

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 FOR *AMICI CURIAE*
FORTUNE-100 AND OTHER LEADING AMERICAN
BUSINESSES IN SUPPORT OF RESPONDENTS

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AOL Inc.	Merck & Co., Inc.
ArcelorMittal USA	Microsoft Corporation
Ariel Investments	Northrop Grumman Corporation
Cargill, Inc.	PepsiCo Inc.
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The Clorox Company	Pfizer Inc.
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INTEREST OF *AMICI CURIAE*

Amici are several of America's largest companies.¹ A similar group of significant businesses filed a brief in this Court in *Grutter v. Bollinger*, 539 U.S. 306 (2003), which this Court cited and relied upon in its decision, *see id.* at 330.²

Amici recruit employees who are graduates of the University of Texas at Austin ("UT") or similar leading institutions of higher education. Indeed, *amici* – who collectively have revenues in the trillions of dollars – hire thousands of graduates of UT and other major public universities every year.

As a result, *amici* have a vital interest in this case. *Amici* are directly affected by the admissions policies at UT and similar colleges and universities, and they care deeply about what kind of education and training those institutions offer their students.

Amici file this brief to reaffirm the significance of diversity in higher education to America's largest businesses. In addition, although *amici* do not take a position on the constitutionality of the specific

¹ All parties have consented to the filing of this *amicus curiae* brief. No portion of the brief was authored by counsel for a party. No person or entity other than the *amici* signing this brief or their counsel made a monetary contribution to the preparation or submission of this brief.

² The companies participating in this *amicus* brief came together through an informal, ad hoc process. The strongly held views set forth in this brief, approved at senior levels of each participant, likely are shared by many additional companies as well.

practices at issue here, *amici* do address certain troubling aspects of Petitioner's strict-scrutiny analysis that, if accepted, could render illusory the Court's affirmation of diversity as a compelling state interest.

SUMMARY OF ARGUMENT

1. This Court should reaffirm its holding in *Grutter* that the conscious pursuit of diversity in the admissions decisions of institutions of higher education – including diversity based upon race, religion, culture, economic background, and other factors – is a compelling state interest. The principles established in *Grutter* are more important today than ever. For *amici* to succeed in their businesses, they must be able to hire highly trained employees of all races, religions, cultures and economic backgrounds. It also is critical to *amici* that *all* of their university-trained employees have the opportunity to share ideas, experiences, viewpoints and approaches with a broadly diverse student body. To *amici*, this is a business and economic imperative.

Today even more than when *Grutter* was decided, *amici* operate in a country and world economy that are increasingly diverse. *Amici* have found through practical experience that a workforce trained in a diverse environment is critical to their business success. *Amici* are dedicated to promoting diversity as an integral part of their business, culture, and planning. But *amici* cannot reach that goal on their own. The only means of obtaining a properly qualified group of employees is through diversity in

institutions of higher education, which are allowed to recruit and instruct the best qualified minority candidates and create an environment in which *all* students can meaningfully expand their horizons.

2. *Amici* recognize that strict scrutiny must be applied in assessing the constitutionality of the specific practices employed at UT. *Amici* are not in a position to know or evaluate the legality of specific admissions procedures of UT or any other particular university. But two principles are important to *amici* as the Court evaluates the specific issues in this case.

First, the strict-scrutiny test must not be applied by this Court in such a way as to be inevitably “fatal in fact” in the context of the pursuit of diversity in higher education. Within the confines of a rigorous constitutional analysis, there must be room for a university to decide that a particular approach to admissions is necessary to achieve important educational goals. For instance, a university should be able to evaluate whether students enrolled in particular subsets of the university are realizing the educational benefits of diversity. A university may have a business college or engineering department – both particularly important to *amici* – lacking a “critical mass” of underrepresented minorities and needing an admissions plan that considers race along with applicants’ other personal characteristics. Without such a critical mass, none of the business or engineering students, whether they are minorities or not, are likely to have the kinds of diversity-related

academic experiences that *amici* believe will help prepare them for success in the corporate world.

