

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**

**AMICUS BRIEF OF THE LAWYERS'
COMMITTEE FOR CIVIL RIGHTS UNDER
LAW, ET AL., IN SUPPORT OF RESPONDENTS**

JON GREENBAUM
BRENDA SHUM
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
1401 New York Avenue, NW
Washington, D.C. 20005
(202) 662-8315

WADE HENDERSON
LISA M. BORNSTEIN
DIANNE PICHE
THE LEADERSHIP CONFERENCE
ON CIVIL AND HUMAN RIGHTS
1629 K Street, NW
Washington, DC 20006
(202) 466-3311

BRADLEY S. PHILLIPS
Counsel of Record
MICHELLE FRIEDLAND
DANIEL B. LEVIN
MIRIAM SEIFTER
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue
Los Angeles, CA 90071
(213) 683-9100
brad.phillips@mto.com

Counsel for Amici Curiae

August 13, 2012

TABLE OF CONTENTS

	Page
INTERESTS OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. BECAUSE OF THE ENDURING ROLE OF RACE IN AMERICAN SOCIETY, RACIAL DIVERSITY REMAINS AN IMPORTANT ASPECT OF DIVERSITY IN HIGHER EDUCATION.....	5
A. Race Still Matters in American Life	6
B. Students of Different Races Contribute Diverse Viewpoints, Perspectives, and Experiences	11
II. REALIZING THE EDUCATIONAL BENEFITS OF DIVERSITY REQUIRES MEANINGFUL INTERACTIONS AMONG STUDENTS OF MANY BACKGROUNDS AND PERSPECTIVES.....	13
A. The Educational Benefits of Diversity Are Realized Primarily Through Meaningful Interactions Among Students of Different Backgrounds.....	14
B. Empirical Evidence Shows That Diversity Yields Important Educational Benefits When Meaningful Cross-Racial Interactions Occur	16

TABLE OF CONTENTS

(continued)

	Page
1. Improved Classroom Experiences and Learning Outcomes.....	17
2. Preparing Students for Work and Citizenship	18
III. THE NATURE OF THE COMPELLING INTEREST IN DIVERSITY MAKES CLEAR THAT A UNIVERSITY MUST HAVE LATITUDE TO CONSIDER RACE AS PART OF AN INDIVIDUALIZED ADMISSIONS ASSESSMENT	21
A. Obtaining Diversity's Full Benefits Requires Attention to Individual Applicants	22
B. University Admissions Policies Must Be Permitted To Look Beyond Numbers Alone and Consider Race at an Individual Level	24
1. Petitioner's Reliance on Numbers Alone Is Misplaced and Constitutionally Impermissible	24
2. Petitioner's Reliance on Aggregate Data Is Improper and Misleading	25

TABLE OF CONTENTS

(continued)

	Page
C. A University's Constitutional Interests in Academic Freedom, Including the Freedom To Decide Whom To Admit, Should Inform the Strict Scrutiny Analysis	26
1. Under the First Amendment, Universities' Educational Judgments Are Entitled to Deference.....	28
2. Educational Judgments Entitled to Deference Include University Admissions Policies	29
3. Because a University's Judgments About Its Educational Mission Are Entitled to First Amendment Protection, Its Conclusions That Race-Conscious Admissions Policies Will Further Its Academic Goals Should Be a Factor in the Strict Scrutiny Analysis.....	31
CONCLUSION	33

TABLE OF AUTHORITIES

	Page(s)
FEDERAL CASES	
<i>Board of Curators of the University of Missouri v. Horowitz,</i> 435 U.S. 78 (1978)	28, 29
<i>Board of Education of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley,</i> 458 U.S. 176 (1982)	28
<i>Burson v. Freeman,</i> 504 U.S. 191 (1992)	32
<i>Christian Legal Soc’y Chapter of Univ. of Cal., Hastings Coll. of Law v. Martinez,</i> 130 S. Ct. 2971 (2010)	28
<i>Fisher v. University of Texas,</i> 631 F.3d 213 (CA5 2011).....	17, 26
<i>Grutter v. Bollinger,</i> 539 U.S. 306 (2003)	passim
<i>Keyishian v. Bd. of Regents,</i> 385 U.S. 589 (1967))	20, 28, 31
<i>Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1,</i> 551 U.S. 701 (2007)	passim
<i>Regents of University of California v. Bakke,</i> 438 U.S. 265 (1978)	passim

