

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 *AMICUS CURIAE* UNITED NEGRO
COLLEGE FUND IN SUPPORT OF RESPONDENTS**

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INTEREST OF *AMICUS CURIAE*¹

Amicus United Negro College Fund (“UNCF”) was founded in 1944 to increase educational opportunities for African Americans. It is currently the Nation’s oldest and most successful African American educational association and its steadfast commitment to higher education cannot be overstated. UNCF is most often associated with the slogan for its public awareness campaigns – “A Mind Is A Terrible Thing To Waste®” – which serves as a stark reminder of the consequences of failing to meet the educational needs of a significant portion of the population.

UNCF’s founding purpose was to raise general operating funds for its member colleges and universities to lower tuition costs.² UNCF has been enormously successful in this regard. Since its founding, UNCF has raised nearly \$3.3 billion to support its member colleges and universities, and tuition and fees at UNCF members are at least 30% lower than comparable institutions.

Over time, UNCF has expanded its mission to more than 450 programs at a variety of public and private

1. The parties have filed letters, pursuant to Supreme Court Rule 37.3(a), consenting to the blanket filing of *amicus curiae* briefs. No counsel for a party authored this brief in whole or in part, and no person or entity, other than UNCF, its members or its counsel, made a monetary contribution to the preparation or submission of this brief.

2. To become a member of UNCF, an institution must be a historically black, private, accredited, four-year college or university in the United States, founded prior to 1945, and operated solely for educational or scientific purposes. There are currently thirty-eight UNCF members in eleven southern states and Ohio.

colleges and universities throughout the United States, offering scholarship programs, mentoring, summer enrichment, curriculum and faculty development, and leadership development. For example, UNCF administers Ph.D. fellowships, which increase the number of African Americans with doctoral degrees, and a Corporate Scholars Program, which is a combination of scholarship, work experience and mentoring within corporate America. UNCF also has partnered with various corporations to offer scholarships to minority students. To date, UNCF has helped more than 400,000 students earn undergraduate and graduate degrees.

In 1999, UNCF was honored to become the administrator of the Gates Millennium Scholars Program, which was founded by Bill and Melinda Gates. The program's twenty-year goal is to provide 20,000 African American, Hispanic, Native American and Asian American students, who show academic promise and significant unmet financial needs along with demonstrated leadership, with the opportunity to attend undergraduate, graduate and professional schools.³ Between the 2000 and 2010 academic years, the Gates Millennium Scholars Program funded more than 16,000 scholars and awarded more than \$600 million toward higher education costs.⁴

3. Press Release, Bill & Melinda Gates Foundation, Gates Millennium Scholars Program to Announce Inaugural Class of Gates Millennium Scholars (June 1, 2000), <http://www.gatesfoundation.org/press-releases/Pages/inaugural-class-of-gates-millennium-scholars-000601.aspx>.

4. The Gates Millennium Scholars, About GMS: The Gates Millennium Scholars Program, <http://www.gmsp.org/publicweb/aboutus.aspx> (last visited Aug. 8, 2012).

Throughout its history, UNCF has enjoyed widespread support by Americans of all races and backgrounds. Significantly, it has been honored by a tradition of support from Presidents of the United States, beginning with President Franklin D. Roosevelt, who supported the first annual fundraising campaign;⁵ President John F. Kennedy, who donated his Pulitzer Prize funds awarded for his book, *Profiles in Courage*, to UNCF;⁶ President George H.W. Bush, who hosted the reception to help UNCF launch its most ambitious capital campaign in 1990;⁷ Presidents Bill Clinton and George W. Bush, who helped raise \$3.8 million to support the rebuilding efforts of several UNCF-member colleges and universities along the Gulf Coast that were destroyed by Hurricane Katrina;⁸ and President Barack Obama, who donated to UNCF part of the \$1.4 million he received in conjunction with his 2009 Nobel Peace Prize.⁹

UNCF has sought to remain active before this Court when significant issues relating to education have

5. 2 ABC-CLIO, *PHILANTHROPY IN AMERICA: A COMPREHENSIVE HISTORICAL ENCYCLOPEDIA* 480 (Dwight F. Burlingame ed., 2004).

6. *Id.*

7. *Id.*

8. *Former Presidents Bush and Clinton Honored at UNCF's 63rd Anniversary Dinner for Their Philanthropic Work*, PR Newswire, Mar. 10, 2007, <http://www.prnewswire.com/news-releases/former-presidents-bush-and-clinton-honored-at-uncfs-63rd-anniversary-dinner-for-their-philanthropic-work-51665102.html>.

9. Brian Montopoli, *Obama Donates Nobel Prize Money to 10 Charities*, CBS News, Mar. 11, 2010, http://www.cbsnews.com/8301-503544_162-20000311-503544.html.

arisen. UNCF filed an *amicus curiae* brief in *Grutter v. Bollinger*, 539 U.S. 306 (2003), urging this Court to sustain the constitutionality of the University of Michigan Law School’s consideration of race in making admissions decisions. More recently, UNCF also joined an *amicus curiae* brief in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007), encouraging this Court to sustain the constitutionality of two local school boards’ efforts to integrate their public schools.

Given the historical mission of UNCF and its role over the past 68 years in promoting access to higher education for African American and other minority students, UNCF has a strong interest in the proper resolution of the questions presented in this case.

SUMMARY OF ARGUMENT

As this Court has consistently recognized, education plays a unique role in the future of our great Nation. In *Brown v. Board of Education*, the Court noted that education “is the very foundation of good citizenship.” *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954). In *Plyler v. Doe*, 457 U.S. 202 (1982), this Court referred to “the pivotal role of education in sustaining our political and cultural heritage.” *Plyler*, 457 U.S. at 221. Most recently, in *Grutter*, this Court applied these principles to higher education, writing: “Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.” *Grutter*, 539 U.S. at 332.

The Court’s statements acknowledging the critical role of education in democracy, which is grounded in

voting and community involvement, are supported by objective facts. In the 2008 U.S. presidential election, there was a 32 percentage point gap between the voting rates of graduates of four-year colleges and high school graduates in the 25-44 age group, with college graduates being the more likely to vote.¹⁰ In 2009, college graduates were more likely to volunteer in the community than high school graduates.¹¹

Education is also a key driver of personal income. Median earnings of bachelor's degree recipients working full-time in 2008 were \$55,700, \$21,900 more than median earnings of high school graduates.¹² Over a lifetime, a typical college graduate earns 66% more than the typical high school graduate.¹³ Moreover, top-ranked public universities like the University of Texas at Austin (UT) are uniquely situated to play a role in increasing educational opportunities. In 2007-2008, 37.5% of incoming college freshmen matriculated at a public four year university, while only 16.5% matriculated at a private nonprofit four year university.¹⁴

10. Sandy Baum, Jennifer Ma & Kathleen Payea, *Education Pays 2010: The Benefits of Higher Education for Individuals and Society*, at 33 (College Board Advocacy & Policy Ctr. Trends in Higher Educ. Series, 2010) (hereinafter "*Education Pays*"), available at http://trends.collegeboard.org/downloads/Education_Pays_2010.pdf.