Second, higher-education diversity must not be treated as a simplistic numbers game. Focusing solely on percentages of minorities in an entering class, and determining that a certain percentage is necessarily “sufficient” as a matter of law – as Petitioner suggests here – harkens back to the very quota systems that *Bakke* and *Grutter* expressly rejected.

Rather than treating diversity in purely numerical terms, *amici* urge the Court to find an analogy in *amici’s* own hiring decisions. Those decisions take into account the many different ways that a particular candidate may be able to contribute to the organization. *Amici* are not attempting to reach some numerical quota of minority employees; they would not be satisfied, for instance, by simply hiring a certain *number* of “diverse” employees. Rather, *amici* seek to hire the most qualified group of employees, while taking into account all of the characteristics of those employees that will enrich the *amici’s* workplaces and strengthen their businesses.

ARGUMENT

I. The Pursuit of Diversity in Higher Education Remains a Compelling State Interest – Even More So Than When the Court Decided *Grutter*.

In *Grutter v. Bollinger*, 539 U.S. 306, this Court held that “student body diversity is a compelling state interest that can justify the use of race in

university admissions.” *Id.* at 325; *see also id.* at 328. In so doing, the Court relied in part on the views of “major American businesses,” which filed a brief making 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.” *Id.* at 330 (citing Brief for 3M et al. as *Amici Curiae*).

In the case at hand, Petitioner and a number of her *amici* ask the Court to overrule *Grutter*, pointing specifically to the holding on the importance of diversity. *See, e.g.*, Pet’r Br. at 53; Asian Am. Legal Found. Br. at 36; Pacific Legal Found. Br. at 24. The major American businesses that are signatories to this brief urge the Court to reject this argument and to reaffirm that diversity in university admissions is a compelling state interest.

1. As many of the *amici* here explained in the brief they filed in *Grutter* ten years ago, people who have been educated in a diverse setting make valuable contributions to the workforce in several important ways. Such graduates have an increased ability to facilitate unique and creative approaches to problem-solving by integrating different perspectives and moving beyond linear, conventional thinking; they are better equipped to understand a wider variety of consumer needs, including needs specific to particular groups, and thus to develop products and services that appeal to a variety of consumers and to market those offerings in appealing ways; they are better able to work productively with business partners, employees, and clients in the United States

and around the world; and they are likely to generate a more positive work environment by decreasing incidents of discrimination and stereotyping. Brief for 3M et al. as *Amici Curiae* at 7 (*Grutter*, No. 02-241); *see also, e.g.*, General Motors *Amicus* Br. at 2 (*Grutter*, No. 02-241).

In light of these advantages, the *Grutter* Court concluded that the only way to develop “the skills needed in today’s increasingly global marketplace” is “through exposure to widely diverse people, cultures, ideas, and viewpoints.” *Grutter*, 539 U.S. at 330; *cf. Sweatt v. Painter*, 339 U.S. 629, 634 (1950). The Court therefore endorsed Justice Powell’s statement in *Bakke* that “nothing less than the [N]ation’s future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples.” *Grutter*, 539 U.S. at 324 (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 (1978) (opinion of Powell, J.) (quoting *Keyishian v. Board of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967))).

2. *Amici’s* interest in and need for diversity – and, by extension, the state’s interest in diversity in higher education – has become even more compelling as time has passed. American corporations must address the needs of an increasingly diverse U.S. population and a growing global market, and they need a workforce trained in a diverse environment in order to succeed in these arenas. *Amici* have also found over time that the benefits of diversity are particularly important to their business success in a challenging economic environment.

