

No. 11-345

IN THE
Supreme Court of the United States

ABIGAIL NOEL FISHER,
Petitioner,

v.

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

**On Writ of Certiorari to the
United States Courts of Appeals
For the Fifth Circuit**

**BRIEF *AMICUS CURIAE* OF THE NATIONAL
EDUCATION ASSOCIATION, ET AL.,
IN SUPPORT OF RESPONDENTS**

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INTEREST OF *AMICI CURIAE*

This brief *amicus curiae* is submitted, with the consent of the parties,¹ on behalf of the National Education Association (“NEA”) and 27 of its affiliated state education associations;² the American Federation of Labor-Congress of Industrial Organizations (“AFL-CIO”) and its affiliated national unions, including the American Federation of Teachers (“AFT”) and the American Federation of State, County, and Municipal Employees (“AFSCME”); the Service Employees International Union (“SEIU”); and People For the American Way Foundation (“People For Foundation”).

NEA is a nationwide employee organization with more than three million members, the vast majority of

¹ Letters of consent are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* made a monetary contribution to the preparation or submission of the brief.

² The state education associations that join in this brief are the Arizona Education Association, California Teachers Association, Colorado Education Association, Delaware State Education Association, Education Minnesota, Federal Education Association, Florida Education Association, Georgia Association of Educators, Idaho Education Association, Illinois Education Association, Massachusetts Teachers Association, Michigan Education Association, Missouri NEA, NEA-New Hampshire, NEA-Rhode Island, New Jersey Education Association, New York State United Teachers, Ohio Education Association, Oklahoma Education Association, Oregon Education Association, Pennsylvania State Education Association, South Dakota Education Association, Texas State Teachers Association, Utah Education Association, Vermont-NEA, Washington Education Association, and Wisconsin Education Association Council.

whom serve as educators and education support professionals in our nation's public schools, colleges, and universities. NEA has a deep and abiding commitment to equal opportunity in all aspects of our society and to the proposition that equal educational opportunities, including the opportunity to learn with students of races other than one's own, are a fundamental prerequisite to such equality. As NEA's governing policy affirms, a "racially diverse student population is essential for all elementary/secondary schools, colleges, and universities to promote racial acceptance, improve academic performance, and foster a robust exchange of ideas." Attaining such racial diversity may require "elementary/secondary schools, colleges, and universities to take race into account in making decisions as to student admissions, assignments, and/or transfers." These are likewise the views of the NEA affiliates that have joined in this brief.

AFL-CIO is the largest organization of working men and women in the United States, consisting of 56 national and international unions representing over 12 million members. Many of these members, including those of the AFL-CIO's affiliate AFT, teach or perform other essential services in universities, colleges and public elementary and secondary schools. The AFT, for example, represents over 1.5 million members who work in public education, including over 200,000 full and part time faculty, administrative staff, and graduate teaching fellows at public colleges and universities across the country. Dating back to the Court's historic desegregation decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), in which the AFT filed an *amicus curiae* brief supporting the plaintiffs, the AFL-CIO and AFT have had an enduring commitment to educational equality for all, regardless of race.

AFSCME is an international labor organization representing approximately 1.6 million working men and women throughout the United States and Puerto Rico, including tens of thousands who are employed in higher education, providing important services at public colleges and universities throughout the country.

SEIU represents 2.1 million men and women working in health care, property services, and public services, including public school and university employees. SEIU's membership is among the most diverse in the labor movement. The union is deeply committed to the principles of equal opportunity and social, economic, and racial justice. This commitment is reflected in SEIU's Mission Statement, adopted as part of its Constitution and Bylaws, which affirms that "we must not be divided by forces of discrimination based on gender, race, ethnicity, religion, age, physical ability, sexual orientation or immigration status." SEIU believes that diversity in elementary, secondary, and higher education classrooms is vitally important to achieving a society that lives up to these ideals.

The NEA, AFL-CIO, AFT, AFSCME, and SEIU recognize that virtually every student in our public schools will ultimately enter the workplace. Once there, they will be expected to honor a set of fundamental public policies, including the command that they not discriminate on the basis of race. The experience of the labor organization *amici* teaches that opportunities for students to interact with their peers from other races in the educational process—opportunities that are fostered by policies such as those at issue in this case—have substantial, positive impacts that make them better citizens in our democracy and in the workplace.

People For Foundation is a nonpartisan, education-oriented, citizens' organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of civic, religious, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, People For Foundation now has hundreds of thousands of members and supporters nationwide. People For Foundation continues to seek to combat discrimination and its effects and to promote quality public education, including classroom diversity, through educational programs and participation in important litigation such as these cases.

INTRODUCTION

Amici believe that racially integrated public elementary and secondary schools and institutions of higher education not only help to overcome our nation's deplorable legacy of slavery, segregation, and discrimination, but also—and more to the point in the present context—enable such schools to fulfill their dual mission of instilling in all students “the values on which our society rests,” *Ambach v. Norwich*, 441 U.S. 68, 76 (1979), and providing them with the skills and knowledge necessary to realize their full potential, *see Wisconsin v. Yoder*, 406 U.S. 205, 239 (1972). To accomplish those ends, educational institutions should be permitted in certain narrowly-limited circumstances to consider race and ethnicity when making educational policy judgments (ranging from school attendance zones to college admissions criteria) that affect the composition of schools and classrooms.

While this Court has been unyielding in its insistence that any use of racial classifications in such decisions must satisfy “strict scrutiny,” *Adarand Constructors, Inc.*

v. Peña, 515 U.S. 200, 222 (1995), so as to “smoke out’ illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool,” *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion), this Court has also been clear that diversity in schools and classes, including racial and ethnic diversity, can be “a goal important enough” to warrant consideration of race in making such decisions. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 722 (2007) (recognizing that the government can have a “compelling” interest in “student body diversity” at the higher education level); *id.* at 782 (recognizing that “diversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue”) (Kennedy, J., concurring); *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003). Such diversity promotes “cross-racial understanding,’ helps to break down racial stereotypes,” precipitates “more enlightening” classroom discussion, promotes better “learning outcomes” and “better prepares students for an increasingly diverse workforce and society.” *Grutter*, 539 U.S. at 330. Those interests are compelling; nothing less than the “nation’s future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples.” *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 (1978) (Powell, J.) (citation and internal quotation marks omitted).