11. *Id.* at 32.

12. *Education Pays*, *supra* note 10, at 11.

13. *Id.* at 12.

14. *Almanac of Higher Education 2011: Who are the Undergraduates?*, CHRONICLE OF HIGHER EDUC., Aug. 26, 2011, at 36.

It is against this background of national importance that this Court must consider any attempts to roll back the progress of minorities and the progress of our Country under the guise of “equal” treatment. The *Grutter* Court, in holding that the University of Michigan’s race-conscious admissions policy was narrowly tailored to achieve the compelling interest of diversity, expressed its hope that the need for affirmative action would one day end, writing:

It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved.

Grutter, 539 U.S. at 343 (citation omitted). UNCF shares the *Grutter* Court’s belief that student body diversity will, sometime soon, occur naturally without the need for race-conscious admission policies. However, as fully demonstrated below, because of the effects of centuries of slavery, segregation, discrimination and unequal opportunity based on race, that day is not today. And for the betterment of our Nation, race-conscious admissions in higher education remain necessary to further the compelling state interest of student body diversity.¹⁵

15. Campus diversity is not the only compelling government interest that can withstand strict scrutiny to support race-conscious decision making in higher education. In *Regents of University of California v. Bakke*, 438 U.S. 265 (1978), four Justices found that the government may have a compelling interest

ARGUMENT**IT IS NOT IN THE NATION'S INTEREST TO END
RACE-CONSCIOUS ADMISSIONS IN HIGHER
EDUCATION****A. THE EFFECTS OF STATE-SPONSORED
DISCRIMINATION ARE NOT MERE
HISTORICAL FOOTNOTES**

It is impossible to evaluate colleges and universities' compelling interest in student body diversity without recognizing the primary reasons that diversity does not occur naturally. There has been a long history of state-sponsored and private segregation and discrimination in the United States against African Americans, Native Americans, Hispanics and Asian Americans. This segregation and discrimination has, in turn, limited educational and employment opportunities for these groups.

**1. A Brief History of State-Sponsored
Discrimination Against African Americans**

For the first one hundred years of this Nation's existence, the vast majority of African Americans were

in using race "to remedy disadvantages cast on minorities by past racial prejudice." *Id.* at 325 (joint opinion of Brennan, White, Marshall and Blackmun, JJ., concurring in judgment in part and dissenting in part). UNCF agrees that, in addition to campus diversity, remediation is also a compelling interest. Moreover, *Grutter* does not foreclose remediation for past discrimination as a compelling government interest for race-conscious decision making in higher education. *Grutter*, 539 U.S. at 328.

barred, by law, from educational institutions throughout the United States. At the time of the Civil War, 92% of the population of African Americans in this country were enslaved. Under many then-existing laws, they were legally prohibited from obtaining any type of education.¹⁶

It was not until the 1870s that a true public primary school system and, to a lesser extent, a secondary school system for African Americans began to develop in the South. Those systems were almost entirely segregated and remained so for nearly a century.¹⁷ As late as 1934, only 39 public secondary schools for African Americans in the South were accredited, including only two in Alabama, one in South Carolina, and none in Mississippi, which had the largest percentage of African-American citizens of any State.¹⁸ In the 1940s, per-pupil spending on education in the South for African-American children averaged about one-third of that for white students and the school year was one to three months shorter.¹⁹

16. JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS 138-166 (8th Ed. 2000); HENRY N. DREWRY & HUMPHREY DOERMANN, STAND AND PROSPER: PRIVATE BLACK COLLEGES AND THEIR STUDENTS 13-15, 23 (2001).

17. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877 365-368 (1988); FRANKLIN & MOSS, *supra* note 16, at 445-55.

18. DREWRY & DOERMANN, *supra* note 16, at 72.

19. SUSAN T. HILL, THE TRADITIONALLY BLACK INSTITUTIONS OF HIGHER EDUCATION 1860-1982 11 (1985); S. EDUC. FOUND., REDEEMING THE AMERICAN PROMISE: REPORT OF THE PANEL ON EDUCATIONAL OPPORTUNITY AND POSTSECONDARY DESEGREGATION (1995), *available at* <http://www.southerneducation.org/getattachment/fb3092fa-160f-424e-9a25-b386ad0826e7/Redeeming-the-American-Promise-Full-Report.aspx>.

Finally, in 1954, this Court declared in *Brown v. Board of Education*, 347 U.S. 483 (1954), that segregated schools were inherently unequal, and thus racial segregation and discrimination in education could no longer be defended against constitutional challenge as “separate but equal.” *Id.* at 495. Unfortunately, transforming that decree into reality has proved difficult at all levels. See *United States v. Fordice*, 505 U.S. 717, 729, 732-33 (1992) (holding that a State must take affirmative steps to eradicate prior de jure segregation, and “that the adoption and implementation of race-neutral policies alone [do not] suffice to demonstrate that the State has completely abandoned its prior dual system”); *Florida ex rel. Hawkins v. Bd. of Control*, 350 U.S. 413, 414 (1956) (per curiam) (applying *Brown* to higher education and holding that an African-American law school applicant was “entitled to prompt admission under the rules and regulations applicable to other qualified candidates”); *Lucy v. Adams*, 350 U.S. 1, 1-2 (1955) (per curiam) (restraining the University of Alabama from denying admission to petitioners based solely on race); *Meredith v. Fair*, 305 F.2d 343, 344, 346 (5th Cir. 1962) (ordering injunction where plaintiff was denied admission to University of Mississippi solely based on his race).

2. Lingering Effects of Discrimination: Inferior Primary and Secondary Schools

In the 58 years since *Brown*, the educational system in America has undergone a remarkable transformation. Notwithstanding the laudable progress made to date, large numbers of minority school children, especially African-American youngsters in large urban and smaller rural school settings, remain stuck in poorly-funded,

racially segregated schools.²⁰ In 2009, 74% of African-American children and 78% of Latino children attended schools in which minorities made up a majority of the student body.²¹

Moreover, significant achievement gaps between minority and white students persist, ranging between 15 and 30 percentage points.²² At the current rate of progress, the gap still could easily take decades to close.²³ Unfortunately, the schools with the most limited resources, the least experienced and most poorly paid teachers and the parents least able to advocate effectively for their children, are the same ones attended by minority and low-income families. It is a simple fact that a low-

20. See LAURA LIPPMAN, SHELLEY BURNS & EDITH McARTHUR, NAT'L CTR. FOR EDUC. STATISTICS, *URBAN SCHOOLS: THE CHALLENGE OF LOCATION AND POVERTY* v-xii, 75-80 (1996), *available at* <http://nces.ed.gov/pubs/96184all.pdf>.

21. NAT'L CTR. FOR EDUC. STATISTICS, *DIGEST OF EDUCATION STATISTICS 2011* 168, tble. 102 (2012), *available at* <http://nces.ed.gov/pubs2012/2012001.pdf>.