First, the U.S. population is increasingly diverse, and it is important to *amici* to be able to hire the best educated and trained students of all backgrounds. Since *Grutter* was decided, minority populations have grown at a significantly faster rate than the non-minority population. The population of those who reported their race as “white” grew only 1% between 2000 and 2010.³ In that same period, the Hispanic population grew by 43 percent, increasing from 35.3 million people to 50.5 million people; the African-American population grew by 12 percent, increasing from 34.7 million people to 38.9 million people.⁴ This trend is particularly pronounced in Texas, where growth in the Hispanic and African-American communities drove rapid population growth over the last decade. *See, e.g.*, Ross Ramsey et al., *Minorities Drove Texas Growth, Census Figures Show*, TEX. TRIB., Feb. 18, 2011.

Given these changes in the population as a whole, it is not surprising that the U.S. workforce has also grown more diverse in recent years. In 2000, 72% of the workforce in the United States was “White non-Hispanic”; by 2010, that percentage had decreased to

³ *See* U.S. Census Bureau, *Overview of Race and Hispanic Origin: 2010*, 2010 Census Briefs, at 3 (March 2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf>.

⁴ *See id.* at 4; *see also* U.S. Census Bureau, *The Black Population: 2010*, 2010 Census Briefs, at 3 (Sept. 2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf>.

67.5%.⁵ The Bureau of Labor Statistics projects that in 2020 that percentage will have further decreased to 62.3%.⁶

Now more than ever, then, *amicis*'s employees need to be able to work successfully with a diverse group of co-workers, supervisors, subordinates, counterparts at other U.S. businesses (including distributors, suppliers, and competitors), and U.S. customers. The rich variety of ideas, perspectives, and experiences to which both minority and non-minority students are exposed in a diverse university setting, and the cross-cultural interactions that they experience, are essential to the students' ability to function in and contribute to the increasingly diverse community in the United States. *See, e.g.*, William J. Holstein, *Diversity Is Even More Important in Hard Times*, N.Y. TIMES, Feb. 14, 2009, at B2 (stating that "[i]n the United States, the multi-cultural consumer today is over a third of the population, and 80 percent of the population growth").

Second, in the years since *Grutter* was decided American businesses have continued their rapid expansion into the global marketplace. U.S. companies increasingly sell their goods and services abroad and manage extensive operations in foreign

⁵ Bureau of Legal Statistics, U.S. Dep't of Labor, Employment Projections – Civilian Labor force by age, sex, race, and ethnicity, Table 3.4, *available at* http://www.bls.gov/emp/ep_table_304.htm (last visited July 23, 2012).

⁶ *See id.*

countries. Indeed, “[i]n 2009, worldwide American companies in the Standard & Poor’s 500 (S&P 500) had more than 55 percent of total income earned outside the United States.” Business Roundtable, *Taxation of American Companies in the Global Marketplace: A Primer*, at 4 (April 2011), available at http://businessroundtable.org/uploads/studies-reports/downloads/Taxation_of_American_Companies.pdf.⁷

For example, *amicus* Procter & Gamble has employees located in and serving customers in 75 different countries. Hundreds of American-trained employees are working for Procter & Gamble in those countries. More and more, *amici* operate and compete in a global environment, and therefore need employees who can effectively serve and work together with people from many different cultures.

Finally, *amici* have found that the benefits they realize from a workforce educated in a diverse university setting are particularly critical in difficult economic times. In that kind of economic environment, competition becomes more intense, and there is a greater need to think creatively and come

⁷ See also, e.g., Prepared for the Joint Economic Committee by the Council of Economic Advisers, 112th Cong., 2d Sess., Economic Indicators, at 35 (May 2012) (value of U.S. exports has grown from \$1023.5 billion in 2003 to \$2105.1 billion in 2011), available at <http://www.gpo.gov/fdsys/pkg/ECONI-2012-05/pdf/ECONI-2012-05.pdf>; see also Press Release, U.S. Dep’t of Commerce, U.S. Census Bureau News, *A Profile of U.S. Importing and Exporting Companies 2009-2010* at 1-2 (2012), available at <http://www.census.gov/foreign-trade/Press-Release/edb/2010/edbrel.pdf>.

up with innovative approaches. Those are exactly the skills that are developed in a diverse and vibrant university environment. *See Grutter*, 539 U.S. at 330; *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312-14 (1978) (opinion of Powell, J.). Particularly when economic times are tight, “[i]t’s difficult, if not impossible, for homogenous” groups “to challenge and offer different perspectives, unique experiences, and the broad-based wisdom” that makes all levels of a company “as effective as they can be.” Holstein, *supra*, at B2.