Petitioner and the supporting *amici* seek to overturn these precedents either directly or indirectly by making strict scrutiny fatal in fact in every circumstance. As the duly-authorized representatives of millions of educators and millions more working Americans, we write to

urge this Court to continue to recognize that ensuring diversity at the school and classroom level, including racial and ethnic diversity, is a compelling government interest that can justify the appropriately limited use of race as one of many factors in school admissions and assignment decisions—whether at the primary, secondary or higher education level.

SUMMARY OF ARGUMENT

A. Ours is not a color-blind society, and race still matters. When it comes to public elementary, secondary, and higher education, racial classifications continue to carry great weight—dividing educational opportunities inequitably and distorting perceptions with stereotypes and prejudice. The mission of public elementary, secondary, and higher education is to instill in all students the values on which our society rests and to provide them with the skills and knowledge necessary to realize their full potential. That mission cannot adequately be fulfilled without racially-diverse classrooms. Accordingly, achieving such diversity unquestionably serves a compelling state interest.

B. The societal and educational benefits of racially diverse classrooms in public elementary, secondary, and higher education are well documented. A robust body of recent empirical research confirms that racially diverse schools and classrooms produce tangible and lasting improvements in academic achievement for minority students, while often benefitting nonminority students as well. Classroom contact among students of different races also reduces stereotypes and prejudice, and has been found to be more effective in promoting tolerance and cross-racial understanding

than any other pedagogical method. Racially diverse classrooms therefore offer enduring benefits to a multiracial, democratic society, and its citizens.

ARGUMENT

ACHIEVING DIVERSITY IN PUBLIC SCHOOLS AND INSTITUTIONS OF HIGHER EDUCATION REMAINS A COMPELLING GOVERNMENT INTEREST

Diversity—specifically, “obtaining the educational benefits that flow from an ethnically diverse student body,” *Bakke*, 438 U.S. at 306—is an even more compelling interest today than it was when this Court decided *Bakke* and *Grutter*. Because of the changing demographics of American society, the ability of an individual to function in a racially and ethnically diverse environment is increasingly important. By 2025, the year in which children who are entering kindergarten this year will graduate from high school, over half of all children will be Black, Hispanic, American Indian, Native Hawaiian, or multiracial, and over 42% of the overall population will be from these historically minority racial and ethnic groups.³ By 2042, the U.S. Census Bureau projects that Whites will no longer be a majority of the population.⁴ These demographic shifts reflect an ongoing

³ U.S. Dep’t of Educ., STATUS AND TRENDS IN THE EDUCATION OF RACIAL AND ETHNIC MINORITIES 7 (July 2010); U.S. Census Bureau, *An Older and More Diverse Nation by Midcentury* (Aug. 14, 2008), available at <http://www.census.gov/newsroom/releases/archives/population/cb08-123.html>.

⁴ *An Older and More Diverse Nation by Midcentury*, *supra* note 3.

trend in which “[t]he country as a whole and the workforce in particular is becoming more, not less [racially] diverse.”⁵

Yet, at the same time that American society is becoming more racially diverse, the nation’s public elementary and secondary schools remain highly segregated. The most serious segregation affects Black and Hispanic students: “in both of these populations about two of every five students attend intensely segregated schools.”⁶

Institutions of higher education thus confront a choice in making admissions decisions. They can ignore the persistent inequalities in the elementary and secondary school systems that segregate students by race, depriving all students of an education enriched by exposure to diversity. Or, they can take that reality into account in some limited and measured way by, for example, considering racial and ethnic background as one of many factors used in admitting a truly diverse student body. We detail below why institutions have a compelling interest in choosing the latter course in order to fulfill their two interrelated purposes of

⁵ Julie F. Mead, *Conscious Use of Race as a Voluntary Means to Educational Ends in Elementary and Secondary Education: A Legal Argument Derived from Recent Judicial Decisions*, 8 MICH. J. RACE & L. 63, 134-35 (2002).

⁶ Gary Orfield, *Reviving the Goal of an Integrated Society: A 21st Century Challenge* 12 (January 2009), available at <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/reviving-the-goal-of-an-integrated-society-a-21st-century-challenge/orfield-reviving-the-goal-mlk-2009.pdf>.

instilling in all students “the values on which our society rests,” *Ambach*, 441 U.S. at 76, and providing them with the skills and knowledge necessary to realize their full potential by “expand[ing] their knowledge, broaden[ing] their sensibilities, kindl[ing] their imagination, foster[ing] a spirit of free inquiry, and increas[ing] their human understanding and tolerance,” *Yoder*, 406 U.S. at 239. While these purposes have long been recognized by this Court as those underlying the public elementary and secondary school system, there is no doubt that in the 21st Century they demarcate the aspirations of public higher education as well.

A substantial body of empirical evidence indicates that racially diverse classrooms contribute significantly to the achievement of both of these purposes. Learning in a racially diverse setting furthers students’ cognitive and intellectual development, thus providing an important educational benefit to students of every race. Diverse classrooms also teach students to judge others as individuals, rather than according to stereotypes and prejudices. These benefits provide a powerful catalyst toward integration over the course of a student’s lifetime.

Before turning to that showing, in order to provide a context in which to judge the importance of the benefits produced by racially diverse classrooms, this brief first endeavors to show the extent to which educational opportunities continue to be inequitably apportioned by race. What will emerge from this review is the stark reality that we can predict—based largely on the color of a student’s skin—what kind of schools that student will attend, how well that student will be pre-

pared for college, whether that student will obtain higher education, and what that student's prospects are in the workforce.

A. The Inequitable Apportionment of Educational Opportunities by Race

We doubt that there is anyone connected with these cases—on either side—who does not share the goal of attaining a society in which, in the words of Martin Luther King, Jr., our children “will not be judged by the color of their skin, but by the content of their character.” Notwithstanding intimations to the contrary in the briefs of Petitioner and the supporting *amici*, we still have a long way to go to realize Dr. King's dream. Racial classifications continue to carry great weight in our country, dividing educational opportunities inequitably and distorting perceptions with stereotypes and prejudice.

1. A student's race is, by itself, largely predictive of the racial composition of the elementary and secondary schools he or she will attend. In the 2006-2007 school year, over half of all Black (51.5%) and Hispanic (57.3%) public elementary and secondary students attended public schools in which the combined enrollment of Black, Hispanic, Asian/Pacific Islander, and American Indian/Alaska Native students was at least 75%; in comparison, only 3.3% of White students attended such schools.⁷ Conversely, only 7.9% of Black students and 7.3% of Hispanic students attended public schools in which the enrollment was at least 75%

⁷ U.S. Dep't of Educ., THE CONDITION OF EDUCATION 2009 198 (June 2009).