22. NANCY KOBER, NAOMI CHUDOWSKY & VICTOR CHUDWOSKY, CTR. ON EDUC. POLICY, *STATE TEST SCORE TRENDS THROUGH 2008-2009, PART 2: SLOW AND UNEVEN PROGRESS IN NARROWING GAPS* 4 (2010), *available at* <http://www.cep-dc.org/displayDocument.cfm?DocumentID=334>. The term "achievement gap" refers to the disparity in academic performance as measured by standardized test scores, grades, high school graduation rates and post-secondary enrollment and completion rates.

23. *Id.*

income, less well-prepared student has the least chance of gaining access to college.²⁴

While many African-American children who attended the substandard segregated schools of the 1950s have seen their children not only attend integrated primary and secondary schools, but also have the opportunity to attend colleges and universities, as late as 2007, virtually half of the African-American freshmen matriculated at U.S. colleges and universities were first-generation college students.²⁵ By stark contrast, in that same year, 87% of white college students had at least one relative who attended college.²⁶ Even when they do attend college, African Americans are overrepresented in public two-year universities and underrepresented in public doctorate-granting institutions.²⁷

24. See CHILDREN'S DEFENSE FUND, PROGRESS AND PERIL: BLACK CHILDREN IN AMERICA 27-28, 79-97 (1993), available at http://diglib.lib.utk.edu/cdf/data/0116_000050_000286/0116_000050_000286.pdf.

25. Inst. for Higher Educ. Policy, *Mini Brief: A Snapshot of African Americans in Higher Education* (Feb. 25, 2010), available at http://www.ihep.org/assets/files/publications/a-f/BLACK_HISTORY_MONTH_2010_MINI_BRIEF.pdf; 1 MICHAEL T. NETTLES & LAURA W. PERNA, THE AFRICAN AMERICAN EDUCATION DATA BOOK 265 tbl. 5 (1997).

26. Victor B. Saenz, Sylvia Hurtado, Doug Barrera, De'Sha Wolf & Fanny Yeung, *First in My Family: A Profile of First-Generation College Students at Four-Year Institutions Since 1971*, at 1, 11 & tbl. 1 (2007), available at <http://heri.ucla.edu/PDFs/pubs/TFS/Special/Monographs/FirstInMyFamily.pdf>.

27. *Almanac of Higher Education 2011: Enrollment by Race of Students and Type of Institution*, CHRONICLE OF HIGHER EDUC., Aug. 26, 2011, at 44.

3. Lingering Effects of Discrimination: Underrepresentation in Government And Military Leadership Positions

Equal access to opportunity remains a largely unrealized aspiration, as illustrated by minority underrepresentation in key leadership roles in the government and the military.

At all levels of government, the proportion of minority elected officials trails far behind minorities' share of the electorate. In Congress, 85% of lawmakers are white and African Americans do not hold a single Senate seat.²⁸ African Americans and Latinos comprise fewer than 10% of all state senators and hold only three governorships.²⁹ Overall, African Americans and Latinos hold only 3%³⁰

28. Congressional Demographics: Ethnicity, CONGRESS.COM, <http://www.congress.org/congressorg/directory/demographics.tt?catid=ethnic> (last visited Aug. 8, 2012).

29. Directory of Latino Elected Officials, NALEO EDUCATIONAL FUND, <http://www.naleo.org/directory.html> (last visited Aug. 8, 2012); David A. Bositis, *Resegregation in Southern Politics?*, Research Brief, JOINT CTR. FOR POLITICAL & ECON. STUDIES (Nov. 2011), available at <http://www.jointcenter.org/sites/default/files/upload/research/files/Resegregation%20in%20Southern%20Politics.pdf>.

30. Currently, 5,850 Latinos serve in elected offices nationwide. *Id.* In addition, approximately 10,500 African Americans serve in elected office at all levels of government. National Roster of Black Elected Officials, Fact Sheet at 1, JOINT CENTER FOR POLITICAL AND ECONOMIC STUDIES (Nov. 2011), available at <http://www.jointcenter.org/sites/default/files/upload/research/files/National%20Roster%20of%20Black%20Elected%20Officials%20Fact%20Sheet.pdf>. During its last count of popularly

of elected offices in the United States.³¹ At present, not a single Native American judge sits on the federal bench.³² In total, minorities currently make up only approximately 12% of state judiciaries.³³

Racial and ethnic representation disparities also exist in U.S. military leadership. Despite the widespread recognition that diverse military leadership is critical to U.S. national security,³⁴ only 16% of all officers were African American or Latino in 2006.³⁵ At the highest levels

elected officials, the Census Bureau determined that the 85,006 governments in the United States had 513,200 elected officials. 1992 Census of Government – Popularly Elected Officials, Bureau of the Census (1995) *available at* http://www.census.gov/prod/2/gov/gc/gc92_1_2.pdf.

31. Fed. Judicial Ctr., Judges of the United States Courts: Biographical Directory of Federal Judges, <http://www.fjc.gov/public/home.nsf/hisj> (last visited Aug. 8, 2012).

32. *Id.* (follow “Diversity on the Bench” hyperlink).

33. ABA, Standing Committee on Judicial Independence: National Database on Judicial Diversity in State Courts, <http://apps.americanbar.org/abanet/jd/display/national.cfm> (last visited Aug. 8, 2012).

34. *See* Brief for Lt. Gen. Julius W. Becton, Jr., et al. as Amici Curiae Supporting Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241).

35. NELSON LIM, JEFFERSON P. MARQUIS, KIMBERLY CURRY HALL, DAVID SCHULKER & XIAOHUI ZHUO, RAND CORP., OFFICER CLASSIFICATION AND THE FUTURE OF DIVERSITY AMONG SENIOR MILITARY LEADERS: A CASE STUDY OF THE ARMY ROTC 2 (2009), *available at* http://www.rand.org/pubs/technical_reports/2009/RAND_TR731.pdf.

of leadership,³⁶ African Americans and Latinos officers comprised 4% and 1%, respectively.³⁷ By contrast, African-Americans and Latinos make up 24% and 7%, respectively, of the lower-level, enlisted military ranks.³⁸

4. Lingering Effects of Discrimination: Underrepresentation in Key Private Sector Leadership Positions

This lack of representation extends beyond the public sector. The dearth of diversity persists in the boardrooms and among the executive ranks of the nation's leading companies, even though more diverse corporate boards, on average, are linked with better stock performance and greater profitability.³⁹ Of the 5,463 corporate board seats available in 2011 on *Fortune 500* corporate boards, minorities only held approximately 10%.⁴⁰ More specifically, African Americans held 4.6% of board seats

36. The equivalent of an Army Brigadier General (O-5 rank) and above.

37. LIM, *supra* note 35, at 2.

38. *Id.*

39. David A. Carter, Frank D'Souza, Betty J. Simkins & W. Gary Simpson, *The Gender and Ethnic Diversity of US Boards and Board Committees and Firm Financial Performance*, 18 CORP. GOVERNANCE 396, 410-11 (2010); Amy J. Hillman, Albert A. Cannella, Jr., & Ira C. Harris, *Women and Racial Minorities in the Boardroom: How Do Directors Differ?*, 28 J. MGMT., 747 (2002).

