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 AMHERST, ALLEGHENY, BARNARD, BATES, BOWDOIN, BRYN MAWR, CARLETON, COLBY, CONNECTICUT, DAVIDSON, DICKINSON, FRANKLIN & MARSHALL, GRINNELL, HAMILTON, HAMPSHIRE, HAVERFORD, LAFAYETTE, MACALESTER, MIDDLEBURY, MOUNT HOLYOKE, OBERLIN, POMONA, REED, SARAH LAWRENCE, SIMMONS, SMITH, ST. OLAF, SWARTHMORE, TRINITY, UNION, VASSAR, WELLESLEY, AND WILLIAMS COLLEGES, AND BUCKNELL, COLGATE, WESLEYAN AND TUFTS UNIVERSITIES, *AMICI CURIAE*, SUPPORTING RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*

Amici curiae are thirty-seven private, highly selective residential colleges whose small size and excellence attract students from around the nation and the world.[1] They provide their students with a liberal education in its broadest sense – a rich, deep training in diverse subject matters, in residential settings where education takes place not only in the classroom but throughout four years on campus with classmates from different backgrounds and with different experiences and viewpoints.

Because of their excellence, each of the *amici* colleges is highly regarded and besieged with applications from well-qualified high school seniors. Because of their size, they offer admission to only a small fraction of applicants. Because of their goals, they select applicants not mechanically by SAT score, but by looking holistically at each qualified applicant, taking into account a wide range of factors. Each year, *amici* decide which set of qualified applicants, considered individually and collectively, will take fullest advantage of what the college has to offer, contribute most to the educational process, and use what they have learned for the benefit of the larger society. Each college self-consciously seeks to assemble and house

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[1] Although four of the *amici*, Bucknell, Colgate, Tufts and Wesleyan, are universities, their small size, selectivity, and emphasis on a liberal education in a residential setting align them with the others, and for convenience we refer to *amici* as "colleges" throughout.

No counsel for a party authored this brief in whole or in part, and no person or entity other than the *amici curiae* made a monetary contribution to its preparation or submission. Letters consenting to the filing of *amici curiae* briefs have been lodged by the parties with the Clerk.

on-campus a highly diverse group of students – from different states and countries, from urban and rural backgrounds, home-schooled, prep-schooled, and public schooled, with differing economic circumstances, with different kinds of experience or talent or athletic ability, students who will be the first in their families to go to college and legacy students following after parents or grandparents.

Amici have a direct interest in the outcome of this case because petitioner's claim is asserted, inter alia, under Title VI of the Civil Rights Act of 1964, which seemingly has identical application to public and private institutions alike. *See, e.g., Cannon v. Univ. of Chicago*, 441 U.S. 677 (1978) (applying Title IX of the Education Amendments of 1972, patterned on Title VI, to a private institution without suggestion of differential application); *Grove City Coll. v. Bell*, 465 U.S. 555, 566-67 (1984) (same).

Both the Court's opinion and Justice Kennedy's dissent in *Grutter v. Bollinger*, 539 U.S. 306 (2003), approvingly cited the brief filed by most of these same *amici* in *Grutter* and seemed to endorse and commend the ways in which *amici* seek to enroll broadly diverse classes. In view of Title VI and *Cannon*, a decision condemning Texas's admissions procedures might well be taken – depending on how it was written – to confound and restrict *amici's* effort to assemble diverse student bodies. To alert the Court to the substantial harm that applying petitioner's arguments to *amici* would cause – and advise it of the extent to which the "alternatives" touted by petitioner are impracticable and illusory for smaller selective institutions – *amici* submit this brief.

SUMMARY OF ARGUMENT

The Court should examine petitioner's sterile submission with a view to the experience of operating admissions programs at the nation's selective colleges and universities. The Court should consider the experience of admissions before diversity was highly valued, and the progress toward equal opportunity since. Private colleges were created as engines of social change, and the Court should consider the realities of selecting students in a society in which race still matters and the effects of discrimination and entrenched segregation still linger. If it does, it will affirm the judgment below.

African-American students were absent, or present in very small numbers, from most selective institutions of higher education, including *amici,* until the 1960's. Only when those institutions began to include racial diversity among the other kinds of diversity long sought for did they begin to enroll more than token numbers of African-American students. Research and experience both suggest that for small, highly selective private colleges like *amici*, carving out race from all the other kinds of diversity consciously aimed for would have a predictable, substantial resegregating effect.

Certainly *amici* could not possibly institute the Texas' practice of offering admission to the top 10% of high school graduates, or any program like it, without radically changing their nature. Additional alternatives suggested – admitting a percentage of each high school class, or focusing on class or economic circumstance without looking at racial background – could not work if the objective is to enroll a class that is both academically excellent

and diverse. The rules petitioner urges would deprive *amici* of precisely the diversity that they value for its contribution to the residential, liberal education they provide. Seeking out and obtaining diversity, including racial diversity, does not violate Title VI and amounts to no quota. The competition between highly selective institutions ensures a meritocracy and militates against any racial division of spoils. Diversity as practiced at *amici* has had substantial educational benefits.

Both the deference due the educational policies of universities and colleges, *Grutter,* 539 U.S. at 328-29, and the respect due under *stare decisis* to *Grutter* and *Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265 (1978), support the judgments below.

ARGUMENT

I. PRIVATE, HIGHLY SELECTIVE COLLEGES HAVE A COMPELLING EDUCATIONAL INTEREST IN ENROLLING BROADLY DIVERSE – INCLUDING RACIALLY DIVERSE – CLASSES, AND CANNOT DO SO WITHOUT TAKING THE DIVERSITY THEY STRIVE FOR INTO ACCOUNT.