White, while 62.2% of White students attended such schools.⁸

The magnitude of the problem is drawn into its sharpest relief with public schools that have 99-100% non-White enrollment. In the 2005-2006 school year, these schools enrolled almost 2.5 million—about one out of every twenty—public school students.⁹ Nationwide, these schools enrolled roughly one-sixth of all Black students and one-ninth of all Hispanic students.¹⁰ In the nation's largest metropolitan areas, more than one-third of Black students and about one-fifth of Hispanic students attended these profoundly racially isolated schools.¹¹

This highly concentrated segregation of Black and Hispanic students into majority-minority schools is on the increase. From the 1990-1991 school year to the 2006-2007 school year, the enrollment of Black students in schools with a student body comprised of at least 75% minority students increased by nearly seven percentage points (from 44.8% to 51.5%); over the same time period, the figure for Hispanic students increased

⁸ THE CONDITION OF EDUCATION 2009, *supra* note 7, at 199.

⁹ Gary Orfield & Erica Frankenberg, *The Last Have Become First: Rural and Small Town America Lead the Way on Desegregation* 7 (2008), available at <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/the-last-have-become-first-rural-and-small-town-america-lead-the-way-on-desegregation/frankenberg-last-have-become-first-2008.pdf>.

¹⁰ *Id.*

¹¹ *Id.*

by more than six percentage points (from 50.9% to 57.3%).¹²

2. The trend toward higher levels of concentrated segregation for Black and Hispanic students has ramifications beyond racial isolation. Nearly nine times out of ten, segregated schools with high percentages of students of color are also high poverty schools.¹³ Among all public school students in the 2009-2010 school year, approximately 37% of Black and Hispanic students attended high-poverty schools (defined as public schools where 76% or more students are eligible for the free or reduced-price lunch), while less than 6% of White students attended such schools.¹⁴ This effect is even more pronounced in large urban areas, where 48% of Black and nearly 46% of Hispanic students attend high-poverty schools.¹⁵

Students in such high-poverty, minority-segregated schools often lack adequate access to the necessary components of a high-quality education, such as Advanced Placement courses, science labs, and gifted-and-

¹² THE CONDITION OF EDUCATION 2009, *supra* note 7 at 200.

¹³ Gary Orfield & Chungmei Lee, *Why Segregation Matters: Poverty and Educational Inequality* 16 (2005), available at <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/why-segregation-matters-poverty-and-educational-inequality/orfield-why-segregation-matters-2005.pdf>.

¹⁴ U.S. Dep't of Educ., THE CONDITION OF EDUCATION 2012 172 (May 2012).

¹⁵ *Id.* at 173.

talented programs.¹⁶ Furthermore, although educational research has shown the critical importance of a stable, high-quality teaching force,¹⁷ high-poverty, minority-segregated schools are more likely to be associated with high rates of teacher turnover and fewer experienced and fully certified teachers.¹⁸ For example, fully certified mathematics and science teachers are more prevalent in low-minority schools than in high-minority schools, and fully certified science teachers are more prevalent in low-poverty schools than in high-poverty schools.¹⁹ And more generally, schools with the largest numbers of low-income and minority students are much more likely than other schools to fill vacancies with substitutes, teachers who are not fully certified, or teachers instructing classes in which they are not certified; such schools are also more likely to expand class sizes or cancel course offerings when they cannot find teachers.²⁰

¹⁶ Linda Darling-Hammond, *Educational Quality and Equality: What It Will Take to Leave No Child Behind*, in ALL THINGS BEING EQUAL 39, 55-59 (Brian D. Smedley & Alan Jenkins eds., 2007); Nat'l Sci. Bd., SCIENCE AND ENGINEERING INDICATORS 2004 18, 46-47 (May 2004).

¹⁷ Linda Darling-Hammond, *Teacher Quality and Student Achievement: A Review of State Policy Evidence*, 8 EDUC. POLY ANALYSIS ARCHIVES 1, 31-33 (2000).

¹⁸ C. Kirabo Jackson, *Student Demographics, Teacher Sorting and Teacher Quality: Evidence from the End of School Desegregation*, 27 J. LAB. ECON. 213, 247-49 (2009).

¹⁹ Nat'l Sci. Bd., SCIENCE AND ENGINEERING INDICATORS 2012 1-23 (January 2012).

²⁰ Linda Darling-Hammond & Laura Post, *Inequality in Teaching and Schooling: Supporting High-Quality Teaching and Leadership in Low-Income Schools* in A NOTION AT RISK: PRESERVING PUBLIC EDUCATION AS AN ENGINE FOR SOCIAL MOBILITY 136 (Richard D. Kahlenberg, Ed. 2000).

3. The result of this pervasive segregation is all too predictable. Students who attend high-poverty, minority-segregated primary and secondary schools have poorer educational outcomes and are often not as well equipped to enter institutions of higher education or the workforce. The most obvious measure of this is that Hispanic and Black students are far more likely than White students to drop out of high school: in 2010, the dropout rate was 15.1% for Hispanic students and 8.0% for Black students, as compared to 5.1% for White students.²¹

In addition, Hispanic and Black students are far less likely to pursue higher education. In 2008, about 44% of White 18 to 24-year-olds were enrolled in colleges and universities, as compared to 32% of Blacks and 26% of Hispanics in the same age cohort.²² Those Blacks and Hispanics who do pursue higher education are far less likely to enroll in a four-year college program: in 2008, 45% of Hispanic college students and 36% of Black college students were enrolled in 2-year colleges, while just 28% of White college students were enrolled in such programs.²³

These inequities are only growing worse. Between 1980 and 2011, the gap between Blacks and Whites in the percentage of 25- to 29-year-olds who had attained

²¹ THE CONDITION OF EDUCATION 2012, *supra* note 14, at 240.

²² STATUS AND TRENDS IN THE EDUCATION OF RACIAL AND ETHNIC GROUPS, *supra* note 3, at 121.

²³ U.S. Census Bureau, *School Enrollment in the United States: 2008* 14 (June 2011), available at <http://www.census.gov/prod/2011pubs/p20-564.pdf>.

a bachelor's degree or higher increased by 6 percentage points, from 13% to 19%; and the gap between Whites and Hispanics increased by 9 percentage points, from 17% to 26%.²⁴

4. The fact that Black and Hispanic students are more likely to attend high-poverty, racially-isolated schools, which in turn often leaves them less prepared to pursue higher education, has dire consequences for their prospects for success in the workforce. Black and Hispanic adults face persistently higher rates of unemployment than their White counterparts,²⁵ with much of that unemployment concentrated among those with a high school diploma or less.²⁶

The wage gap between college and high school graduates is at a historical peak.²⁷ The median weekly earnings of a full-time, full-year bachelor's degree holder in 2011 were 64 percent higher than those of a high school graduate.²⁸ College graduates are more consistently employed than high school graduates; they also receive a higher share of nonwage fringe benefits, including sick and vacation pay, employer-paid health insurance, pension contributions, and safe working

²⁴ THE CONDITION OF EDUCATION 2012, *supra* note 14, at 114-15.