All of this is not just a matter of abstract ideas, but of dollars and cents as well. *Amici* seek to strengthen their businesses and to grow; they seek to increase their revenue and the return to their shareholders. *Amici* support the findings of extensive research that indicates that a commitment to diversity, with all of its attendant benefits, is “associated with increased sales revenue, more customers, greater market share, and greater relative profits.” Cedric Herring, *Does Diversity Pay?: Race, Gender, and the Business Case for Diversity*, 74 AM. SOCIOLOGICAL REV. 208, 219 (2009).⁸

⁸ *See also, e.g.*, Scott E. Page, *The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools, and Societies* (2007) (collecting studies demonstrating that diversity leads to more productive and innovative solutions); Stanley F. Slater et al., *The Business Case for Commitment to Diversity*, 51 BUSINESS HORIZONS 201 (2008) (concluding that a true commitment to diversity throughout an organization fosters better board decisions, increases connections with customers,

Thus, it continues to be true that – as the Court observed in *Grutter* – the benefits of diversity in the university setting are “not theoretical but real.” 539 U.S. at 330-31. *Amici* have found, through practical experience, that a workforce trained in a diverse environment is important to their business success – and that a critical means of obtaining a properly qualified group of employees is through diversity in institutions of higher education, which recruit and instruct the best qualified minority candidates and create an environment in which students of all backgrounds can meaningfully expand their horizons.

3. *Amici*'s own actions attest to the importance they place on a workforce trained in a diverse environment. *Amici* have devoted substantial financial and human resources to create and maintain a diverse workforce – efforts that have only

and leads to innovation); Lisa H. Nishii & David M. Mayer, Ctr. for Advanced Human Res. Studies, Cornell Univ., *Paving the Path to Performance: Inclusive Leadership Reduces Turnover in Diverse Work Groups*, Feb. 2010 (emphasizing the importance of managers who are adept at leveraging the benefits of diversity); Marcus Robinson et al., *Business Case for Diversity with Inclusion*, WetWare, Inc., 2003 (explaining the importance of diversity in business to respond to increasingly diverse customer bases); Carol Hymowitz, *The New Diversity*, WALL ST. J., Nov. 14, 2005, at R1 (describing how PepsiCo, IBM, and Harley-Davidson are leveraging diverse workforces to come up with new ideas to attract a more diverse customer base); Jill Dutt, *Taking an Engineer's Approach at Lockheed Martin*, WASH. POST, May 1, 2006, at D1 (describing how Lockheed Martin has created a “diversity maturity model” to foster diversity in order to compete better).

intensified in the years since this Court decided *Grutter*. These extensive efforts are part of *amicus*'s core values, are implemented and overseen by senior managers, and are supported at the very highest levels of each company participating in this brief.

Amici are hiring an increasingly diverse group of employees. *Amici* have also intensified their own internal diversity programs and their efforts to enhance the success of minority students and employees. Each *amicus* has an internal diversity program and works to support minority employees. *Amici* also partner with universities like UT to reach out to aid minority students.

For example, *amicus* Merck drew on the diversity of its employees in order to broaden access to Gardasil, a vaccine that protects against the virus that causes cervical cancer. Recognizing that some populations might not use the vaccine for religious reasons, Merck sought the assistance of its Muslim employees in obtaining Halal certification in order to improve its acceptability and use under Islamic guidelines. Merck has formed and supported many groups of employees who bring their specific cultural, ethnic, religious, gender and other demographic knowledge and understanding to bear on business challenges and opportunities.