40. ALLIANCE FOR BD. DIVERSITY, MISSING PIECES: WOMEN AND MINORITIES ON *FORTUNE 500* BOARDS 9 app. 2 (2011), available at http://theabd.org/Missing_Pieces_Women_and_Minorities_on_Fortune_500_Boards.pdf.

Asian and Pacific Islanders held 2.1% of board seats, and Latinos held 3% of board seats.⁴¹ Further, minorities were virtually locked out of board leadership roles, as whites held 97% of board chair positions.⁴² In 2011, *Fortune 500* Chief Executive Officers included only seven African Americans⁴³ and six Latinos.⁴⁴

5. Lingering Effects of Discrimination: Underrepresentation in Academia

A diverse faculty provides all students with the opportunity to directly participate in a multicultural learning environment and minority students with visible role models.⁴⁵ The mission of cultivating an understanding and appreciation for diversity remains especially important for professional schools, whose graduates will ultimately interact with and serve a diverse population. Unfortunately, despite the acknowledged value of diversity in higher education, major diversity gaps persist in academic institutions.

41. *Id.*

42. *Id.* at 10 app 3.

43. RICHARD L. ZWEIGENHAFT & G. WILLIAM DOMHOFF, THE NEW CEOs: WOMEN, AFRICAN AMERICAN, LATINO, AND ASIAN AMERICAN LEADERS OF FORTUNE 500 COMPANIES 38 tbl. 3.1 (2011).

44. *Id.* at 54 tbl. 4.1 (2011).

45. See E. Thomas Sullivan, The Importance of a Diverse Faculty, University of Minnesota Symposium: Recruiting, Retaining, and Advancing Faculty of Color (Nov. 19, 2004), <http://www.academic.umn.edu/img/assets/12261/nov19ets.pdf>.

Across all higher education faculty, minorities account for approximately 18% of faculty.⁴⁶ Specifically, African Americans are 5.4% of faculty, Latinos are 3.8% of faculty and Native Americans and Native Alaskans are .5% of faculty.⁴⁷ For the top twenty-five national universities listed in U.S. News & World Report's 2012 rankings of Best Colleges, African Americans and Latinos comprise 3.1% and 2.8% of faculty, respectively.⁴⁸

Faculty diversity woes plague the nation's best graduate schools as well. Minorities account for approximately 15% of all ABA-accredited law school faculty.⁴⁹ Minority representation among faculty dwindles to a mere 11% for the top twenty-five law schools.⁵⁰ In 2008, African-American, Native American and Latino faculty were only 7.3% of medical school faculty at

46. NAT'L CTR. FOR EDUC. STATISTICS, *supra* note 21.

47. *Id.*

48. Data were obtained using custom report of fall 2009 staff survey data from the U.S. Department of Education, National Center for Educational Statistics, Integrated Post Secondary Education Data Center, available at <http://nces.ed.gov/ipeds/datacenter/>.

49. ABA, Legal Education Statistics from ABA-Approved Law Schools, Law School Staff by Gender and Ethnicity (Mar. 6, 2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/ls_staff_gender_ethn.authcheckdam.pdf.

50. LAW SCH. ADMISSION COUNCIL & ABA, ABA-LSAC OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS (2012 ed. 2011), *available at* https://officialguide.lsac.org/release/OfficialGuide_Default. Rankings are by determined reference to the 2013 U.S. News and World Report graduate school rankings.

both elite medical schools⁵¹ and nationwide.⁵² Equally concerning is minority representation among U.S. business school faculty. African Americans, Latinos and Native Americans and Native Alaskans account for only 6.5% of all faculty at U.S. AACSB-accredited schools.⁵³ At the fifty best business programs, that representation falls to approximately 4.8%.⁵⁴ African Americans, Latinos and Native Americans comprise 2.36%, 2.26% and 0.17%, respectively.⁵⁵

6. Lingering Effects of Discrimination: Underrepresentation in White-Collar Jobs

Minorities are also noticeably absent from traditional white-collar jobs. African-American, Latino, Native American and Alaska Native physicians made up only

51. Elite medical schools are the top twenty-five medical research schools as determined by reference to 2013 U.S. News and World Report graduate school rankings.

52. ASS'N OF AM. MED. COLLS., STRIVING TOWARD EXCELLENCE: FACULTY DIVERSITY IN MEDICAL EDUCATION 3 fig. 1 (2009), *available at* <https://members.aamc.org/eweb/upload/Striving%20Towards%20Excellence%20Faculty%20Diversity%20in%20Med%20Ed.pdf>.

53. ASS'N TO ADVANCE COLLEGIATE SCH. OF BUS. (AACSB), BUSINESS SCHOOL DATA TRENDS AND 2012 LIST OF ACCREDITED SCHOOLS 31 (2012), *available at* <http://www.aacsb.edu/publications/businesseducation/2012-Data-Trends.pdf>.

54. ASS'N TO ADVANCE COLLEGIATE SCH. OF BUS. (AACSB), FACULTY ETHNICITY – TOP 50 SCHOOLS (2012) (on file with author). Rankings are determined by reference to the 2013 U.S. News and World Report graduate school rankings.

55. *Id.*

9.2% of all physicians in 2010.⁵⁶ Approximately 12% of all attorneys are racial or ethnic minorities.⁵⁷ Minorities are also underrepresented in the accounting profession, constituting only 8% of Certified Public Accountants in 2008.⁵⁸

This underrepresentation among white-collar jobs accounts for a significant loss of income. For example, in 2010, 30.3% of whites were college graduates, compared to 19.8% of African Americans and 13.9% of Latinos.⁵⁹ That same year, the average African American family median income was \$22,552 lower than that of non-Hispanic white families.⁶⁰

56. AMA, PHYSICIAN CHARACTERISTICS AND DISTRIBUTION IN THE US (2012).

57. ABA, Lawyer Demographics, http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/lawyer_demographics_2012_revised.authcheckdam.pdf (last visited Aug. 8, 2012).

58. Louis Grumet, MINORITIES IN THE ACCOUNTING PROFESSION: MUCH REMAINS TO BE DONE, CPA J., Jan. 1, 2008, at 7, *available at* <http://www.nysscpa.org/cpajournal/2008/108/perspectives/p7.htm>.

59. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2012, tbl. 229 (Educational Attainment by Race and Hispanic Origin: 1970 to 2010), *available at* <http://www.census.gov/compendia/statab/2012/tables/12s0229.pdf>.

60. CARMEN DENAVAS-WALT, BERNADETTE D. PROCTOR & JESSICA C. SMITH, U.S. CENSUS BUREAU, INCOME POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2010, at 6 tbl. 1 (2011), *available at* <http://www.census.gov/prod/2011pubs/p60-239.pdf>.

It is against this backdrop of discrimination and its tangible lingering effects – which cannot be relegated to a mere footnote in our history – that race-conscious decision making in higher education must be reviewed.