²⁵ U.S. Census Bureau, STATISTICAL ABSTRACT OF THE UNITED STATES: 2012 378 (2012).

²⁶ *Id.* at 404.

²⁷ David Autor, *The Polarization of Job Opportunities in the U.S. Labor Market* 5 (April 2010), available at http://www.americanprogress.org/issues/2010/04/pdf/job_polarization.pdf.

²⁸ U.S. Dep't of Educ. & U.S. Dep't of Treas., *The Economic Case for Higher Education* 1 (June 21, 2012).

conditions.²⁹ The rising relative earnings of college graduates are not just due to rising real earnings for college-educated workers, but also to falling real earnings for non-college-educated workers.³⁰

Those with college educations also benefit from higher levels of satisfaction and feelings of accomplishment related to their work. For example, in 2008, 58% of college graduates reported being very satisfied with their jobs, compared to 50% of high school graduates and 40% of individuals without a high school diploma. Similarly, in 2006, 59% of college graduates reported that feeling their work is important and having a sense of accomplishment from their work are the most important characteristics in a job, compared to 36% of high school graduates and 21% of those without a high school diploma.³¹

To put the point plainly, this empirical evidence shows that inequitable opportunities for education at the elementary and secondary level have profound implications for students for the rest of their lives.

5. Even minority students who receive the same tangible educational opportunities as White students may, due to their race, still have very different educational

²⁹ Autor, *supra* note 27, at 5.

³⁰ *Id.* at 6.

³¹ Sandy Baum et al., *Education Pays 2010: The Benefits of Higher Education for Individuals and Society* 19 (2010), available at http://trends.collegeboard.org/downloads/Education_Pays_2010.pdf.

and workforce experiences. People—even children—have been found to react to individuals differently based on their racial perceptions. For example, a 1995 study found that children, when asked to read a list of names and decide whether the named individuals were politicians or criminals, were more likely to decide that names typically associated with Black Americans were the names of criminals.³²

As a society, we have not outgrown these responses. In 2004, researchers studied racial discrimination in the labor market by sending fictitious resumes to employers with randomly-assigned names statistically associated with Black or White individuals. White-associated names led to 50% more callbacks for interviews—a racial gap that was uniform across occupation, industry, and employer size.³³

In sum, ours is not a color-blind society, and race still matters. When it comes to public elementary and secondary education, minority and nonminority students of equal ability do not, in the aggregate, have equal opportunities. In light of this inescapable fact, the mission of public elementary, secondary, and higher education cannot be fulfilled without affirmative efforts to achieve racially diverse classrooms. Such racial diversity in classrooms, as we now

³² Connie T. Wolfe & Steven J. Spencer, *Stereotypes and Prejudice: Their Overt and Subtle Influence in the Classroom*, 40 AM. BEHAV. SCIENTIST 176, 178 (Nov./Dec. 1996).

³³ Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991 (2004).

show, contributes significantly to the fulfillment of the public educational mission.³⁴

B. The Educational and Societal Benefits of Racially Diverse Classrooms

As grim as this portrait of persistent racial disparity and *de facto* segregation may be, there are solutions that we, as a society, can pursue to address it. In what follows, we explain how an impressive body of empirical research has shown that fostering racially diverse classrooms is a fundamental and necessary step in closing minority achievement gaps and promoting productive intergroup relations in society at large.

1. Even when one controls for parental income, education, and other measures of socioeconomic status, there are persistent racial gaps in achievement and other educational outcomes.³⁵ These gaps—particularly in student test scores—have narrowed during peri-

³⁴ As detailed *infra* note 54, merely placing minority and nonminority students in the same school does not in itself necessarily create the conditions for beneficial interactions among students of different races. Accordingly, classroom diversity rather than simply school diversity is essential. See Patricia Gurin et al., *Diversity and Higher Education: Theory and Impact on Educational Outcomes*, 72 HARV. EDUC. REV. 330, 333 (2002).

³⁵ Roslyn Arlin Mickelson & Martha Bottia, *Integrated Education and Mathematics Outcomes: A Synthesis of Social Science Research*, 88 N.C. L. REV. 993, 998 (2010).

ods coinciding with greater school integration;³⁶ conversely, the more recent stagnation in the narrowing of these gaps corresponds with a period when desegregation has effectively stalled or reversed.³⁷

Over the past two decades, social science research has become increasingly sophisticated in its ability to isolate and identify the educational detriments of segregation and the concomitant benefits of integration. As compared to earlier research on the subject, recent scholarship examines more comprehensive data from larger nationally representative samples or state-wide populations, relies on more sensitive measures of student achievement, and uses more advanced statistical methods to control for other possible mediating factors such as family background and school quality.³⁸ Because much of this research has been developed only in the last decade, this Court has not yet had the occasion to fully consider its implications.

Much of this research focuses on the influence of segregation on disparities in mathematics achievement, where racial gaps persist irrespective of socioeconomic factors.³⁹ As a whole, this body of research

³⁶ *Id.* at 1010 (citing Mark Berends & Roberto V. Peñaloza, *Increasing Racial Isolation and Test Score Gaps in Mathematics: A 30-Year Perspective*, 112 TEACHERS COLL. REC. 978, 988-91 (2010)).

³⁷ *Id.*

³⁸ *Id.* at 1005.

³⁹ *Id.* at 998.

unambiguously finds that racial diversity in classrooms positively affects Black students' math achievement,⁴⁰ and, conversely, that racial segregation negatively affects their mathematics performance.⁴¹ This research also presents strong evidence that segregation undermines mathematics achievement among Hispanics and moderately strong evidence that attending diverse schools fosters it.⁴² And these studies provide strong evidence that racial isolation negatively affects the achievement of Whites and that attending diverse schools does not harm their mathematics achievement.⁴³ Together, these findings provide consistent and unambiguous evidence that math learning in racially diverse classrooms is positively related to better academic outcomes for most students—irrespective

⁴⁰ *Id.* at 1032 & n.150 (collecting studies). *See also* Bernadette Gray-Little & Robert A. Carels, *The Effect of Racial Dissonance on Academic Self-Esteem and Achievement in Elementary, Junior High, and High School Students*, 7 J. RES. ON ADOLESCENCE 109, 123, 125-26 (1997) (finding that Black and White 11th graders had the highest achievement levels at racially balanced schools and that school racial composition exerted a more powerful influence on Black student performance than it did on White student performance).