During the late 1960's, as American society was coming to grips with the exclusion of African-Americans from many of the institutions and benefits of American life, *amici* took note of how few such students they had enrolled and began to seek out and enroll students from historically disadvantaged groups. The educational benefits that they gained from those efforts, and their assessment that substantial resegregation would likely follow if the Court precludes consideration of racial or ethnic diversity, are accurately reflected in the pathbreaking work by former Princeton President William G. Bowen and former Harvard

President Derek Bok, *The Shape of the River*.

Building on that work, the Court's consideration of the University of Michigan cases in 2003, inspired institutions and scholars to closely examine the benefits of diversity. The result has been an evolving and compelling body of research, applied across private and public sectors, which explores the benefits of diversity and the conditions under which the benefits of diversity are fully realized. *See* Hurtado, *Linking Diversity with the Educational and Civic Missions of Higher Education*, 30 Review of Higher Education, Winter 2007, at 185, 185 ("Much of the empirical work that links diversity and learning and democratic outcomes emerged from the developing area of research, now termed 'the educational benefits of diversity' because of its role in the University of Michigan affirmative action cases"); Chang, *The Educational Benefits of Sustaining Cross-Racial Interaction Among Undergraduates*, 77 Journal of Higher Education, May-June 2006, at 430, 431 ("Basically, these reviews showed that diversity-related benefits are far ranging, spanning from benefits to individual students and the institutions in which they enroll, to private enterprise, the economy, and the broader society.")

The argument of petitioner and her *amici*, if accepted, would harm the education offered at highly selective institutions, and the nostrums they offer to avoid or mitigate those harms are entirely impractical. *See generally* Brief for American Social Science Researchers supporting respondents.

A. Private, Highly Selective Colleges Are Committed To Obtaining The Educational Benefits Of Diversity, Including Racial Diversity.

In considering petitioner's challenge, the beginning of wisdom is to recognize, as Justice Powell and a majority of the Court did in *Bakke*, 438 U.S. at 312, that *educators* set the relevant policies of institutions of higher education, and that there are sound *educational* reasons why America's colleges and universities have virtually without exception concluded that *many different kinds of diversity, including racial diversity,* best create the circumstances for the learning required in the 21st century. *Grutter* expressly accepted that a university's interest "in attaining a diverse student body" is compelling. 539 U.S. at 329-33.

The point is basic, and the agreement of educators is broad,[2] particularly as regards liberal arts colleges which *intentionally* are close-knit communities in which students live and constantly engage with each other.[3] The broad diversity that characterizes American colleges and universities makes them unique, educationally superior, the envy of the world, and excellent beyond the capacities of narrower institutions.

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[2] *See, e.g.,* Ass'n of American Universities, *Diversity Statement on the Importance of Diversity in University Admissions* (by presidents of its 62 member institutions), Apr. 14, 1997, *available at* http://www.aau.edu/WorkArea/DownloadAsset.aspx?id=1652.

[3] *See* Umbach & Kuh, *Students Experiences with Diversity at Liberal Arts Colleges: Another Claim for Distinctiveness*, 77 Journal of Higher Education, Jan. 2006, at 169, 172.

The Amherst Trustees' 1996 Statement on Diversity is representative of the views of *amici* generally:

> We will continue to give special importance to the inclusion within our student body, our faculty and our staff of talented persons from groups that have experienced prejudice and disadvantage. We do so for the simplest, but most urgent, of reasons: because the best and brightest people are found in many places, not few; because our classrooms and residence halls are places of dialogue, not monologue; because teaching and learning at their best are conversations with persons other than ourselves about ideas other than our own.[4]

That understanding is not newly minted. Oberlin College, which almost uniquely among *amici* has been steadily attentive to the importance of enrolling black Americans since well before the Civil War, concluded as early as the 1830s that "bringing together students with different backgrounds and experiences" made for a superior education.[5]

Grutter's nuanced, balanced insistence that consciousness and consideration of racial difference

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[4] www.amherst.edu/fac_serv/aaction/diversity. *See also, e.g.*,http://www.conncoll.edu/diversity/index.htm; http://www.middlebury.edu/studentlife/doc.

[5] Oberlin Alumni Magazine, Winter, 2002-03, at 2. The suggestion that upon enactment of the 1866 Civil Rights law Oberlin was violating the law – which is what petitioner's argument amounts to – is a terrible and indefensible misreading of history. *See* n.24 *infra*.

would be permissible in the context of a genuine commitment to diversity broadly conceived has had an extraordinary impact, rippling from admissions through curriculum and campus life.

The kind of holistic consideration that Justice Powell referred to as "the Harvard College Program"–in which applicants are each considered, with the choice of offerees made from among well-qualified applicants after considering all their various strengths and interests, without quotas or reserved slots by race–is standard at each of the *amici* (and appears to be indistinguishable from the Texas plan). Seriously pursued, it necessitates consideration of race or ethnic background (all of them), because consideration of *every* kind of diversity (socio-economic, artistic, musical, athletic, legacy connection to the institution, foreign residence) self-evidently requires just that.

The proposition that broad diversity (including racial diversity) is important to education in our nation's colleges and universities, or at least that they may reasonably so conclude, is supported by thoughtful, experienced leaders such as former Secretary of State and Stanford Provost Condoleezza Rice,[6] in addition to all the *amici* supporting respondents. Their impressively unanimous judgments, supported by common sense and experience, cannot be displaced by sterile citations to inapposite cases or tendentious research.

Why is an education "characterized by encounters with difference" so vital? Because, as former Carleton President Robert A. Oden, Jr. said, "'the single greatest source of growth and devel-

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[6] Lewis, *Bush Adviser Backs Use of Race in College Admissions*, N.Y. Times, Jan. 18, 2003, at A14.

opment is the experience of difference, discrepancy, anomaly," and "the free and uncensored play of ideas and opinions and arguments and positions is central to the fabric of a liberal arts education, and a college peopled by those representing and trying out such ideas and opinions and arguments is a finer college for the presence of these people." A "pluralistic, widely representative college is a significant factor in the college choice of the world's most talented students."[7]

All of the *amici* share exactly that experience and judgment, and believe that they would receive fewer applications and matriculate fewer of the students that they want of every sort (including white students) if they could not offer the broad diversity that today's students value and demand.