B. THE RAMIFICATIONS OF ELIMINATING RACE-CONSCIOUS DECISION MAKING IN HIGHER EDUCATION ARE SIGNIFICANT

1. Eliminating Race-Conscious Decision Making Will Decrease Student Body Diversity

Recent studies indicate that state prohibitions on race-conscious admissions preferences would widen the minority educational attainment gap in higher education, resulting in significant decreases in minority representation in both undergraduate and graduate programs, especially elite ones.⁶¹ Where the use of race-conscious decisions is flatly prohibited in admissions, underrepresented minorities are less likely to obtain an undergraduate degree from a selective institution.⁶² One 2010 study suggested that banning affirmative action at a selective public institution would decrease African American enrollment from 5.79% to 4.05% (a 30% decline),

61. Currently seven states – Arizona, California, Florida, Michigan, Nebraska, New Hampshire and Washington – prohibit the use of affirmative action in admissions.

62. Peter Hinrichs, *The Effects of Affirmative Action Bans on College Enrollment, Educational Attainment, and the Demographic Composition of Universities* (Oct. 28, 2010), *available at* http://www.georgetown.edu/faculty/plh24/hinrichs_aff_action.pdf. This study defined a “selective institution” as one that ranked in the top 50 on the 1995 U.S. News and World Report rankings.

decrease Hispanic enrollment from 7.38% to 5.35% (a 27.5% decline) and decrease Native American enrollment from 0.51% to 0.04% (a 92% decline).⁶³

Affirmative action bans have a similar impact on graduate education. The bans in Texas, California, Florida and Washington reduced overall first-year minority graduate enrollment by 12%.⁶⁴ Science and engineering programs are among the hardest hit, with decreases in the proportion of underrepresented minority students in engineering and natural sciences graduate programs of 26% and 19%, respectively.⁶⁵ Selective institutions of law and medicine experienced similar reductions in minority enrollment rates.⁶⁶

The share of underrepresented minorities at top public institutions also has declined in most states that have banned affirmative action in post-secondary education. The University of California system was banned from using race conscious admissions beginning in 1998 and its top public institutions immediately experienced a sharp

63. *Id.*

64. LILIANA M. GARCES, CIVIL RIGHTS PROJECT THE IMPACT OF AFFIRMATIVE ACTION BANS IN GRADUATE EDUCATION 4 (2012), available at <http://civilrightsproject.ucla.edu/research/college-access/affirmative-action/the-impact-of-affirmative-action-bans-in-graduate-education/> (follow “The Impact of Affirmative Action Bans in Graduate Education” hyperlink under “Related Documents” inset).

65. *Id.*

66. *Id.*

decline in black student admissions.⁶⁷ The University of California at Berkeley saw underrepresented minority student share of admissions fall from 26.3% to 14.4% and the University of California at Los Angeles saw underrepresented minority student share of admissions fall from 22.2% to 15.7%.⁶⁸ Top public schools in Texas also experienced declines in student minority enrollment following bans on affirmative action.⁶⁹ By one estimate, the end of affirmative action in Texas in 1996 lowered the Hispanic admission rate by 15% and the black admission rate by 30% at Texas A&M in 1997 as compared to 1995.⁷⁰ UT-Austin's decline continued after 1997, with estimates that the black and Hispanic admission rates fell 5-7% relative to whites and Asians between 1995 and 1997.⁷¹

67. David Card & Alan B. Krueger, *Would the Elimination of Affirmative Action Affect Highly Qualified Minority Applicants? Evidence from California and Texas*, 58 INDUS. & LAB. REL. REV. 416, 420-21 (2005) [hereinafter *Evidence from California and Texas*] (noting that the “halting of affirmative action had an immediate impact on minority admissions at the University of California” and that the admission rates for black applicants fell from 45-55% between 1995-1997 to 20-25% between 1998-2001). In 2001, California adopted a “Top X Percent” rule, discussed *infra* Part C.1.

68. Mark C. Long, *Affirmative Action and Its Alternatives in Public Universities: What Do We Know?*, 67 PUB. ADMIN. REV. 315, 320 (2007).

69. In Texas, affirmative action was banned following the Fifth Circuit's decision in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), *abrogated by Grutter v. Bollinger*, 539 U.S. 306 (2003).

70. *Evidence from California and Texas*, *supra* note 67, at 422.

71. *Id.*

Finally, even in those schools experiencing a rebound in minority representation following affirmative action bans, much of the rebound has been in absolute numbers, rather than increased share, and has been attributed to increasing numbers of minorities in the general population.⁷²

Elimination of affirmative action has a dramatic effect on the number of minority students considering attending college. One study found that the elimination of affirmative action in Texas led to a statistically significant decline in the numbers of Hispanic and black students taking a college entrance exam.⁷³ The results continued to show a statistically significant decline, even accounting for the implementation of the Top Ten Percent Plan in Texas.⁷⁴

Another study found that underrepresented minorities in California and Texas significantly lowered the number of entrance score reports (e.g. SATs and ACTs) they sent to in-state, public colleges following bans on affirmative action.⁷⁵ The study concludes that a student's probability

72. Long, *supra* note 68, at 320-21. In a separate study, Mark C. Long and Marta Tienda conclude that the Top 10 percent Plan combined with varied weights for admissions "did not fully compensate for the effects of the *Hopwood* decision in lowering the odds of admission for Blacks and Hispanics." *Winners and Losers: Changes in Texas University Admissions Post-Hopwood*, 30 EDUC. EVALUATION & POL'Y ANALYSIS 255, 268 (2008).

73. Lisa M. Dickson, *Does Ending Affirmative Action in College Admissions Lower the Percent of Minority Students Applying to College?* 25 ECON. EDUC. REV. 109, 114-16 (2006).

74. *Id.* at 116.

75. Mark C. Long, *College Applications and the Effect of Affirmative Action*, 121 J. ECONOMETRICS 319, 325 (2004).

of acceptance weighs heavily on the student's application decisions and that "minority applicants will substantially reduce the number of their score reports sent to top-tier colleges after the elimination of affirmative action policies."⁷⁶ Similarly, in Washington, the rates of admission of minority students to that state's top research schools decreased as a result of a drop in applications submitted by minority students.⁷⁷

The lack of diversity at selective schools will negatively impact the other students on those campuses, as a number of studies show that the benefits to a diverse education extend to the entire student body.⁷⁸ Recent studies continue to provide evidence that diversity in a student body improves teamwork and leadership skills, reduces prejudice and promotes civic development.⁷⁹ These

76. *Id.* at 340.

77. *Id.*

78. Faye J. Crosby, Aarti Iyer, Susan Clayton, & Roberta A. Downing, *Affirmative Action: Psychological Data and the Policy Debates*, 58 AM. PSYCHOLOGIST 93, 99 (2003) (discussing the benefits of a diverse undergraduate experience). There is also evidence that a diverse student body increases academic skills and cognitive functioning. See Nida Denson & Mitchell J. Chang, *Racial Diversity Matters: The Impact of Diversity-Related Student Engagement and Institutional Context*, 46 AM. EDUC. RES. J., 322 (2008) (discussing improved learning and educational experiences from a racially diverse college where students are more likely to be engaged in cross-racial interaction); Nicholas A. Bowman, *College Diversity Experiences and Cognitive Development: A Meta-Analysis*, 80 REV. EDUC. RES. 4 (2010) (linking diversity experiences with cognitive growth).