TABLE OF AUTHORITIES

(continued)

	Page(s)
<i>Regents of the University of Michigan v. Ewing</i> , 474 U.S. 214 (1985)	29, 30
<i>Richmond Newspapers, Inc. v. Virginia</i> , 448 U.S. 555 (1980)	32
<i>Simmons v. United States</i> , 390 U.S. 377 (1968)	32
<i>Sweezy v. New Hampshire</i> , 354 U.S. 234 (1957)	5, 30
<i>Wieman v. Updegraff</i> , 344 U.S. 183 (1952)	28, 31

OTHER AUTHORITIES

U.S. Census Bureau, Current Population Survey, 2010 Annual Social and Economic Supp., <i>Years of School Completed by Poverty Status, Sex, Age, Nativity and Citizenship</i>	9
Balfanz, R. & Legters, N., <i>Locating the dropout crisis: Which high schools produce the nation's dropouts?</i> (2004)	8
Bowen, <i>Admissions and the Relevance of Race</i> , Princeton Alumni Weekly 7 (Sept. 26, 1977)	15
Bowman, Nicholas A., <i>College Diversity Experiences and Cognitive Development</i> 80 Rev. Educ. Res. 4 (2010)	15, 18

TABLE OF AUTHORITIES

(continued)

	Page(s)
Bowman, Nicholas A., <i>Promoting Participation in a Diverse Democracy: A Meta-Analysis of College Diversity Experiences and Civic Engagement</i> 81 Rev. Educ. Res. 29 (2010)	20
Center for Disease Control and Prevention, <i>Health Disparities and Inequalities Report – United States, 2011</i>	10
Chang, Mitchell J., et al., <i>The Educational Benefits of Sustaining Cross-Racial Interaction Among Undergraduates</i> 77 J. Higher Ed. 430 (2006)	11, 15, 16
Chang, Mitchell James, <i>Quality Matters: Achieving Benefits Associated with Racial Diversity</i> (Kirwan Institute 2011).....	18
Demuth, Stephen & Steffensmeier, Darrell, <i>Ethnicity Effects on Sentence Outcomes in Large Urban Courts: Comparisons Among White, Black, and Hispanic Defendants</i> 85 Soc. Sci. Q. 994 (2004)	10
Engberg, Mark E., <i>Educating the Workforce for the 21st Century: A Cross-Disciplinary Analysis of the Impact of the Undergraduate Experience on Students' Development of a Pluralistic Orientation</i> 48 Res. Higher Educ. 283 (2007)	19

TABLE OF AUTHORITIES

(continued)

	Page(s)
Gerald, Danette & Haycock, Kati, <i>Engines of Inequality: Diminishing Equity in the Nation's Premier Public Universities</i> (The Education Trust, 2006)	9
Gurin, Patricia, et al., <i>The Benefits of Diversity in Education for Democratic Citizenship</i> 60 J. Soc. Issues 17 (2004)	21
Gurin, Patricia, et al., <i>Diversity and Higher Education: Theory and Impact on Educational Outcomes</i> 72 Harv. Educ. Rev. 330 (2002)	15, 19
Hurtado, Sylvia, <i>Preparing College Students for a Diverse Democracy: Final Report to the U.S. Department of Education</i> (Univ. of Mich., Ctr. for the Study of Higher & Postsecondary Educ. 2003)	12
Jayakumar, Uma M., <i>Can Higher Education Meet the Needs of an Increasingly Diverse and Global Society? Campus Diversity and Cross-Cultural Workforce Competencies</i> 78 Harv. Educ. Rev. 615 (2008)	18, 19
Lee, Jr., John Michael, et al., <i>The College Completion Agenda 2011</i> (College Board Advocacy & Policy Center 2011)	8, 9

TABLE OF AUTHORITIES

(continued)

	Page(s)
Losen, Daniel J. & Gillespie, Jonathan, <i>Opportunities Suspended: The Disparate Impact of Disciplinary Exclusion from School</i> (2012)	8
Luo, Jiali, & Jamieson-Drake, David, A <i>Retrospective Assessment of the Education Benefits of Interactions Across Racial Boundaries</i> , 50 J. Cal.. Student Dev. 67 (2009)	16
National Center for Education Statistics, Institute of Education Sciences, U.S. Dept. of Education, <i>The Nation's Report Card: Reading 2011</i> (2011).....	7
National Center for Education Statistics, Institution of Education Sciences, U.S. Dept. of Education, <i>The Nation's Report Card: Mathematics 2011</i> (2011).....	7
National Poverty Center, <i>Poverty Facts: Poverty in the U.S.</i>	9
Office for Civil Rights, U.S. Dept. of Education, Civil Rights Data Collection 2012	8
Office of Juvenile Justice & Delinquency Prevention, U.S. Dept. of Justice, <i>Juvenile Offenders and Victims: Juvenile Arrests 2009</i> (Dec. 2011)	10