Deliberately seeking out diversity of every sort (including of gender, ethnicity, and race) – and not merely hoping it magically arrives – has been the rule in the judicial appointment process in state and federal courts for the past three decades; for the nation's two principal political parties, both of which seek to enlist candidates and spokesmen who *as a group* are diverse in various ways (including racially and ethnically); in federal and state cabinet selections; in the service academies; and in the

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[7] Inauguration Convocation Address, Oct. 25, 2002, *available at* www.carleton.edu/inauguration/speeches.php3.

military's officer ranks.[8] It is even more essential now that "minority" births (including Hispanics, blacks, Asians and those of mixed race) reached 50.4% of U.S. births last year.[9]

The practical wisdom underlying these practices rebuts any assertion that diverse viewpoints and opinions could be adequately obtained by considering only economic circumstances and disadvantage. Those differences are valuable educationally too, and *amici* devote enormous resources to identifying and supporting such applicants, but they do not exhaust or reflect all the diversity that students will need to confront, understand, and be able to relate to and work with.

That educational conversations may be different when we speak with those whose experience is different – deeper, more powerful, with a different moral force – is the point made in Justice O'Connor's memoir of Justice Thurgood Marshall, Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur,* 44 Stan. L.

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[8] Successive presidents since at least 1976 have treated appointing more women, blacks, and Hispanic attorneys to the federal bench and cabinet as a laudable goal, not an equal protection violation. Federal and state judiciaries have been transformed from virtually all-white four decades ago to today's judiciary, which looks like the population at large. For the service academies, *see, e.g.,* Clymer, *Service Academies Defend Use of Race in Their Admissions Policies*, N.Y. Times, Jan. 28, 2003, at A17; Hunt, *Service Academies: Affirmative Action at Work,* Wall St. J., Jan. 23, 2003, at A15. Both political parties have for years made a public point of seeking to enlist well-qualified black and Hispanic candidates to run for office, and the ethnically balanced ticket has an even longer pedigree.

[9] Tavernise, *Whites Account for Under Half of Births in U.S.*, N.Y. Times, May 17, 2012, at A1.

Rev. 1217, 1220 (1992). It has been important for every President since President Johnson to give the nation that measure of diversity in their judicial and cabinet appointments; it is equally important that *amici* colleges be able to do so in admitting students as well.

B. Highly Selective Institutions Cannot Obtain The Diversity They Seek Except By Seeking It Directly.

For every aspect of the diversity they seek – including but not limited to socio-economic, athletic, artistic, intellectual, ethnic, and racial – *amici* have needed to identify students that can offer it, and consider those potential contributions in the discussion that takes place concerning virtually every well-qualified applicant. The Deans of Admissions and their staffs need to consider all the talents, interests, and backgrounds of qualified applicants in comparing each year's class. They look for students with particular backgrounds or talents or interests, international students, legacy students, students interested in as-yet-undersubscribed fields to better occupy recently hired faculty, students whose parents have not had the benefits of higher education, and students from deprived economic backgrounds or rural areas. And then the larger admission committee discusses each (or virtually each) qualified applicant file.

Typical of the factors holistically considered is this list from Amherst, in no particular order:

1. the candidate's standardized test scores;
2. the strength of the candidate's academic program in relation to the opportunities available at the candidate's secondary school;

3. the candidate's academic record, taking into account the rigor of the grading system at the candidate's secondary school;
4. the depth of academic talent at the candidate's secondary school, particularly important at secondary schools where rank in class information is provided;
5. evidence of intellectuality, creativity, or unusually well developed commitment to a particular academic field, as evidenced in the two required teacher recommendations, guidance counselor report, and the candidate's two required essays;
6. the extent and depth of the candidate's non academic achievement and leadership;
7. formalized and standardized assessments of the candidate's athletic or artistic ability made by coaches and arts faculty;
8. the candidate's socio-economic status, as determined by family income and educational attainment of parents;
9. particular personal, family and economic hurdles faced by the candidate and/or immediate or extended family, including but not limited to race and ethnic background;
10. ongoing and prospective support from extended family, community based organizations, opportunity programs, or religious organizations;
11. educational attainment of siblings; and
12. prospects for success or lack thereof in a candidate's particular field of academic interest.

The overriding task is to assemble the most interesting class of students, ready to learn from one another and from the college's faculty, and

likely then to spread the benefits of the resources they have been privileged to receive. As Williams put it, "the college seeks students with strong intellectual skills who will benefit most from the education offered at Williams and then, in turn, benefit society by filling leadership positions in local and national life."

These factors are considered not to allocate benefits according to race, but to assess each student's likely success and contribution. In making those assessments, consideration of challenges surmounted is indispensable. The primary and secondary educational system in the U.S. is far from a level playing field, and although "an increasing share of U.S. students attend schools of a type "that was very rare when the civil rights movement was at its height—multiracial schools with more than 10% students from each of three or more racial groups"—black and Latino students are becoming more isolated from whites than they have been.[10]

Because of the unequal education applicants have received, and for most their experience that SAT and ACT scores are not predictive of educational achievement after the first year of college, highly selective colleges need to be especially alert to evidence of special efforts and accomplishment indicating exceptional promise and

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[10] Orfield, *Reviving the Goal of an Integrated Society: A 21st Century Challenge*, Jan. 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. Two in five Latino and African-American students are in 90-100% minority schools. *Id.* at 6, 12, 15.

motivation on the part of students who have not had many advantages.