79. See Nida Denson & Shirley Zhang, *The Impact of Student Experiences with Diversity on Developing Graduate Attributes*, 35 STUD. HIGHER EDUC. 529 (2010) (finding that diversity positively

results hold true even for students who did not grow up in diverse settings. For instance, Professor Victor Saenz at the University of Texas showed in a 2010 paper that despite *de facto* segregation in many students' precollege environments, public universities that are more diverse can positively affect students' levels of interactions with diverse peers, which leads to academic benefits and helps to interrupt the "cycle of segregation."⁸⁰

2. Eliminating Race-Conscious Decision Making Will Have Negative Consequences for the Nation

According to the most recent figures from the United States Census, persons belonging to minority racial and ethnic groups constituted more than one-third of the population in 2010.⁸¹ It is expected that, by 2042, non-Hispanic white Americans, historically the majority ethnic

impacts skills necessary to work with others, such as problem solving and the ability to work as part of a team); Nisha Gottfredson et al., *The Effects of Educational Diversity in a National Sample of Law Students: Fitting Multilevel Latent Variable Models in Data With Categorical Indicators*, 44 MULTIVARIATE BEHAVIORAL RES. 305 (2009) (showing that increased contact with racially diverse peers reduces prejudice).

80. Victor B. Saenz, *Breaking the Segregation Cycle: Examining Students' Precollege Racial Environments and College Diversity Experiences*, 34 REV. HIGHER EDUC. 1, 30-32 (2010).

81. Amanda Paulson, *More Than Half of US Babies Now Minorities*, *US Census Reports*, CHRISTIAN SCIENCE MONITOR, May 17, 2012, available at <http://www.csmonitor.com/USA/2012/0517/More-than-half-of-US-babies-now-minorities-US-Census-reports-video>.

group in the United States, will become a minority.⁸² In this nation's increasingly diverse and global society, it is not only important that people of differing backgrounds benefit from attending top schools, but it is also more important than ever that students of the nation's top schools be exposed to people of differing backgrounds: students at these top schools will be chief among the politicians, business executives and community leaders of their generation. They must be comfortable working with and understanding people of many different cultural backgrounds. But due to long standing racial and ethnic segregation in the nation's neighborhoods and primary and secondary schools, colleges and universities are often the first opportunity many of these future leaders will have to interact with those who are different from themselves before they enter the global labor force.⁸³

Limitations on race-conscious decision making would have the deepest impact on students at the most selective schools, resulting in a cadre of national leaders who will have had little experience interacting with the many ethnic and racial groups in the United States today. As previously stated, an affirmative action ban would dramatically decrease minority enrollment at the nation's selective schools.⁸⁴ By way of example, California's ban shifted underrepresented minority students away from

82. Carol Morello & Ted Mellnik, *Census: Minority babies are now majority in United States*, WASH. POST, May 17, 2012, available at http://www.washingtonpost.com/local/census-minority-babies-are-now-majority-in-united-states/2012/05/16/gIQA1WY8UU_story.html.

83. Saenz, *supra* note 80, at 5.

84. Hinrichs, *supra* note 62, at 21.

the more selective campuses in the University of California system and towards the less selective ones.⁸⁵

But the elimination of—or imposition of a functionally unattainable standard on—race-conscious decision making also would cause the entire country to suffer. As the world continues to globalize, the need for a highly educated and diverse workforce increases. An education that does not provide opportunities for interaction with students of a variety of backgrounds is an inferior education in the wake of globalization. Justice Powell recognized this key need for diversity in *Regents of University of California v. Bakke*, 438 U.S. 265 (1978), stressing that “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.” *Id.* at 312-13. Similarly, the *amicus* brief filed by leading businesses in *Grutter* emphasized the same point:

In the practical experience of the *amici* businesses, the need for diversity in higher education is indeed compelling. Because our population is diverse, and because of the increasingly global reach of American business, the skills and training needed to succeed in business today demand exposure to widely diverse people, cultures, ideas and viewpoints. Employees at every level of an organization must be able to work effectively with people who are different from themselves. *Amici* need the talent and creativity of a workforce that is as diverse as the world around it.

85. *Id.* at 4.

Brief for *Amici Curiae* 65 Leading America Business in Support of Respondents at 5-6, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241).

What was true when Justice Powell penned *Bakke* and when these leading businesses urged the Court in *Grutter* to allow affirmative action is even more true today. Since *Bakke* and *Grutter* were decided, the world has continued to globalize, and the need for a diverse workforce is even more acute.⁸⁶ Employers continue to place a high value on candidates who can interact with and relate to a wide variety of people, and college presents a unique opportunity to nurture this comfort and understanding.⁸⁷ If American students come into contact with only those like them, they will be ill prepared to interact with an ever globalizing world. American businesses that depend on employees' diverse perspectives will likewise suffer.

Studies have shown that groups with diverse members performed better than homogenous groups. Diverse groups show improved outcomes because of the varying viewpoints brought to the table. Beyond the introduction of alternative perspectives, the "majority" group members also behave differently in a heterogeneous group.

86. See Scott E. Page, *THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES* (2007).

87. David Thomas, *Making Diversity Part of the Organization*, in *What do leaders need to understand about diversity?*, Q8: A PUBLICATION OF YALE SCH. OF MGMT., Winter 2011, at 90, 92, available at <http://qn.som.yale.edu/sites/default/files/Q8.pdf> ("[I]f our customer base is diverse, we need diversity in our workforce so that we can learn from our own diversity to make ourselves more effective at meeting the needs of our clients.").

Interestingly, studies have found that the better outcomes were driven by the mere presence of diverse members, and not necessarily because of new perspectives.⁸⁸ We will not reach our full potential as a nation if we resist heterogeneous groups.

3. Race-Conscious Decision Making Positively Impacts Today's Students and Future Generations

For minorities, attending an elite institution has an undeniable impact on career success. Students who graduate from the top-ranked public colleges earn at least 30% more than their counterparts who graduate from the bottom-ranked public colleges.⁸⁹

88. A study simulated jury deliberations and found that “[w]hite jurors processed the trial information more systemically when they expected to deliberate with a heterogeneous group.” Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 *J. Personality & Social Psychol.* 597, 606-07 (2006), available at <http://happy.cs.vt.edu/courses/diversity-F10/readings/Legal/2006-Sommers-Racial%20Diversity%20and%20Group%20Decision%20Making.pdf>. The author concluded the “present data suggest that racial heterogeneity can have observable decision-making benefits for groups as a whole and can also lead majority individuals to demonstrate improved performance.” *Id.* at 608.