⁴¹ Mickelson & Bottia, *supra* note 35, at 1032 & n.151 (collecting studies) *See also* Berends & Peñaloza, *supra* note 36, at 992-93.

⁴² Mickelson & Bottia, *supra* note 35, at 1034 & nn.162-63 (collecting studies).

⁴³ *Id.* at 1033-34 & nn.156-60 (collecting studies). *See also* Gray-Little & Carols, *supra* note 40, at 123, 125-26.

of the student's age, race, or socioeconomic status.⁴⁴

Similar results obtain for segregation's effect on student's reading and verbal achievement. For example, one recent study found that attending a highly segregated Black school has a "profound" negative effect on a student's verbal achievement, "above and beyond" the effects of a student's own poverty level or racial group.⁴⁵ Another study found that, for each standard deviation increase in the proportion of Black and Hispanic students at a school, average reading gains among first-graders slowed by two-thirds of average monthly gains, with the negative association between classroom composition and reading growth being strongest for Black students.⁴⁶

More integrated school environments are also more effective than segregated ones in helping students graduate. For example, a study of public school students in Cleveland showed that Black, Hispanic, and

⁴⁴ Mickelson & Bottia, *supra* note 35, at 1043. See also Xiaoxia A. Newton, *End-of-High-School Mathematics Attainment: How Did Students Get There?*, 112 TEACHERS COLL. REC. 1064, 1087-88 (2010).

⁴⁵ Geoffrey Borman & Maritza Dowling, *Schools and Inequality: A Multilevel Analysis of Coleman's Equality of Educational Opportunity Data*, 112 TEACHERS COLL. REC. 1201, 1236-39 (2010).

⁴⁶ James Benson & Geoffrey Borman, *Family, Neighborhood, and School Settings Across Seasons: When Do Socioeconomic Context and Racial Composition Matter for the Reading Achievement Growth of Young Children?* 112 TEACHERS COLL. REC. 1338, 1371, 1374-75 (2010).

White students had lower drop-out rates when attending diverse high schools—and that this effect intensified if the students were exposed to diverse school environments before high school.⁴⁷ In other words, a diverse school environment “turn[s] the average high school into an institution that cushions more effectively the negative effects of intensifying non-school problems on graduation chances.”⁴⁸

In 2007, the National Academy of Education reviewed the available research on the impact of racial diversity in schools and concluded that, although “[r]acial diversity per se does not guarantee such positive outcomes, . . . it provides the *necessary conditions* under which other educational policies can facilitate improved academic achievement, improved intergroup relations, and positive long-term outcomes.”⁴⁹ The sum of the empirical evidence is this: if we are to have a society in which children of all races are allowed to realize their academic and intellectual potential, that goal can only be reached by permitting policies that foster racial diversity in elementary, secondary, and higher education.

⁴⁷ Argun Saatcioglu, *Disentangling School- and Student-Level Effects of Desegregation and Resegregation on the Dropout Problem in Urban High Schools: Evidence From the Cleveland Municipal School District, 1977-1998*, 112 TEACHERS COLL. REC. 1391, 1419, 1427 (2010).

⁴⁸ *Id.* at 1429.

⁴⁹ National Academy of Education, *Race-Conscious Policies for Assigning Students to Schools: Social Science Research and the Supreme Court Cases* 45 (2007), available at http://www.naeducation.org/Meredith_Report.pdf.

2. Beyond the well-documented educational benefits of racially diverse classrooms, there are broad societal benefits to be realized from the interracial contact that comes with diverse classroom environments. The theory that interracial contact reduces racial stereotypes and prejudice was first articulated by Gordon W. Allport in his seminal work, *THE NATURE OF PREJUDICE*. Allport posited that racial isolation breeds stereotypes and prejudice, and that “equal status contact between majority and minority groups in the pursuit of common goals” is a critical ingredient in improving relations between members of those groups, especially if such contact “is of a sort that leads to the perception of common interests and common humanity between the members of the two groups.”⁵⁰

Subsequent empirical research has repeatedly and consistently confirmed the common-sense understanding that interracial contact can combat stereotypes and prejudice and make individuals more comfortable relating to members of other racial groups.⁵¹ This research makes plain, however, that the conditions of contact are critical to its impact. In the first place, contact that occurs during key periods of personal development—for example, in a student’s formative years—and that frequently recurs, is far more effective at pro-

⁵⁰ Gordon W. Allport, *THE NATURE OF PREJUDICE* 281 (1954).

⁵¹ See Cynthia Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 *GEO. L. J.* 1, 23-24 (2000) (“[The [contact] hypothesis has been tested, and has usually been confirmed, in a large number of empirical studies using many different methodologies—field studies, survey research, and laboratory experiments—in a wide range of settings.”).

moting tolerance and cross-racial understanding than intermittent contact among persons whose social beliefs and identities are fully formed.⁵²

So too, contact with a number of different people of another race is more effective in breaking down racist attitudes than contact with just a few individuals of another race, because it forces people to “de-categorize” those with whom they are dealing and to treat them as individuals rather than simply as members of a particular racial group.⁵³ This finding highlights the importance of Respondent’s recognition that, in the educational context, meaningful racial diversity requires a “critical mass” of minority students if it is to attain its goals.

Finally, contact must be among individuals of equal status, lest contact serve simply to reinforce rather than reduce racist attitudes and prejudices.⁵⁴

⁵² Such crucial stages of development include not only the college years (of those individuals who advance to that educational level) but, more broadly, children’s very earliest educational experiences. See Susanne E. Dutton et al. *Racial Identity of Children in Integrated Predominantly White, and Black Schools*, 138 J. OF SOC. PSYCHOL. 41, 42 (1998); Richard R. Scott & James M. McPartland, *Desegregation as National Policy: Correlates of Racial Attitudes*, 19 AM. EDUC. RES. J. 397, 399 (Fall 1982).

⁵³ See Marilynn B. Brewer & Norman Miller, *Contact and Cooperation: When Do They Work?*, in ELIMINATING RACISM: PROFILES IN CONTROVERSY 315, 318-20 (Phyllis A. Katz & Dalmas A. Taylor eds., 1988)..