Laden with applications from far more well-qualified students than they can possibly admit, *amici*'s admissions decisions are nuanced, multi-factorial, and never purely quantitative. They do not, and never have, admitted applicants by descending order from SAT scores until the class fills up. To the contrary; as Pomona College put it, "We have different expectations for different students: the exam scores from a daughter of two college professors are viewed in a different context than the scores from a first generation college student who attends an underfunded high school."

No numerical points or weights whatever are assigned for any racial or ethnic background; numerical quotas are not set or enforced. The same evaluative procedures are generally used for all applicants regardless of color or ethnic background; for example, different color files are not used, and file readers are not provided with periodic reports of the numbers of students of color admitted to date.

The process for each *amici* college is essentially the same as the Harvard College program described by Justice Powell in *Bakke* and the program upheld in *Grutter* – facially nondiscriminatory, without any quotas, considering racial or ethnic background as a "plus" in a particular applicant's file without insulating that individual "from comparison with all other candidates for the available seats." *Grutter*, 539 U.S. at 334-35.

Amici cannot be reasonably assured of having the desired range of talent, or international students, or legacy students, or students from underprivileged backgrounds, without noting and

considering all those factors when it comes time to discuss each file. Nor could they obtain a class with more than token numbers of African-American or Latino students without making special efforts to attract such applications and then considering those factors as well (albeit in a way that ensures that no factor, including race, is "decisive when compared" with any other candidate, as *Grutter* and *Bakke* expressly envisioned). This is particularly important for those institutions (*e.g.,* Bates, Carleton, Grinnell, and Middlebury) which, because of their rural locations in notably nondiverse states, would without such efforts draw fewer applications from African-American or Latino students.

As Bowen and Bok summarize their findings, if liberal arts institutions are to fulfill their educational missions, colleges *have to* be sensitive to race in making admissions decisions. That need "stems directly from continuing disparities in pre-collegiate academic achievements of black and white students" as presently measured.[11] While a*mici* each uses grades and standardized tests as an important part of the process, they cannot rely on them exclusively, because "racial gaps of all kinds remain" even after attempting to control for the influence of other variables, and because long experience has taught *amici* that SAT scores for

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[11] Bok & Bowen, *The Shape of the River* 51 (1998). "People will debate long and hard, as they should, whether particular gaps reflect unmeasured differences in preparation and previous opportunity, patterns of continuing discrimination, failures of one kind or another in the educational system itself, aspects of the culture of campuses and universities, individual strengths and weaknesses, and so on. But no one can deny that race continues to matter." *Id. at* 279 n.2; *see generally id.* at 269-74.

African-American students do not accurately predict achievement later in college and beyond.

It follows—as both exhaustive research and the experience of the few state universities that were forced to abandon consideration of race confirm—that enforced elimination of the Harvard College/*Grutter* approach at highly selective institutions would have drastic resegregating impact.[12] Black enrollment would likely be reduced "by between 50 and 70 percent"; the probability of black applicants obtaining offers would drop to half that of white students; and the percentage of black students matriculating would drop from roughly 7.1% of the student body to roughly 2.1%. Seriously enforced, a race-neutral policy would "presumably take black enrollments . . . back to early 1960's levels, before colleges and universities began to make serious efforts to recruit minority students."[13]

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[12] Selectivity (the acceptance rate) at *amici* colleges ranges as high as 13% (one offer for every 7.5 applicants), and averages 25% to 33%. Even the women's colleges among *amici,* which receive proportionately fewer applications, have many more applicants than spaces. No *amicus* college admits applicants mechanically on the basis of test scores or grades, or ever has.

[13] *The Shape of the River*, 31-34, 39, 50-51, 280. *Amici*'s assessments are the same: elimination of the approach held permissible in *Grutter* would likely result promptly in sharp reductions in enrolled African-American students.

C. Selecting A Broadly Diverse Student Body Does Not Classify Students By Race Or Violate Title VI, And Without More Imposes No Quota, And Built-In Structural And Competitive Factors Afford Substantial Guarantees Against Abuse.

1. The central insight underlying the distinctions drawn by Justice Powell and the *Grutter* Court between the dual-track admissions process operated by the UC-Davis Medical School and the approach used at Harvard College and the U of M Law School is that consideration of all kinds of diversity does not deny the equal protection of law. A "facial intent to discriminate is evident" when public university operates two separate processes, for two lines of racially-reserved admission slots. But "[n]o such facial infirmity exists in an admissions program where race or ethnic background is simply one element – to be weighed fairly against other elements – in the selection process." *Bakke*, 438 U.S. at 318; *see also Grutter*, 539 U.S. at 334-39.

When colleges and universities decide that the advantages of diversity warrant encouraging applications from (and admittance to) students from Japan, Korea, China, South Africa, and Latin America, it makes no sense to say that white students from the domestic 50 states have thereby been "excluded . . . on ground of race, color, or national origin." By that same reasoning, the consideration expressly permitted by *Grutter* and *Bakke* of all aspects of a candidate's background in the service of "'attaining the goal of a heterogeneous student body,'" reflects no "facial intent to discriminate" and violates no rights under Title VI

or the Fourteenth Amendment. *Grutter*, 539 U.S. at 324; *Bakke*, 438 U.S. at 318.

Consideration of an applicant's racial and ethnic background – and all backgrounds are considered, not just those of racial or ethnic minorities – is not different in kind from the consideration New England colleges have for decades given to applicants from California, Oregon, and Washington State, or the consideration that Reed and the Claremont colleges have given to the relatively fewer applications they received from the northeast. That interest in difference is not actionable discrimination, but simply the implementation of the judgment that given an overabundance of well qualified applicants, it is educationally beneficial for the institution and its student body to have members from far-flung states and myriad backgrounds. *Amici* colleges aspire, after all, to be national institutions, to draw students from (and prepare future leaders for) the whole nation.