89. Dominic J. Brewer, Eric R. Eide & Ronald G. Eherenberg, *Does it Pay to Attend an Elite Private College? Cross-Cohort Evidence on the Effects of College Type on Earnings*, 34 *J. HUMAN RES.* 104 (1999). Black and Hispanic students at selective colleges have higher retention and graduation rates than those at less selective schools. Kalena E. Cortes, *Do bans on affirmative action hurt minority students? Evidence from the Texas Top 10% Plan*, 29 *ECON. OF EDUC. REV.* 1110 (2010).

African American and Latino students as well as students from disadvantaged backgrounds experienced an earnings increase from attending an elite institution.⁹⁰ Minorities and disadvantaged students who attend elite institutions gain access to valuable networks and opportunities that ability alone could not have garnered them.⁹¹ Mere attendance at an elite institution significantly factored into a student's career trajectory.⁹²

Moreover, access to education transcends today's individual students. As parents' education increases, so does their child's likelihood of enrolling in post-secondary education.⁹³ Thus, race-conscious decision making impacts not only the career success of the individual admitted today but also the likelihood that future generations will attend, and benefit from, a strong post-secondary education.

90. Stacy Berg Dale & Alan B. Krueger, *Estimating the Payoff to Attending a More Selective College: An Application of Selection on Observables and Unobservables* (Nat'l Bureau of Econ. Research, Working Paper No. 7322, 1999) available at <http://www.nber.org/papers/w7322.pdf>.

91. *Id.*

92. David L. Chambers, Richard O. Lempert & Terry K. Adams, *Michigan's Minority Graduates in Practice: The River Runs Through Law School*, 25 LAW & SOC. INQUIRY 395, 502-03 (2000).

93. National Center for Education Statistics, *Students Whose Parents Did Not Go To College: Postsecondary Access, Persistence, and Attainment* (2001), available at <http://nces.ed.gov/pubs2001/2001126.pdf>.

C. “TOP X PERCENT” LAWS ARE INADEQUATE

1. In States That Prohibit Race-Conscious Decision Making in Higher Education, The “Top X Percent” Laws Do Not Achieve the Compelling Interest of Student-Body Diversity

Multiple studies demonstrate that “Top X Percent” laws have failed to generate increases in the enrollment of underrepresented minority students at public universities.⁹⁴ Florida’s policy guarantees admission to the top 20% of Florida public high school students to a university within the Florida state university system.⁹⁵ California’s policy for several years guaranteed admission to a California university to students who were either in the top 4% of their high school’s graduating class or the top 12.5% of the state admissions index (based on GPA and SAT/ACT scores).⁹⁶

Unlike Texas, however, both Florida and California are “race neutral” states and cannot consider race as a factor

94. Long, *supra* note 68, at 322-23; Jessica S. Howell, *Assessing the Impact of Eliminating Affirmative Action in Higher Education*, 28 J. LAB. ECON. 113, 116 (2010) at 151-52.

95. Fla. Admin. Code r. 6C-6.0029(c)(5) (2012).

96. California now guarantees admission to a California university if the student is either within the top 9% of her high school’s graduating class or within the top 9% of the state admissions index. THE REGENTS OF THE UNIV. OF CAL., MINUTES FOR THE REGENTS OF THE UNIV. OF CAL., Attach. 8 at c(2), (Feb. 5, 2009), *available at* <http://www.universityofcalifornia.edu/regents/minutes/2009/board2.pdf>.

in admissions decisions.⁹⁷ Generally, the result has been a reduction in the numbers of underrepresented minority students enrolled in the most selective state schools. For example, in California, the number of underrepresented minority students admitted to UC Berkeley dropped 58% between 1995 (the year that SP-1, implementing race neutrality, was adopted) and 1998 (the class for which SP-1 first took effect).⁹⁸ At UCLA, the number of admitted underrepresented minority students dropped 53% during that same period.⁹⁹ Whereas underrepresented minority students were close to 30% of UC Berkeley and UCLA admits prior to Prop. 209, after the ban, they made up only 12 and 13% of each school's respective admitted pools.¹⁰⁰ And UCLA's first-year class in 2006 included only 100

97. California became race neutral as a result of both a University California admissions guideline known as SP-1 and the passage of Proposition 209 ("Prop. 209"). University of California Fact Sheet, "SP-1 and SP-2" (May 2001), *available at* <http://www.ucop.edu/ucophome/commserv/factsheets/sp1and2.pdf> (last visited Aug. 8, 2012). Florida became race neutral by executive order of the Governor. FLA. Exec. Order No. 99-281 (Nov. 9, 1999).

98. Erica Perez, *Despite diversity efforts, UC minority enrollment down since Prop. 209*, CALIFORNIA WATCH (Feb. 24, 2012), *available at* <http://californiawatch.org/dailyreport/despite-diversity-efforts-uc-minority-enrollment-down-prop-209-15031> (last visited Aug. 8, 2012). So-called "race-neutral" admissions policies following state bans on affirmative action have generally been demonstrated to result in reduced minority admission at flagship public universities. *See* Ben Backes, *Do Affirmative Action Bans Lower Minority College Enrollment and Attainment? Evidence from Statewide Bans*, 47 J. HUMAN RESOURCES 435, 447 (2012).

99. Perez, *supra* note 98.

100. *Id.*

African-American students—down from 221 who entered in 1997.¹⁰¹

In Florida, a study of enrollment data from 1994 to 2005 showed that the first class admitted to the flagship institution, the University of Florida, without affirmative action showed significant losses for African-American students.¹⁰² For Hispanic students, enrollment shares at the Florida flagship stayed fairly flat after the affirmative action ban and during the implementation of the Talented Twenty program, despite a broader increase in Hispanic enrollment at statewide institutions of higher education.¹⁰³

These results should not be surprising because logically “Top X Percent” laws only guarantee success in diversifying college entrant bodies if high schools are and remain segregated. Without segregation, “Top X Percent” plans guarantee only that those students with the highest GPAs or test scores are admitted to public universities. Much of the literature demonstrates that the Texas plan has little effect on admission of students in the top decile of their classes because most of those students would have been admitted even absent the plan.¹⁰⁴ Thus

101. Michele S. Moses, John T. Yun, and Patricia Marin, *Affirmative Action's Fate: Are 20 More Years Enough*, 17 EDUCATION POLICY ANALYSIS ARCHIVES (17), at 10 (2009), available at <http://epaa.asu.edu/epaa/v17n17/>.

102. *Id.* at 13-14.

103. *Id.*

104. See Long, *supra* note 68, at 324-25; Marta Tienda et al., *Closing the Gap?: Admissions & Enrollments at the Texas Public Flagships Before and After Affirmative Action*, OFFICE OF

minority applicants who are admitted on the basis of their “Top Ten” qualifications would likely have been admitted even without the plan. To achieve unique diversity gains, the “Top Ten” plan must be paired with race-conscious, individualized review. And below the top two deciles, the Texas plan gives white students an advantage over African Americans and Hispanics in admissions decisions.¹⁰⁵ That is, for the students at or below the seventy-ninth percentile, white students simply have higher odds of being admitted than African Americans or Hispanics.

