit access to the Nation's top universities to many qualified students who, if admitted, would make important contributions to the learning environment. *See* Jessica S. Howell, *Assessing the Impact of Eliminating Affirmative Action in Higher Education*, 28 J. OF LABOR ECON. 1, 133-166 (2010) (using economic model to predict 10% decrease in minority representation at "most selective four-year institutions" if affirmative action is eliminated). Those educational opportunities, in turn, provide a pathway into corporate boardrooms and political office, and they plant the seeds for more volunteering and voting, higher earnings and job satisfaction, better parenting, lower social costs, and a host of other economic and social benefits. *See* Elizabeth Fuller, *Top 10 Benefits of a College Degree*, THE CHRISTIAN SCIENCE MONITOR, Oct. 28, 2010.[18]

c. Nor has legal doctrine changed so much since 2003 so as to render *Grutter* "irreconcilable" with current law. *Neal*, 516 U.S. at 295. The continued legal vitality of *Grutter* is underscored by this Court's most recent case involving race-conscious action, *Parents Involved in Community Schools. v. Seattle School. Dist. No. I*, 551 U.S. 701 (2007). There, the Court did not cast doubt on *Grutter's* essential holding that the promotion of diversity in higher education was a compelling governmental interest. *Id.* at 722-725. Rather, ruling on narrow grounds, the Court in *Parents Involved* held only that the K-12

---

[18] *Available at* http://www.csmonitor.com/Business/2010/1028/Top-10-benefits-of-a-college-degree/Better-prepared-kids.

student assignment plans at issue were unconstitutional because they often made race "determinative standing alone." *Id.* at 723.

As the Court emphasized, "race [in those plans was] not simply one factor weighed with others in reaching a decision, * * * it [was] *the* factor." *Parents Involved*, 551 U.S. at 723. The Court thus concluded that the challenged K-12 plans functioned like unconstitutional quotas, *id*. (citing *Gratz*, 539 U.S. at 275 (2003)), rather than like the individualized, holistic admissions policies approved in *Grutter*. *Id*. at 722-23. The Court in *Parents Involved* also stressed that considerations unique to the higher education setting do not apply to K-12 education. *Id*. at 724-725. In short, *Parents Involved* confirmed, rather than "removed or weakened [*Grutter's*] conceptual underpinnings," *Neal*, 516 U.S. at 295 (internal quotation marks and citation omitted).

Because strict scrutiny demands a highly particularized analysis, "context matters." *Parents Involved*, 551 U.S. at 725. Just as *Parents Involved*, while striking down the specific program at issue, nonetheless reaffirmed *Grutter*, here, any determination regarding the constitutionality of Texas's policies under *Grutter* would not implicate the central holding of that case, much less be applicable to wholly different arenas, including race-conscious action in the administration of the mass media. In applying *Grutter*, as the petitioner requests, the Court's holding should be limited to the "unique context of higher education." *Parents Involved*, 551 U.S. at 725.

d. Finally, the facts of American life have not so drastically changed in the nine years since *Grutter* was decided to warrant its reexamination. *See Fox Television Stations*, 556 U.S. at 534. While Justice O'Connor in 2003 predicted the Nation would no longer need race-conscious affirmative action in 25 years, *Grutter*, 539 U.S. at 343, that ideal of equality remains elusive. A recent survey of Forbes's 500 list companies conducted by Sen. Robert Menendez's office, for example, found that only one out of seven corporate board members identifies as a racial minority, and among those companies' executive management teams, only 10.4% of team members identified as racial minorities. Sen. Robert Menendez, *Corporate Diversity Report*, 10, 19 (2010).[19] For the media companies surveyed, 18.6% of board members identified as a racial minority, but racial minorities were only 5.1% of executive management teams. *Id.* at 16, 25.

Such skewed ownership and management structures undermine the ability of media companies to best serve the interests of an increasingly diverse populace. Continued fostering of diversity in higher education is needed to increase the diverse pool of talent available to compete, on an equal footing, for ownership licenses and to occupy positions of leadership within the media industry. Greater diversity in higher education will also help to build the next generation of future media owners, programmers, broadcasters, and journalists—of all races and ethnicities—and to ensure that this next

---

[19] *Available at* http://www.menendez.senate.gov/imo/media/doc/CorporateDiversityReport2.pdf.

generation is equipped with the skills and training they need to communicate across racial divides and encourage civic engagement.

* * * * *

Stated simply, the need for the "path to leadership [to] be visibly open to talented and qualified individuals of every race and ethnicity" applies with as much force today as it did a short time ago in *Grutter* "[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry." *Grutter*, 539 U.S. at 332. Such a diverse set of leaders, in turn, will be best-positioned to contribute to an "uninhibited marketplace of ideas," *Red Lion Broadcasting Co.*, 395 U.S. at 388-390, in which broadcasters, serving as "fiduciaries for the public," provide "the widest possible dissemination of information from diverse and antagonistic sources." *Associated Press*, 326 U.S. at 20.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

Michael Small
AKIN, GUMP, STRAUSS, HAUER & FELD LLP
Los Angeles, CA 90067
(310) 229-1000

John B. Capehart
AKIN, GUMP, STRAUSS, HAUER & FELD LLP
Dallas, TX 75201
(214) 969-2800

Patricia A. Millett
Ruthanne M. Deutsch
Counsel of Record
AKIN, GUMP, STRAUSS, HAUER & FELD LLP
1333 New Hampshire Avenue, N.W.
Washington, DC 20036
(202) 887-4000
rmdeutsch@akingump.com

David Honig
Maurita K. Coley
MINORITY MEDIA AND TELECOMMUNICATIONS COUNCIL
Washington, DC 20010
(202) 332-7005

August 13, 2012