2. Saying that consideration of racial background is inescapably a "quota" doesn't make it so. None of the *amici* operates under any quota, and their consciousness of race as one of the many factors to be included within the student body neither establishes nor conceals a quota system. A quota is a preset number (or narrow range) reserved for some applicants or limiting offers to another. Results that are fairly reached without such an allocation process, goals that are aimed for but often not met, and the widely varying numbers of offers to African-American and Latino applicants which depend on competitive consideration of applicants who may each present talents, back-

grounds, or achievements that the institutions are hoping to include, reflect no "quota."[14]

Both the process (a broad, holistic consideration of all kinds of diversity without separate committees or readers for applicants of color) and its output (wide variation year by year) refute any such label. Notwithstanding that Republicans and Democratic presidential vote tallies have varied narrowly for many elections between 47% and 53%, it would be nonsensical to identify a "quota" for either party in our electoral process. And the wide range of offers and matriculations at *amici* is far broader than that. At Amherst, for example, since 2003, offers extended in recent years to students with African-American backgrounds have varied widely, ranging without discernible trend from 95 to 179, resulting in matriculations of from 22 to 61 in classes of about 450.

Nor, to address another concern, does this holistic review at the *amici* colleges entail any governmental (or for that matter private) assignment of a personal designation according to a crude system of individual racial classifications," a concern expressed by Justice Kennedy in *Parents Involved v. Seattle Sch. Dist.*, 551 U.S. 701, 789 (2007). Students self-identify (or not), and not according to any "white or nonwhite" dichotomy,

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[14] Justice Kennedy's dissent in *Grutter* contrasted what he saw as the narrow band of variation at the Law School with the broader variation reported at Amherst. *Amici* generally report at least that broad variation over the past ten years as regards offers to African-American and Hispanic students. The percentage of African-American and Hispanic students admitted and matriculated at *amici* is significantly below the percentage of such students in the general high school population.

but, if they choose, with the full richness of their background.

3. In a variety of contexts, some justices have expressed concern that racial preferences may be self-perpetuating, or become fixed (or even expanding) entitlements. Whatever may be the case when government adopts quotas, no such tendency has been seen or is likely in the case of highly selective colleges.

The extraordinary competition among private colleges and universities – for the best applicants, the best matriculants, the best faculty, the most foundation and governmental grants, and the most important graduate fellowships – operates as a constant check on any abuse. Every institution has a powerful incentive to improve the intellectual capacity of its student body, class by class. The natural constraining power of this competitive quest for excellence virtually guarantees that the consideration of all the aspects of diversity has the genuine purpose of finding the best and the brightest, not filling any quota.

Nor will these efforts become entrenched. Over the past thirty years, the sharply increasing numbers of Asian-American applicants, the convergence of their test scores, and their interest in particular schools, have enabled highly selective schools to matriculate Asian Americans in sizeable numbers without any focus on doing so. As the black and Hispanic middle class expands and the educational opportunities available to those students improve, there is reason to expect a further narrowing of the test score gaps that have created the need to consider race among other diversity factors.

D. The Alternatives Suggested By Petitioner Cannot Work At Smaller Highly Selective Colleges.

Petitioner and her *amici* argue that the Texas 10% plan or replacing any consideration of race with socio-economic status would adequately obtain racially diverse student bodies. *It is vital for the Court to understand that even if those measures could work at large state universities – and the reported experience and reason suggest difficulties and reasons for concern – neither they nor any other alternatives of which we are aware could conceivably work at small, highly selective schools like amici.*

First, given how every *amicus* conducts admissions (virtually every folder read by multiple readers, and then evaluated in meetings without mechanical point systems), there is really no possibility of a *race-blind* admission process: consciousness of *all* the diversity each applicant would contribute is unavoidable.[15] There is no alternative for these colleges but to accept the reality of this *consciousness* of differences (including racial or ethnic background) and to use it intelligently as part of their complex weighing of multiple factors leading to admission decisions.

To the small extent that petitioner's *amici* even bother to recognize or address the problem, the alternatives suggested for obtaining diversity

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[15] At a few of the *amici,* a small number of applicants with overwhelmingly superior intellectual credentials are admitted without committee discussion, but that small exception does not alter the point that all the remaining qualified applicants are competitively evaluated, with focus on the whole applicant and the likely contribution to, and success at, the school.

without attending to it—mechanical formulas looking to grades, tests scores, or graduation rank—would radically change the profile and indeed the nature of each *amici* college. No highly selective small college could use the "percentage of each high school class" method adopted by Texas and Florida, or Florida's guarantee of placement to all students who successfully complete a two year degree at a community college.

Similarly, it is unrealistic to believe that highly selective institutions could retain diversity, while not taking it directly into account, by improving search techniques, or focusing even more than they now do on low socio-economic rank (and they have in fact considerably increased that focus in recent years). California's efforts to restore at least some of the diversity lost since adoption of its race-neutral admissions policy has led to sharp drops of African-American and Hispanic students at the more selective institutions – *i.e.*, the ones most comparable to *amici.*[16]

After analyzing the problem, Williams College concluded that the use of a race neutral affirmative action plan based solely on socio-economic disadvantage would

- cut in half its already small pool of African-American and Latino applicants;
- leave it with a pool of remaining black applicants whose academic record would be on average considerably lower than it now can select from (because a disproportionate share of the economically disadvantaged students will have attended under-resourced high

[16] *See* the *amici curiae* brief being filed by American Social Science Researchers.

schools and have generally weaker preparation);

- create greater competition for those at the higher end of the academic scale, resulting in a much lower yield on admitted students of color; and
- not only reduce the number of matriculating students of color, but also enlarge the existing socio-economic imbalance, since a much larger proportion of the admitted black and Latino students would be poor.