In short, *amicus* are dedicated to promoting diversity as an integral part of their business, culture, and planning. *Amici* need the talent, creativity, and flexibility of a workforce that is as diverse as the world around them.

But *amici* cannot reach that goal on their own. University admission decisions, and the education and training to which a student gains access when admitted to UT and similar institutions, play a crucial role in determining who will ultimately be qualified for the positions *amici* need to fill. When *amici* make decisions about hiring and promotion, it is critical that they be able to draw from a superior pool of candidates – both minority and non-minority – who have realized the many benefits of diversity in higher education. There can be no question that “[t]he Nation’s future” does indeed continue to “depend[] upon leaders” – including business leaders – “trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples.” *Bakke*, 438 U.S. at 312-13 (opinion of Powell, J. (internal quotation marks omitted)).

II. Petitioner’s Application of Strict Scrutiny Would Hamper Educational Institutions’ Legitimate Efforts to Pursue Meaningful Diversity Consistent with Their Educational Missions and the Needs of the Business Community.

Determining whether sufficient diversity has been achieved on campus to create the kind of educational environment that is so critical to graduates’ – and *amici*’s – success is not an exact science. *Amici* recognize that strict scrutiny must be applied in assessing the constitutionality of the specific practices employed at UT. That is a detailed assessment that *amici* here are not in a position to make. However, *amici* do feel compelled to comment on certain troubling aspects of Petitioner’s argument

that, if accepted by the Court, could generally render the strict-scrutiny test “fatal in fact” in the context of the pursuit of diversity in higher education.

The main problems with Petitioner’s analysis, from *amici’s* point of view, flow from the fact that Petitioner places heavy reliance on the proposition that there is no need for any admissions policy addressing diversity when a “substantial” percentage of minority applicants have been admitted in the recent past. Pet’r Br. at 35. It is important to *amici* that diversity in educational institutions is not treated purely as a one-dimensional, top-level numbers game. Focusing solely on the percentages of minorities in an entering class, and determining that a certain percentage is necessarily “enough” as a matter of law, smacks of the kind of quota system that this Court so roundly rejected in *Bakke* and *Grutter*.

Moreover, numbers alone do not indicate whether students on campus are receiving the benefits that make diversity such a compelling interest. *See Fisher v. Univ. of Texas at Austin*, 631 F.3d 213, 246 (5th Cir. 2011). Indeed, the numbers required to reach a “critical mass” may well be different at different institutions. *Amici* are concerned with the suggestion that there is some numerical benchmark that is automatically sufficient and permanently bars any consideration of race (along with applicants’ other personal characteristics) in admissions decisions – an approach that *amici* believe would undercut the compelling diversity-related advantages discussed above. *See Grutter*, 539 U.S.

at 330 (explaining that “the Law School’s concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce”).

For instance, overall numbers do not reveal whether students enrolled in particular subsets of the university are realizing the educational benefits of diversity. A university may have a college of business or a school of engineering from which some of the *amici*’s recruiting efforts are particularly likely to draw, *see, e.g.*, IBM Amicus Br. at 9 (*Grutter*, No. 02-241) – and it may be that there will be no “critical mass” of underrepresented minorities within those areas of study unless administrators deploy an admissions plan that considers race along with applicants’ other personal characteristics. Without such a critical mass, none of the business or engineering students – whether they are minorities or not – are likely to have the kinds of diversity-related academic experiences that *amici* believe will help prepare them for success in the corporate world. The Court should for these reasons reject the argument that the only “proper base” for assessing diversity “is the ‘student body.’” Pet’r Br. at 19.

In addition, there must be some room for a university to decide that a particular approach to admissions is no longer workable for educational reasons and to take a different tack. It cannot be, as Petitioner argues, *see, e.g.*, Pet’r Br. 35-38, 56, that a university that has achieved certain numerical benchmarks of minority attendance under one approach is thereby foreclosed from ever approaching

admissions in a different way – even a way that the university legitimately believes will better serve its educational goals and is equally or more likely to create a truly diverse student body.