⁵⁴ Thus, for example, the mere fact that a school is integrated, standing alone, does not ensure improved cross-racial relations among students. Rather, the nature and number of inter-

The interactions of diverse students in higher education clearly satisfy this requirement, contrary to the claims of Petitioner’s supporting *amici*.⁵⁵ As this Court recognized in *Grutter*, the benefits that accrue from student-body diversity in higher education are “not theoretical but real.” 539 U.S. at 330. Such diversity fosters the ability to relate to other people, cultures, and viewpoints, which in turn holds tremendous value for our economy, military, and society at large. *Id.* at 330-333.

Given these findings, it is not surprising that interracial cooperative contact among students of different races in our public schools has repeatedly been linked with increased levels of tolerance for children of other races,⁵⁶ and increased likelihood that children of differ-

racial interactions in which students engage are the determinative factors. *See, e.g.*, Janet Schofield, BLACK AND WHITE IN SCHOOL: TRUST, TENSION, OR TOLERANCE? 157, 176-81 (1981) (reporting that desegregation alone generated “a definite, but relatively modest, improvement in relations between black and white students” but that cooperative activities among black and white students generated more significant improvements).

⁵⁵ *See* Brief of *Amici Curiae* Abigail Thernstrom et al. 9-18.

⁵⁶ For example, a 1998 study reports that white fourth graders in a predominantly white school were less likely than white fourth graders in integrated schools to choose a picture of a black child as someone with whom they wanted to be friends, and were more likely than the white students in the integrated schools to choose the picture of the black child as representing the child-among an array of pictures of children-that they disliked most. *See* Dutton, *supra* note 52, at 48.

ent races will become and remain friends.⁵⁷ Such one-on-one contact has been found to be more effective in promoting racial tolerance and cross-race interaction than any other pedagogical method—including a multicultural curriculum.⁵⁸ Moreover, such contact has been linked to the formation of “close, reciprocated [interracial] friendship choices, the kind of friendships that should be [the] most difficult to change,”⁵⁹ and which social scientists have long viewed “as one of most potent agents” for promoting racial tolerance.⁶⁰

In the end, this process—far from resulting in the racial balkanization that Petitioner and the supporting *amici* evoke—leads to precisely the opposite result. As one researcher explained, cooperative interaction between different groups “induces members [of differ-

⁵⁷ Robert E. Slavin, *Cooperative Learning: Applying Contact Theory in Desegregated Schools*, 41 J. SOC. ISSUES 45, 53, 59 (1985) (concluding, based on review of nineteen studies, “that when students work in ethnically mixed cooperative learning groups, they gain in cross-ethnic friendships”).

⁵⁸ See Yehuda Amir, *The Role of Intergroup Contact in CHANGE OF PREJUDICE AND ETHNIC RELATIONS*, IN *TOWARDS THE ELIMINATION OF RACISM* 240, 260, 266, 281 (Phyllis A. Katz ed., 1976) (reporting that direct interpersonal contact with blacks was more effective in changing white ethnic attitudes than participating in an educational program designed to raise awareness of black issues, and that a multicultural curriculum, standing alone, did little to improve the attitude of white students toward blacks).

⁵⁹ Slavin, *supra* note 57, at 55, 59.

⁶⁰ Amir, *supra* note 58, at 272.

ent groups] to conceive of themselves as one (superordinate) group rather than as two separate groups, thereby transforming their categorized representations from us and them to a more inclusive we.”⁶¹

3. Teaching elementary and secondary school students to treat people with whom they are dealing as individuals and to identify common ground is of great consequence to their intellectual development. Social scientists have reported that heterogeneous groups—including groups that differ only with respect to the race of the participants—are better at creative problem-solving than homogeneous groups, due to the benefits of interactions between individuals with different vantage points, skills, or values.⁶² Reflecting that reality, high school students who are asked whether or not racial and ethnic diversity has enhanced their educational experience respond in the affirmative in overwhelming numbers.⁶³ Indeed, some even contend that

⁶¹ Samuel L. Gaertner et al., *How Does Cooperation Reduce Intergroup Bias?*, 59 J. PERSONALITY & SOC. PSYCHOL. 692, 693 (1990).

⁶² Poppy Laretta McLeod et al., *Ethnic Diversity and Creativity in Small Groups*, 27 SMALL GROUP RES. 248, 250 (May 1996) (summarizing “consistent empirical support” for the conclusion that heterogeneous groups—including groups that are diverse only as to race or gender—generate more creative and feasible solutions to problems than do homogeneous groups).

⁶³ Surveys of public high school students in Louisville, Kentucky and Cambridge, Massachusetts, found that over 80% of students believed that their experiences in racially and ethnically diverse high schools “ha[d] helped them to work more effectively with and to get along with members of other races

greater classroom diversity would further improve the educational process.⁶⁴

Other research provides further evidence of the cognitive benefits of interracial interactions in the educational context. For example, in one study, 250 high school students were asked to view a short film showing two boys (one black and one white) engaged in various activities—some positive, some negative and some ambiguous—both together and apart. The students were asked to describe what the boys had done in the film and predict what each would do in various specified situations. White students who had had the opportunity for more interracial classroom contact:

- (1) described [the boys] in ways that were more differentiated, more integrated, and more multi-valent;
- (2) made predictions of the future behavior of [the boys] that were less absolute;
- (3) inferred the presence of attributes in [the boys]

and ethnic groups.” Michal Kurlaender & John T. Yun, *Is Diversity a Compelling Educational Interest?*, in *DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION 132* (Gary Orfield ed., 2001); The Civil Rights Project-Harvard University, *The Impact of Racial and Ethnic Diversity on Educational Outcomes: Cambridge, MA School District 7* (Jan. 2002) (“*Cambridge Study*”), available at <http://www.eric.ed.gov/PDFS/ED462469.pdf>.

⁶⁴ One white high school student voiced his view that “the AP classes would be much better with a more diverse group of students.” *Cambridge Study*, *supra* note 63, at 10. A black student made a similar point, voicing his discomfort as the only black student in his AP history class because “[w]hen we have discussions about the black community, I get offended and intimidated.” *Id.*

with less certainty; and (4) were less likely to perceive [the black boy] as submissive and [the white boy] as domin[⁶⁵a]nt.