See also The Shape of the River, 46-50 ("class-based preferences cannot be substituted for race-based policies if the objective is to enroll a class that is both academically excellent and diverse").

Search techniques (including obtaining printouts of every minority student at a specified SAT level) are already extraordinarily comprehensive. Because so many of the poor are white, attending to socio-economic factors only without race consciousness could not possibly maintain the present mix of diversity. It would also result in a very different mix of students in any event, shedding the middle class applicants of color who, research and experience shows, are most likely to excel.[17] The result of a much poorer cohort of black and Hispanic students would likely be increased stereotyping, when "diminishing the force of such stereotypes" should be the goal. *Grutter*, 539 U.S. at 333.

Another difficulty with leaving racial diversity to chance is that a critical mass of students is important in attracting individual students. This

[17] *The Shape of the River*, 46-51.

does not mean quotas, but just as it is hard to attract a violinist to a school that has no orchestra, it is hard to attract students of color to Middlebury, Colgate, and other rural campuses in highly undiverse regions without a critical mass of fellow students.

And finally, there is the stark reality of the extraordinary high cost of providing the education that *amici* offer. Attempting to use socio-economic status to retain present racial and ethnic diversity could not work at all rural campuses, and even at others would require a huge increase in financial aid, well past the ability of most selective institutions.

II. THE COMMITMENT TO SEEK A BROADLY DIVERSE STUDENT BODY HAS BROUGHT MYRIAD BENEFITS WHICH THE COURT SHOULD RESPECT AND SAFEGUARD.

A. *Amici* Recognized That Their Student Bodies Were Not Racially Or Ethnically Diverse, And Have Undertaken To Obtain A Broader Diversity.

That the precious resources Americans have committed to private colleges from the earliest days of the Republic should be available to the students who in the judgment of each college will best advance its goals, including those previously excluded, is a view with deep roots in American history, and cannot be dismissed as a fad or late-twentieth century social engineering.

Hamilton was established as Hamilton Oneida College in 1793 as "an institution for the education of American *and Indian youth*." Dartmouth's charter created a college "for the education and instruction of youth of the Indian tribes, and also of

English youth and others." Oberlin resolved in 1835 that "the education of people of color is a matter of great interest and should be encouraged and sustained in this institution."[18] Bates was founded by abolitionists in 1855 who resolved immediately to admit applicants previously excluded from most American institutions of higher education.[19] Middlebury graduated a black student in 1823, and Amherst and Bowdoin followed in 1826 and 1833.[20] In short, even while most African-Americans were still enslaved, some northeastern colleges were intentionally recruiting diverse students in the service of their educational missions.

Despite such aspirations here and there, until the mid-1960's, African-American students were absent or rare at every one of the *amici* colleges to a degree inexplicable except as a consequence of the underlying discrimination rampant throughout American society and systematic denial of equal

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[18] By 1900, Oberlin had graduated 128 African-Americans, nearly half of *all* black college graduates in the United States. Surely Oberlin's race-conscious efforts would not properly have been held to violate the 1866 Civil Rights Act upon its enactment.

[19] An early beneficiary of Bates' efforts, Rev. Benjamin E. Mays, a child of freed slaves, graduated from Bates in 1920, went on to become president of Morehouse College, and was described by Martin Luther King Jr. as "my spiritual mentor and my intellectual father."

[20] Wade, Jr., *Black Men of Amherst*, 5 (1976).

opportunity.[21] Even today, with their outreach efforts and consideration of color and ethnic background in the admissions process, none of the *amici* colleges enrolls African-American students in anything like their proportion of the high school population.

For the colleges as much as for the rest of American society, the Civil Rights Movement in the 1960's was a watershed, an occasion for taking stock, making commitments, and pursuing them. The trustees and faculty at each college examined the education mission they were charged with serving and considered whether the continued effecttive absence (or great paucity) of students of color was consistent with education broadly conceived and the public service each college aims to serve. They all concluded that special efforts to attract, enroll, and graduate students from groups historically excluded was an educational, social, and moral imperative. And it was not only trustees and faculties that changed their views and

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[21] No African-Americans graduated from Haverford until 1951. None graduated from Amherst from 1939 to 1947, even though under different leadership Amherst had, from 1915 to 1926, enrolled a number of African-American students, including four from the M Street (Dunbar) High School in Washington, D.C who are among its most illustrious and successful graduates by any standard – William Hastie (who after arguing a series of civil rights cases in the Supreme Court became the first African-American federal judge, and later served on the United States Court of Appeals for the Third Circuit), Charles Houston (Dean of the Howard Law School and NAACP Special Counsel who planned the legal strategy leading to *Brown v. Board of Education*), Charles Drew (who perfected the storage of blood plasma saving save thousands of lives in World War II), and Mercer Cook (twice a United States Ambassador). Wade, Jr., *Black Men of Amherst*, chs. IV-V.

concluded that including students from African-American backgrounds was an educational imperative; applicants choosing among colleges also reached the same judgment, and began identifying campus diversity as a significant factor motivating their application and enrollment decisions as well.

Since the King assassination sparked reflection and action across American campuses, *amici* have graduated more African-American students, and are more diverse in multiple ways, than in the previous 175 years. They have done so through the use of race-conscious admissions efforts permitted by *Bakke* and *Grutter* – indispensable efforts that petitioner would foreclose.

B. The Colleges' Experience Demonstrates That Aiming for Diversity Has Had Educational Benefits – And Benefits For American Society.