TABLE OF AUTHORITIES

(continued)

	Page(s)
Orfield, Gary, <i>Reviving the Goal of an Integrated Society</i> (2009).....	7
Pettigrew, Thomas F. & Tropp, Linda R., A <i>Meta-Analytic Test of Intergroup Contact Theory</i> 90 J. Personality & Soc. Psychol. 751 (2006)	19
Reardon, Sean F., et al., <i>Race, Income, and Enrollment Patterns in Highly Selective Colleges, 1984-2004</i> (Stanford Center for Education Policy Analysis, 2012).....	9
Reason, Robert D., et al., <i>Faculty and Institutional Factors that Promote Student Encounters with Difference in First-Year Courses</i> , 33 Rev. Higher Educ. 391 (2010)	23
Syed, Moin, et al., <i>Identity and Academic Success Among Underrepresented Ethnic Minorities</i> J. Soc. Issues 442, 442–43 (2011).....	7
Taylor, Paul, et al., <i>Twenty-to-One: Wealth Gaps Rise to Record Highs Between Whites, Blacks, and Hispanics</i> , Pew Research Center (2011)	9
The Psychology of Prejudice and Discrimination: Racism in America, Vol. 1 (Jean Lau Chin ed., 2004)	6
<i>Top 100 Degree Producers</i> , Black Issues in Higher Education, June 2, 2005	26

x
TABLE OF AUTHORITIES
(continued)

	Page(s)
University of Texas at Austin, <i>Proposal to Consider Race & Ethnicity in Admissions</i> 24 (2004)	17
Wilson, George, <i>Racialized Life-Chance Opportunities Across the Class Structure: The Case of African Americans</i> , 609 <i>Annals Am. Acad. Pol. & Soc. Sci.</i> 215 (2007).....	10

INTERESTS OF AMICI CURIAE¹

The Lawyers' Committee for Civil Rights Under Law is a tax-exempt, nonprofit civil rights legal organization founded in 1963 by the leaders of the American bar at the request of President Kennedy to provide legal representation to the victims of civil rights violations. Its members include former presidents of national Bar Associations, law school professors, and many of the nation's leading lawyers. For almost fifty years, the Lawyers' Committee and its independent local affiliates in Boston, Chicago, Denver, Los Angeles, Philadelphia, San Francisco and Washington, D.C. have represented members of minority groups and others in hundreds of civil rights cases. Among the essential interests of the Lawyers' Committee is the proper construction and implementation of programs to provide for racial diversity in higher education. The Lawyers' Committee filed an amicus curiae brief in *Grutter v. Bollinger*, 539 U.S. 306 (2003).

The Leadership Conference on Civil and Human Rights is a diverse coalition of more than 200 national organizations charged with promoting and protecting the civil and human rights of all persons in the United States. The Leadership Conference was founded in 1950 by A. Philip Randolph, head of the Brotherhood of Sleeping Car Porters; Roy Wilkins of the NAACP; and Arnold Aronson, a leader of the

¹ The parties have consented to the filing of this brief. No party to this case or their counsel authored this brief in whole or in part, and no person other than amici and their counsel paid for or made a monetary contribution toward the preparation or submission of this brief.

National Jewish Community Relations Advisory Council. Its member organizations represent people of all races, ethnicities, religions and socio-economic backgrounds. The Leadership Conference works to build an America that is as good as its ideals, and toward this end, supports the use of race as one factor in admissions policies to promote diversity in the nation's colleges and universities. Diversity improves the quality of education for all students and promotes leadership and civic engagement. The success of The Leadership Conference as a multiracial and multiethnic coalition dedicated to common goals illustrates the tangible contribution of diversity to contemporary American society.

Additional amici curiae listed in the Appendix represent a broad array of allied organizations that have a common interest in promoting diversity in the nation's colleges and universities.