The White students' greater ability to describe the film participants in meaningful, individualized ways applied not only to their description of the Black boy but to their description of the White boy as well, "suggest[ing] that interracial contact had a facilitating effect on the development of interpersonal cognitive skills in general."⁶⁶

4. These consequences of classroom diversity offer enduring benefits to a multiethnic, democratic society, and its citizens. Students who learn to interact with individuals of other races in elementary and secondary school are far "more likely to function in desegregated environments in later life. As adults, they more frequently live[] in desegregated neighborhoods, ha[ve] children who attend[] desegregated schools, and ha[ve] close friends of the other race[s] than did adults ... who had attended segregated schools."⁶⁷ They are also more likely

⁶⁵ Bert Meltzer, *The Influence of the Duration of Interracial Classroom Contact on the Development of Interpersonal Cognitive Skills* 133-34 (Doctoral Dissertation, Clark University) (Ann Arbor, Mich., University Microfilms 1969, No. 69-20, 406).

⁶⁶ *Id.* at 133.

⁶⁷ Jomills Henry Braddock II & James M. McPartland, *Social-Psychological Processes that Perpetuate Racial Segregation*, 19 J. BLACK STUDIES 267, 269 (1989) (discussing results of desegregation at the elementary and secondary school level based on national survey of 12,686 individuals).

as adults to interact with individuals of other races than are students educated in racially homogeneous schools.⁶⁸

Two studies of high school students in Louisville, Kentucky, and Cambridge, Massachusetts support these conclusions. These studies demonstrate that racially diverse schools and classrooms produce students who have very high levels of comfort in dealing and working with individuals of other races in later life—which they attribute in large part to their school experiences.⁶⁹

⁶⁸ See, e.g., Lee Sigelman et al., *Making Contact? Black-White Social Interaction in an Urban Setting*, 101 AM. J. SOC. 1306, 1322 (Mar. 1996); Peter B. Wood & Nancy Sonleitner, *The Effect of Childhood Interracial Contact on Adult Antiracial Prejudice*, 20 INT'L J. INTERCULTURAL REL. 1 (1990).

⁶⁹ See *Cambridge Study*, *supra* note 63, at 4, 6-7 (reporting, based on survey of 379 high school seniors in racially diverse school, that 90% of black students and 99% of white students said they were “comfortable” or “very comfortable” working with students of other races, that 94% of both black and white students felt prepared to work with individuals of other races after high school, and that 73% of black students and 82% of white students believed their school experiences had “helped a lot” or “somewhat” in teaching them to work with individuals of other races); Kurlaender & Yun, *supra* note 63, at 111, 124-25, 130 (reporting, based on survey of 1,164 high school juniors in Louisville, Kentucky, that 94.9% of black students and 92.6% of white students reported being “comfortable” or “very comfortable working with students of other races and that over 80% of both black and white students believed their school experience had helped them “a lot” or “somewhat” in working effectively with individuals of other races both in school and in the future).

Three more recent studies further confirm these conclusions. In one study, researchers found that early racial isolation, especially in schools, is significantly associated with a later expressed desire to live around people of the same race.⁷⁰ Another study found that attending a segregated, predominantly Black school was more influential than a student's own race in choosing to live in a predominantly Black neighborhood, indicating that more diverse public schools "may lead in the long run to more integrated neighborhoods over time."⁷¹ Yet another study shows strong associations between high levels of school segregation and later racial isolation in workplaces—a result that held over the long term.⁷²

As the foregoing studies explain, racially diverse classrooms produce these long-range benefits because they break the cycle of segregation in neighborhoods, schools, social networks, and occupations. Equally to the point, they demonstrate that by closing the door on racial diversity in the schools, we open the door to further racial

⁷⁰ Jomills Henry Braddock II & Amaryllis Del Carmen Gonzalez, *Social Isolation and Social Cohesion: The Effects of K-12 Neighborhood and School Segregation on Intergroup Orientations*, 112 TEACHERS COLL. REC. 1631, 1649-51 (2010).

⁷¹ Pat Rubio Goldsmith, *Learning Apart, Living Apart: How the Racial and Ethnic Segregation of Schools and Colleges Perpetuates Residential Segregation*, 112 TEACHERS COLL. REC. 1602, 1626-27 (2010).

⁷² Elizabeth Stearns, *Long-Term Correlates of High School Racial Composition: Perpetuation Theory Reexamined*, 112 TEACHERS COLL. REC. 1654, 1670-74 (2010).

prejudice and discrimination by perpetuating the racial isolation that breeds such prejudice and discrimination.

5. Several of the *amici* supporting the Petitioner argue that a new body of empirical research—in particular, Richard Sander’s work purporting to show a “mismatch” effect from race-conscious admission policies—critically undermines the diversity rationale this Court accepted in upholding the University of Michigan Law School’s admission policy in *Grutter*, 539 U.S. 306 at 327-33.⁷³ The thrust of Sander’s mismatch theory is that, because of race-conscious admission policies, minority students arrive at institutions of higher education less qualified than their White classmates, and, because of their relative lack of qualifications, they fail to achieve at the level they otherwise would at an institution matching their qualifications.⁷⁴ The narrative that emerges from Sander’s work is that policies that promote racial diversity victimize their ostensible beneficiaries by setting them up to fail.

However compelling that narrative may be, it is far more fiction than fact. Unlike the robust evidence of

⁷³ Brief of *Amici Curiae* Cal. Ass’n of Scholars, et al. at 9-10 & n.3; Brief of *Amici Curiae* Richard Sander & Stuart Taylor, Jr. at 2-28; Brief of *Amicus Curiae* Am. Civil Rights Union at 13-14 & n.3; Brief of *Amicus Curiae* S.W. Legal Found., Inc. at 8-9 & n.3. Brief of *Amici Curiae* Pac. Legal Found. et al. at 20-24; Brief of *Amici Curiae* Gail Heriot et al. at 4-24.

⁷⁴ Richard Sander, *A Systematic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 370, 449-54 (2004).

racial diversity’s many educational and societal benefits,⁷⁵ Sander’s “mismatch” hypothesis does not withstand sustained scrutiny. Several critics of Sander’s work have already identified key methodological flaws that—when taken into account—yield results that either undermine Sander’s original conclusion or even support diametrically opposite conclusions.⁷⁶ Indeed, attempts to replicate Sander’s results using different analytic approaches (rather than simply re-running

⁷⁵ See *supra* notes 39 to 72.