In the years since *amici* colleges recognized that they were each more insular and less diverse than was educationally wise or socially defensible – and more than the students they sought to attract wanted them to be or their missions warranted – their efforts to cast their nets more widely have paid off in numerous respects. The careful, thoughtful, well-considered efforts to attract more qualified students of color to apply to and matriculate at the colleges have enabled the colleges to better accomplish the missions they set for themselves, which inclued, among other things, educating students who, individually and collectively, will contribute most to – and gain most from – the educational process, and be most successful in using what they have learned for the benefit of the larger society.

l. All of *amici* colleges, as part of their commitment to diversity and educational excellence, are cognizant of the interaction between campus diversity and educational attainment and all conclude that their diversity is an integral part of their educational strengths. Pomona, for example, studied the correlation between the diversity of students' interactions with others and various educational outcomes and concluded that increased diversity led to significant gains in educational attainment for both students of color and white students. These and other studies confirm the diffuse and wide-ranging educational benefits of the diversity sought by *amici*.

The educational benefits to diversity have also been fed back in the form of curricular and pedagogical innovations. As colleges gain experience from enrolling diverse students, the curriculum is adjusted to incorporate students' and alumni's practical experience of diversity, fostering better preparation for life beyond college. All colleges report changes and improvements in what is taught, how it is taught, and extracurricular programming.

For instance, Carleton's sciences faculty began an intensive effort to improve the success rates of students of color in science and math, which resulted in pedagogical innovations that benefitted Carleton's math and science students generally. To preclude colleges from casting a wide net and choosing a diverse class risks throwing away the educational gains that have already accrued and forestalling new innovations that arise from the experiences and perspectives of a diverse student body.

Beyond the incorporation of diverse perspectives into pedagogical design and practice, diversity is also an increasingly important part of the subject matter of various fields of study. The inescapable realities of increased diversity in the country and growing global interconnectedness have led *amici* colleges to incorporate the understanding of diversity in many fields of study. Put simply, students need to learn how to work with, market to, and buy from people from diverse backgrounds and cultures.

2. The consumers of education from *amici* colleges, the students, are in the best place to determine what they want out of their educational experiences, and overwhelmingly they demand diversity. The colleges are acutely aware that a lack of diversity will make it much more difficult to attract the best students in future classes.

Overwhelming majorities of incoming students rate "understanding other cultures" and "learning to relate to people of other races and nationalities" as "essential" or "very important" skills to learn in college. Campus diversity is highly correlated with various measures of student satisfaction, including the sense of community which is critically important to the effective functioning of small liberal arts colleges. A lack of student body diversity would prevent students from developing critical skills and decrease satisfaction with life on campus.

3. The outcomes of students of color who attend *amici* colleges bear out the educational benefits of attendance at diverse institutions. The graduation rates of students of color at liberal arts colleges are not substantially different from their peers (higher, at some of *amici*), and these students go on to

achieve great personal and professional success. To cite just one example, a survey of Williams alumni found that 87% of black graduates went on to a graduate or professional degree program, a higher proportion than white graduates. The list of successful students of color who have graduated from *amici* colleges and gone on to leadership roles in the public, private and nonprofit sectors is extensive. The contention that admissions policies that include race as a factor somehow placed these students at the "wrong" school is belied by their tremendous successes on campus and beyond.

III. BARRING INSTITUTIONS OF HIGHER EDUCATION FROM MAINTAINING THEIR OWN ADMISSION CRITERIA WOULD VIOLATE VITAL PRINCIPLES OF ACADEMIC FREEDOM AND INSTITUTIONAL AUTONOMY, AS WELL AS STARE DECISIS.

Petitioner's argument for displacing the educational judgments of the University of Texas—and the educational judgments of *amici* and private colleges and universities generally—is at war with two fundamental principles of constitutional law: the rule that "Considerations of profound importance counsel restrained judicial review of the substance of academic decisions," *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985), and the rule of *stare decisis*.

1. *Grutter* expressly followed *Ewing*'s rule of judicial restraint, recognizing "a constitutional dimension grounded in the First Amendment, of educational autonomy." 539 U.S. at 329. Academic freedom includes the "[d]iscretion to determine, on academic grounds, who may be admitted to study," "one of 'the four essential freedoms' of a university." *Ewing*, 474 U.S. at 226 n.12 (citations omitted).

The judicial restraint commanded by *Ewing* has old and deep roots, reaching back to *Trustees of Dartmouth Coll. v. Woodward,* 17 U.S. 518 (1819), and the Court's recognition there that a free society requires public and private spheres, and limitations on governmental intrusion and control so as to preserve those key distinctions. "Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students . . . but also . . . on autonomous decision-making by the academy itself . . . ." *Ewing*, 474 U.S. at 226 n.12 (citations omitted). Only a "hands off" policy leaves colleges free to reform, experiment, refine, and thereby offer to the whole society the improvements that result from a free market in ideas and practices.

Accordingly, "When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms . . . ." *Ewing*, 474 U.S. at 225; *see also id.* at 227-8 (courts may displace such judgments, if at all, only if they were found to be such a substantial departure from accepted academic norms or "aberrant"); *Grutter*, 539 U.S. at 329 (in advancing an institution's goal of "attaining a diverse student body" as part of its "proper institutional mission," "'good faith' on the part of a university is 'presumed,'") (quoting *Bakke*, 438 U.S. at 318-19 (Powell, J.)); *Bakke*, 438 U.S. at 318-19 ("[I]n an admissions program where race or ethnic background is simply one element – to be weighed fairly against other elements – in the

selection process," "good faith would be presumed").[22]

Individually but with impressive unanimity, private selective colleges and universities have made a collective judgment that obtaining broad diversity in their student bodies, including (but not limited to) racial diversity, is a matter of profound *educational* importance, and that the way to obtain that diversity is by seeking it, in a process in which the reality of race is considered competitively along with numerous other factors. Deference to the colleges' educational judgments that diversity is a core component of the education they are seeking to provide is plainly called for, as *Grutter* held. 539 U.S. at 328. The attempt by petitioners and her allies to strike racial and ethnic background from the list of all the factors that are considered in assembling a class has not met, and cannot conceivably meet, the *Ewing* standard.