SUMMARY OF ARGUMENT

Nine years ago, this Court reaffirmed that attaining the benefits of diversity in higher education is a compelling state interest that can justify the use of race in university admissions. *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) (endorsing “Justice Powell’s view” in *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 314-15 (1978)). For decades, Justice Powell’s opinion in *Bakke* “has served as the touchstone for constitutional analysis of race-conscious admissions policies,” as “[p]ublic and private universities across the Nation have modeled their own admissions programs on [his] views on permissible race-conscious policies.” *Grutter*, 539 U.S. at 323. This Court endorsed Justice Powell’s view because diversity in education remains important “in a society, like our

own, in which race unfortunately still matters.” *Id.* at 333. For reasons explained below, the reasoning and holdings of *Bakke* and *Grutter* remain sound and should govern this case.

It is crucial that the Court’s consideration of this case be informed by a proper understanding of the nature of a university’s interest in diversity. As this Court has recognized, the presence of a diverse student body on campus leads to a range of educational benefits, including improved learning outcomes and better preparation for work and citizenship. Because race and ethnicity continue to affect the experiences and perspectives of individuals in society, racial and ethnic diversity² are important aspects of the diversity that promotes the best educational outcomes. As Justice O’Connor observed in *Grutter*, “[j]ust as growing up in a particular region or having particular professional experiences is likely to affect an individual’s views, so too is one’s own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters.” *Grutter*, 539 U.S. at 333. A student’s identity as a member of a particular racial group inevitably shapes, in various ways, the experiences and perspectives that student brings to both campus life and the classroom. For that reason, admitting a student body that is racially diverse remains a compelling educational interest of a college or university.

² Throughout the remainder of this brief, for the sake of brevity, references to “racial diversity” encompass both racial and ethnic diversity.

But there are no magic numbers that produce diversity's benefits. That is because, as studies show, the educational benefits of diversity flow from meaningful interactions among students of different races, and whether such interactions occur on campus may depend on a wide array of factors beyond percentages. This compels at least three conclusions:

First, to realize the benefits of a racially diverse student body, a university must have leeway to consider race as one factor in holistic, individualized admissions decisions. Social science research shows that a university's courses, programs, and extracurricular activities may each be a forum for the meaningful interactions critical to achieving diversity's benefits. Consideration of how individual applicants will contribute to these environments is therefore crucial to a university's mission.

Second, Petitioner's assertion that the University of Texas ("UT")'s compelling interest is necessarily satisfied by numbers alone—here, that it was satisfied when aggregated "Hispanic and African-American enrollment" constituted "21.4% of the incoming freshman class," Pet. Br. 35—is misplaced. Focusing exclusively on the numbers or percentages of students of color on campus without also permitting race to factor into individualized admissions decisions fails to protect the university's interest in promoting meaningful interactions of students of different races inside and outside the classroom.

Third, the Court's scrutiny of UT's limited use of race in its admissions decisions must take into account that these decisions are made in an educational context. *See Grutter*, 529 U.S. at 327

(“Context matters when reviewing race-based governmental action under the Equal Protection Clause.”). As Justice Frankfurter stated in *Sweezy v. New Hampshire*, the “four essential freedoms of a university” are: “to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and *who may be admitted to study*.” 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (emphasis added). Admissions decisions, including efforts to realize the benefits of racial diversity, require numerous judgments about the students to be admitted and the nature of their interactions inside and outside the classroom. These judgments require expertise in higher education that universities clearly possess and that is squarely within their constitutional domain. Courts should therefore accord some deference to a university’s judgments about both the need for racial diversity and the means that will achieve it without sacrificing other important educational interests.

ARGUMENT

I. BECAUSE OF THE ENDURING ROLE OF RACE IN AMERICAN SOCIETY, RACIAL DIVERSITY REMAINS AN IMPORTANT ASPECT OF DIVERSITY IN HIGHER EDUCATION

Racial diversity remains an important component of the diversity that universities may strive to attain in order to provide the best learning environment and outcomes for their students. This Court has recognized that “[e]ffective 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. But this goal is not yet realized, and the Nation’s long struggle with racial inequality is not over. As Justice Kennedy observed just five years ago, “[t]he enduring hope is that race should not matter; the reality is that too often it does.” *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 787 (2007) (Kennedy, J., concurring).

The continuing significance of race in our society means that a student’s racial identity will very likely affect the experiences and perspectives he or she brings to the educational environment at a university. This is not to say that members of a minority race all have the *same* experiences or perspectives; certainly they do not. But, because race too often “matters,” racial identity may imbue an individual applicant with experiences and qualities that would enrich the learning environment. *See Grutter*, 539 U.S. at 333 (“one’s own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters” “is likely to affect an individual’s views”).