⁷⁶ See, e.g., Katherine Y. Barnes, *Is Affirmative Action Responsible for the Achievement Gap Between Black and White Law Students? A Correction, a Lesson, and an Update*, 105 Nw. U. L. Rev. 791, 811 (2011) (concluding that data do not support the mismatch hypothesis and that “mismatched students do not explain the racial gap in student outcomes”); Beverly I. Moran, *The Case for Black Inferiority? What Must be True if Professor Sander is Right: A Response to A Systemic Analysis of Affirmative Action in American Law Schools*, 5 CONN. PUB. INT. L. J. 41, 58 (2005) (“Professor Sander’s arguments fail on their methodology, their logic, and their real-world application.”); Michele L. Dauber, *The Big Muddy*, 57 STAN. L. REV. 1899, 1910 (2005) (reviewing Sander’s analysis and concluding that “Sander has failed to establish that his analysis and methods are sufficiently valid to support his claims”); David Chambers et al., *Affirmative Action in American Law Schools: A Critical Response to Richard Sander’s “A Reply to Critics,”* UNIV. OF MICH. LAW SCHOOL PROGRAM IN LAW AND ECONOMICS WORKING PAPER NO. 60 at 52-53 (2006) (concluding that Sanders failed to “provide convincing evidence for a mismatch effect, for his claim that affirmative action on average hurts black students, or for his prediction that without affirmative action the number of black law students passing the bar each year would not fall by much and might even rise” and stating that “the truth we believe is often the opposite of what Sander posits”).

Sander's analyses on the same data) have thus far failed.⁷⁷ Sander's research therefore fails one of the most basic criteria of reliable social science, which is

⁷⁷ See, e.g., Ian Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 *Stan. L. Rev.* 1807, 1853 (2005) (Assuming for purposes of replication that Sander's admission and enrollment estimates were valid, the researchers concluded that there is "no compelling evidence that the system of affirmative action in place in 1991 reduced the number of black lawyers"); David L. Chambers et al., *The Real Impact of Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander's Study*, 57 *Stan. L. Rev.* 1855, 1888-91 (2004) (Applying Sander's own methods but using data for another law school admissions cycle, these researchers found that without race-conscious admission policies the number of Black lawyers joining the profession would diminish rather than increase. Also, using different and—in the researchers' view more realistic—statistical assumptions, they found that even using the same data as Sanders, ending race-conscious admission policies would result in a marked drop rather than an increase in the number of Black lawyers); Daniel E. Ho, *Why Affirmative Action Does Not Cause Black Students to Fail the Bar*, 114 *Yale. L. J.* 1997, 2004 (2005) (Using the same bar passage data as Sanders, this researcher applied more sophisticated statistical methods and found that Sander's hypothesis that law school tier causes black students to fail the bar could not be replicated); Jesse Rothstein & Albert H. Yoon, *Affirmative Action in Law School Admissions: What Do Racial Preferences Do?*, 75 *U. Chi. L. Rev.* 649, 712 (2008) (Using the same data as Sander but applying more sophisticated statistical methods and finding "no plausible interpretation of the data" under which the elimination of race-conscious admission policies would increase the number of Black lawyers).

that others can replicate its results and confirm its hypothesis using different data and methodologies.⁷⁸

In any event, the notion that some Black and Hispanic students might arrive at college or law school less prepared to excel than their White colleagues does *not* support the overruling of *Grutter* or the dismissal of diversity as a compelling governmental interest. Quite to the contrary, the facts that we have laid out—which show that integrated education at the elementary and secondary level improves minority educational outcomes and preparedness for college—argue for allowing educational institutions at all levels to have *more*, not less, leeway to adopt policies that create racially diverse classrooms and learning environments. The fostering of such environments is, as the research has shown, a “necessary condition[.]” for the success of other educational policies that will improve minority academic achievement and for the improvement the intergroup relations that characterize a flourishing society.⁷⁹

6. This brief has focused primarily on public elementary and secondary education, and even in that context only on the first prong of the strict scrutiny test—*i.e.*, the value of racially diverse classrooms—as opposed to the “narrow tailoring” prong. The enormous societal value of diversity in the elementary and secondary set-

⁷⁸ See Barbara Schneider, *Building a Scientific Community: The Need for Replication*, 106 TEACHERS COLL. REC. 1471, 1473 (2004) (“Without convergence of results from multiple studies, the objectivity, neutrality, and generalizability of research is questionable.”).

⁷⁹ See *supra* note 49, at 45.

ting does not detract from its importance in the higher education setting. Indeed, it is precisely *because* elementary and secondary education remains so segregated that the societal interest in achieving diversity in higher education is all the more compelling. Most students—of all races—come to college without the benefits of cross-racial interactions at earlier stages of their educations. Thus, higher education is often the first opportunity to gain an opportunity to achieve the educational benefits of diversity.

Furthermore, even if we were to devote our efforts as a society to creating more diverse classrooms in elementary and secondary education, interventions in higher education would remain necessary in the short-to medium-term because any serious efforts to address a lack of diversity in elementary and secondary education would take time to become effective and certainly would not reach students entering college now.

Finally, we feel compelled in closing to say a word in response to the contention by Petitioner and the supporting *amici* that plans guaranteeing admission to a fixed percentage of graduating seniors from each high school in the state are a race-neutral alternative that ensures racially diverse classrooms. Quite apart from the practical problem of how such programs could be applied by institutions—whether kindergartens or law schools—that do not draw their students from a particular universe of feeder schools, such percentage plans at the higher education level depend entirely on the existence of segregated high schools, which in turn is bottomed on continued residential segregation. *See Gratz v. Bollinger*, 539 U.S. 244, 303 n.10 (2003) (Ginsburg, J., dissenting). These plans may also create

perverse incentives that “encourage parents to keep their children in low-performing segregated schools, and discourage students from taking challenging classes that might lower their grade point averages.” *Id.*

Although percentage plans can create some measure of diversity, institutions of higher education should not be required, in order to achieve the constitutionally permissible goal of racial diversity, to resort solely to means that rely on segregation in elementary and secondary schools.

* * *

The sum of the matter is this: if we are to “hasten the day when ‘we are just one race,’” *Adarand Constructors*, 515 U.S. at 275 (Ginsburg, J., dissenting), we must ensure that our children are educated in the racially diverse settings that produce significant societal and educational benefits. Accordingly, educational institutions—at the elementary, secondary, and higher education levels—should be allowed to give some consideration to race in order to achieve such diversity. This is not an “illegitimate use[] of race,” *J.A. Croson Co.*, 488 U.S. at 493, but rather is fully justified under the standard of strict scrutiny by society’s compelling interest in the education of all of its children.

CONCLUSION

The judgment of the Court of Appeals—which upholds Respondent’s limited consideration of race as one of many factors in making admissions decisions—should be affirmed.

Respectfully submitted,

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