Finally, a focus solely on numbers is problematic when the numbers in question treat *all* underrepresented minorities as one undifferentiated group, rather than distinct individuals with different experiences and perspectives. That runs counter to this Court’s rejection of such reductionist views of race. *See, e.g., Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 723 (2007) (plurality op.) (rejecting “a limited notion of diversity” where race is viewed as a dichotomy between “white/nonwhite” or “black/other” in evaluating plans to increase diversity in schools); *Gratz v. Bollinger*, 539 U.S. 244, 277 (2003) (O’Connor, J., concurring) (stating that “the type of individualized consideration the Court’s opinion in *Grutter* . . . requires” includes “the contribution each individual’s race or ethnic identity will make to the diversity of the student body, taking into account diversity within and among all racial and ethnic groups”). And those kinds of statistics simply may not tell the whole story of how students actually experience their university environment, and how that environment prepares them for the varied demands of their future careers.

For all of these reasons, it is *amici’s* considered view that Petitioner’s rigid, quota-like approach to strict-scrutiny analysis will prevent universities from pursuing narrowly tailored admissions policies that

ensure their graduates actually emerge with the experiences and training that *amici* value. *Amici* find an analogy in their own hiring decisions. Those decisions are not based solely on a student's academic achievement relative to others at his or her particular educational institution, but take into account the broader applicant pool and the many different ways that a particular candidate might be able to contribute to the organization. *Amici* are not attempting to reach some "quota" of minority employees; they would not be satisfied, for instance, by simply hiring the top ten percent of the graduating class from a range of diverse colleges, even if they could thereby capture a certain *number* of "diverse" employees. Rather, *amici* seek to hire the most qualified group of employees, while taking into account all of the characteristics of those employees that will enrich the *amici's* workplaces and strengthen their businesses.

In short, *amici's* approach to their own hiring is not driven by a desire to reach some absolute number of minority employees. Similarly, a measure of flexibility at the point of university admissions (if permitted under state law) is important to ensure that universities achieve true and meaningful diversity, not simply some threshold overall number of minority students – and do so in a way consistent with their overarching educational objectives.

In the course of applying strict scrutiny, this Court has previously emphasized the need for such flexibility, and *amici* respectfully suggest that the Court should reaffirm that principle in this case. As

Justice Powell explained, the admissions process must be “flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.” *Bakke*, 438 U.S. at 317 (opinion of Powell, J.). The *Grutter* Court agreed: “truly individualized consideration demands that race be used in a flexible, nonmechanical way.” 539 U.S. at 334; *see also id.* at 336-37 (stating that “a university’s admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant’s race or ethnicity the defining feature of his or her application”); *id.* at 392-93 (Kennedy, J., dissenting) (“individual assessment” must be “safeguarded through the entire process”); *Parents Involved*, 551 U.S. at 722 (plurality op.).

The *Grutter* Court also emphasized that, while strict scrutiny requires a rigorous examination of a university’s admissions practices, such scrutiny cannot be “fatal in fact.” *Grutter*, 539 U.S. at 326 (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995)). In order to ensure that the government achieves its compelling interest in enrolling a diverse group of university students, there must be circumstances in which admissions plans that involve individualized consideration of all of an applicant’s many dimensions – including race – pass constitutional muster. Rather than a “classification that tells each student he or she is to

be defined by race,” *Parents Involved*, 551 U.S. at 789 (Kennedy, J., concurring in part and concurring in the judgment), such individualized review treats race as one of many factors that may provide a fuller understanding of an individual applicant and what he or she can bring to the table to enhance a university’s educational environment – and, ultimately, contribute to businesses like the *amici* and to society as a whole. *See Grutter*, 539 U.S. at 337.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge that the Court reaffirm that diversity in higher education is a compelling state interest, and resist calls to adopt a form of strict scrutiny that would make meaningful pursuit of that interest impossible in fact.

Respectfully submitted,

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