Displacement of a college or university's core prerogatives—including the power to decide which set of applicants, considered individually and collectively, will take fullest advantage of what the college has to offer, contribute most to the educational process in college, and be most successful in using what they have learned for the benefit of the larger society—would be an extraordinary departure from the deference that courts have long shown to institutions of higher education generally, and particularly private institutions.

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[22] *See also Ewing,* 474 U.S. at 227-28 (asking whether the challenged decision by educators was "beyond the pale of reasoned academic decisionmaking"). *Cf. Bd. of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 89-90 (1978) (courts are not equipped or authorized to evaluate academic decisions made by institutions of higher education).

2. *Stare decisis* independently leads to the same judicial restraint required by *Dartmouth College* and *Ewing*. The standards for reversal of *Bakke*'s constitutional holding, as set forth in *Dickerson v. United States*, 530 U.S. 428 (2000), and *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833 (1992), are not nearly met.

After *Bakke* and then again after *Grutter*, each of the *amici* (and undoubtedly other selective colleges and universities as well) reviewed their admissions procedures in light of Justice Powell's opinion sketching out a permissible approach (which five justices plainly supported), and set sail accordingly. Enormous reliance interests have built up accordingly. In dozens of ways, the institutions where diversity is a significant reality have invested in change, and changed.

The peopling of the college communities with a more diverse group of students has made the colleges different (and better) than they were. Reliance on *Grutter* and *Bakke* has had huge impact on the world in which aspiring families and their high school students, and college students, live. *Grutter* and *Bakke* have left their mark on recruiting efforts, on relationships with secondary public and private schools and high school counselors, on support services and programs, on housing choices, and on the curricula, which have broadened and developed to meet the needs and expectations of a more diverse student body.

Not only have the colleges invested in reliance, so too have students and their parents. Current students and those matriculated for next year have expectations about being in a diverse community, and not being isolated. Thousands of such students have been aiming for admission to the *amici*

colleges, or their highly selective university counterparts. Reversal of *Grutter* and *Bakke* would as a practical matter turn realistic opportunities into lottery chances. Without the ability to take race into account—and even more, with the expensive likelihood that differential admission rates in SAT bands after such a decision would be attacked as *prima facie* evidence of unlawful discrimination, with colleges left to prove that they did not exclude on the basis of race—the presence of African-Americans and Latinos on America's most selective campus would plummet, as it did in California's selective universities.

In short, upending the world that *Grutter* and *Bakke* invited and approved would interfere substantially with reasonable expectations and long-settled social patterns. That dislocation should weigh heavily against dispatching *Grutter* (which itself followed *Bakke*) and foreclosing the broadened opportunity they allowed for African-Americans and other disadvantaged students of color at the nation's most selective colleges and universities.

Extraordinary progress in opening up previously closed educational institutions has occurred since conscious efforts to include black Americans within the circle of those admitted to highly selective educational institutions in the United States began in the 1960's and were effectively held permissible

in *Bakke*.[23] Many thousands of black and Hispanic Americans have graduated, taken their place in American society, and benefited the society at large by their accomplishments and civic contributions. For the Court to render a decision that would be widely taken as deeming their very degrees illegitimate—the basis for their achievements and contributions the product of violations of constitutional or statutory law—would be an extraordinary step, permissible, if at all, only if the constitutional or statutory text or history left no doubt whatever that *Grutter* and *Bakke* reached the wrong result.

History, though, confirms that *Grutter* and *Bakke* got it right. The Congress that adopted the Fourteenth Amendment repeatedly enacted race-conscious and race-targeted legislation in order to close the social gap between blacks and whites and eliminate the lingering effects of discrimination. That history precludes any finding that the "original understanding" of the Fourteenth Amendment prohibits what *Grutter* and *Bakke* permit.[24] In view of that telling original understanding, it is

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[23] Greenberg, *Affirmative Action in Higher Education: Confronting the Condition and Theory*, 43 B.C. L. Rev. 521, 569-71 (2002); *JBHE Annual Survey: Black First-Year Students at the Nation's Leading Liberal Arts Colleges*, Journal of Blacks in Higher Education, *available at* http://www.jbhe.com/2011/11/the-jbhe-annual-survey-black-first-year-students-at-the-nations-leading-liberal-arts-colleges.

[24] Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 Va. L. Rev. 753, 784-85 (1985); Rubenfeld, *Affirmative Action*, 107 Yale L.J. 427, 429-32 (1997); Greenberg, *Affirmative Action in Higher Education: Confronting the Condition and Theory*, 43 B.C. L. Rev. at 577 & n.322.

plainly not possible to say that the holding in *Grutter*—that race may be considered competitively, along with other factors, so long as separate racial tracks are not set up—was plainly wrong.

* * * *

The judicial deference owed to colleges and universities, joined to the wise policy of *stare decisis*, counsels against any resolution of these cases that would interfere with the powers of colleges and universities generally—and particularly private institutions—to experiment and pursue their own judgments as to how to best use their resources for educational and charitable purposes, even when doing so entails some consideration of racial background as one factor, among many, to be considered and weighed competitively with many others.

CONCLUSION

Academic freedom and the deference due educational judgments leave colleges and universities free to select those students who, in their judgment and as *Grutter* and *Bakke* contemplated, will, individually and collectively, take fullest advantage of what the college has to offer, contribute most to the educational process, and use what they have learned for the benefit of the larger society. The Fourteenth Amendment and Title VI do not mandate admission to private colleges and universities on the basis of quantitative measures, or forbid them from considering race or ethnic background among other factors to be competitively evaluated and considered in admission decisions, without quotas. The judgment below should be affirmed.

Respectfully submitted,

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