2. “Top X Percent” Laws Encourage Continued High School Segregation and Are an Inefficient Way to Achieve Diversity

“Top X Percent” laws also are inefficient because they incentivize strategic behavior that results in white students displacing minority students in the “Top X” pool. In Texas, researchers found that as many as 25% of students with motive and opportunity to increase their chances of being in the top 10% by moving to a different high school did so.¹⁰⁶ Moreover, “the net effect of strategic behavior is to slightly increase the representation of white students in the top ten percent pool” because strategic

POPULATION RESEARCH AT PRINCETON UNIVERSITY WORKING PAPER No. 2003-01, at 32 (2003), *available at* <http://opr.princeton.edu/papers/opr0301.pdf>.

105. Tienda et al., *supra* note 104 at 32-33.

106. Julie Berry Cullen, Mark C. Long, and Randall Reback, *Jockeying for Position: Strategic High School Choice Under Texas’ Top Ten Percent Plan*, (Nat’l Bureau of Econ. Research, Working Paper No. 16663 2011), *available at* <http://www.nber.org/papers/w16663.pdf>.

behavior by both white students and minority students tends to displace minority students.¹⁰⁷ Thus, the “Top X Percent” policies attract offsetting behavior that would reduce their effectiveness in the long run, making them a poor policy option to rely on for achieving diversity in higher education.

To achieve the admission of racially diverse classes in the long run at the university level, “Top X Percent” laws inherently encourage continued segregation in high schools—a perverse policy to institute or perpetuate solely on the grounds of ensuring the success of “Top X Percent” plans. To escape offsetting strategic behavior, they would also require the restriction of student mobility. This in turn could also have the adverse effect of entrenching homogeneity and disincentivizing intellectual curiosity at the secondary school level. As Justice Ginsburg explained in her *Gratz* dissent, percentage plans “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.” *Gratz v. Bollinger*, 539 U.S. 244, 303 n.10 (2003) (Ginsburg, J., dissenting). UT should not be restricted to such an inefficient tool to achieve its goal of admitting racially diverse classes.

3. Consideration of Race is Necessary to Achieve Educational Diversity

Grutter recognized that achieving a diverse student body is a compelling interest. Here, UT’s use of race in its admissions program is narrowly tailored to a compelling

107. *Id.* at 23.

governmental interest. Thus, it passes constitutional muster under *Grutter*.

The Fifth Circuit began its analysis by recognizing *Grutter* as the applicable standard. It wrote: “*Grutter* held that the Equal Protection Clause did not prohibit a university’s ‘narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body.’” *Fisher v. Univ. of Tex.*, 631 F.3d 213, 218 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (2012). The Fifth Circuit proceeded to faithfully apply this standard.

It held that, after *Grutter* blessed diversity as a compelling interest, UT seriously considered its alternatives. It did not immediately begin using race as a factor; rather, UT commissioned two studies to determine its minority representation and whether it was enrolling a critical mass of minority students. The studies involved examining classroom statistics and surveying undergraduates regarding their impressions of diversity at UT. These studies were incorporated into a June 2004 Proposal to Consider Race and Ethnicity in Admissions, which recommended that race be considered as a factor. *Id.* at 225-26. Thus, UT embarked on a thoughtful, yearlong process, action which is consistent with the heightened level of scrutiny this Court demands.

UT also gave “serious, good faith consideration of workable race neutral alternatives that will achieve the diversity the university seeks.” *Grutter*, 539 U.S. at 339. While the Top Ten Percent Program is facially race neutral, it is best suited only to ensure geographic diversity

in admissions.¹⁰⁸ As the *Grutter* Court recognized, “Top X Percent” programs are not a workable alternative because they may hinder a university’s flexibility in conducting individualized assessments of applicants. *Grutter*, 539 U.S. at 340. Further, as the Fifth Circuit discussed, the Top Ten Percent Program has resulted in the clustering of minority students in specific colleges and programs, such as social work and education, at UT. *Fisher*, 631 F.3d at 240. To achieve the benefits of diversity recognized in *Bakke* and *Grutter*, students need to interact with each other. The benefits of diversity cannot be realized when Hispanic students are in the College of Social Work and white students are in the College of Business Administration. *Id.*

The Texas plan is consistent with the *Grutter* approach because it does not rely on quotas or a special insulated evaluation process. *See Grutter*, 539 U.S. at 334-35 (use of race “as a ‘plus’ factor” consistent with narrow tailoring). As in *Grutter*, race is one factor the admissions committee may consider. If a Texas resident is not in the top 10% of his or her graduating high school class, his or her application is reviewed based on (1) the Academic Index, a mechanical formula based on standardized test scores and high school class rank and (2) the Personal Achievement Index, which considers two required essays, and a personal achievement score based on the entire file. Race becomes a factor only in the personal achievement score, which is one of three scores that goes into the Personal Achievement Index. *Fisher*, 631 F.3d at 227-28.

108. *See Long, supra* note 68, at 324 (noting that the Top Ten program increased the number of high schools sending at least one student to UT-Austin); *Tienda et al., supra* note 104, at 33.

As in *Grutter*, race is only one of many factors that goes into UT's holistic approach. In determining the personal achievement score, the admissions committee considers "an applicant's demonstrated leadership qualities, awards and honors, work experience, and involvement in extracurricular activities and community services" as well as special circumstances, which can include socioeconomic status, family status, standardized test scores compared to the average of his or her high school and race. *Id.* at 228. Race is not dispositive, and there are not a specific number of spots reserved for minority students.

In evaluating UT's consideration of race as a factor, the Fifth Circuit applied strict scrutiny while recognizing the greater degree of deference this Court has traditionally accorded to academic institutions. This deference dulls none of the bite of strict scrutiny; the Fifth Circuit noted only that, "courts must afford a *measure* of deference to the university's good faith determination that certain race-conscious measures are necessary to achieve the educational benefits of diversity, including attaining critical mass in minority enrollment." *Id.* at 233 (emphasis added). This approach is consistent with *Grutter*, where this Court recognized that "universities occupy a special niche in our constitutional tradition." *Grutter* at 329. *Grutter* engaged in narrow tailoring while noting that the "inquiry must be calibrated to fit the distinct issues raised by the use of race to achieve student body diversity in public higher education." *Id.* at 333-34. *Grutter* acknowledged that the application of strict scrutiny is not necessarily inconsistent with the traditional deference to a university's academic decisions, as "[o]ur scrutiny of the interest asserted by the [university] is no less strict for taking into account complex educational judgments

in an area that lies primarily within the expertise of the university.” *Id.* at 328. Even absent this academic context, the Fifth Circuit correctly concluded that UT properly applied strict scrutiny.

CONCLUSION

For the reasons set forth above, colleges and universities should be permitted to make race-conscious admission decisions consistent with *Grutter*, and the judgment of the Court of Appeals for the Fifth Circuit in *Fisher v. University of Texas*, No. 09-50822, should be affirmed.

Respectfully submitted,

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