A. Race Still Matters in American Life

Race continues to play a significant role in individuals’ experiences in many realms of society. Because of both the reality and perception that race matters throughout society—in education, employment, criminal justice, healthcare, and many other sectors—race continues to inform and shape the individual identities of people of color. *See, e.g., The Psychology of Prejudice and Discrimination: Racism in America*, Vol. 1 (Jean Lau Chin ed., 2004).

Racial disparities in educational attainment persist. Indeed, despite our “historic commitment to creating an integrated society that ensures equal

opportunity for all . . . children,” *Parents Involved*, 551 U.S. at 797 (Kennedy, J., concurring), experts continue to report “barriers at every step of the academic pipeline” for underrepresented minority students. Moin Syed, et al., *Identity and Academic Success Among Underrepresented Ethnic Minorities*, 67 J. Soc. Issues 442, 442-43 (2011).

Racial segregation persists at the elementary and secondary levels: In the 2006-07 school year, 73% of black students attended predominately (more than 50%) minority public schools, and 38.5% attended schools that are “intensely segregated” (90–100% minority). Gary Orfield, *Reviving the Goal of an Integrated Society*, at 12, 26 (2009).

Race-based achievement gaps also persist and are linked to racial and socioeconomic segregation. The results of the National Assessment of Educational Progress (NAEP), the largest nationally representative and continuing assessment of student performance in various subject areas, show that racial and ethnic gaps persist for both reading and math. See National Center for Education Statistics, Institute of Education Sciences, U.S. Dept. of Education, *The Nation’s Report Card: Reading 2011*, at 11, 44 (2011), available at <http://nces.ed.gov/nationsreportcard/pdf/main2011/2012457.pdf>; National Center for Education Statistics, Institution of Education Sciences, U.S. Dept. of Education, *The Nation’s Report Card: Mathematics 2011*, at 14, 18, 39, available at <http://nces.ed.gov/nationsreportcard/pdf/main2011/2012458.pdf>.

Racially isolated high schools are less likely to offer a full menu of college-preparatory courses and rigorous curricula that would allow students to earn higher grade point averages or early college credit,

and students of color are underrepresented in gifted and talented programs and have less access to higher level academic programs in math and science. See Office for Civil Rights, U.S. Dept. of Education, Civil Rights Data Collection 2012, *available at* <http://www2.ed.gov/about/offices/list/ocr/docs/crdc-2012-data-summary.pdf>. In addition, the rate of out-of-school suspensions is significantly higher for African-American students than for white and Asian American students. Daniel J. Losen & Jonathan Gillespie, *Opportunities Suspended: The Disparate Impact of Disciplinary Exclusion from School*, at 14 (2012) (nationwide in the 2009-10 school year, 17% of African-American students suspended at least once, compared to 5% of white and 2% of Asian American students).

Taken together, these factors produce lower rates of academic success for minority students. Dropout rates are significantly higher in racially isolated and impoverished schools, and nearly all of these “dropout factories” are doubly segregated by race and poverty. See Balfanz, R. & Legters, N., *Locating the dropout crisis: Which high schools produce the nation’s dropouts?* (2004), *available at* <http://www.csos.jhu.edu/crespar/techReports/Report70.pdf>. As of 2008, of public high school students who enter school as freshman approximately 61% of African Americans, 63% of Hispanics, and 64% of Native Americans graduate in four years, as compared to 81% of white and 91% of Asian students. See John Michael Lee, Jr., et al., *The College Completion Agenda 2011*, at 62 (College Board Advocacy & Policy Center 2011), *available at* http://completionagenda.collegeboard.org/sites/default/files/reports_pdf/Progress_Report_2011.pdf.

These disparities persist in higher education. The percentage of U.S. adults with at least some post-secondary education varies by race. As of 2009, only 29.5% African Americans and 19.2% of Hispanics ages 25 to 34 had earned an associate degree or higher, as compared to 48.7% of white students and 69.1% of Asian students. See Lee, *The Completion Agenda 2011*, *supra*, at 11–12. Over the past few decades, flagship public universities “have become much less representative of the racial composition” of those who graduate from high school. Danette Gerald & Kati Haycock, *Engines of Inequality: Diminishing Equity in the Nation’s Premier Public Universities*, at 7 (The Education Trust, 2006). Black and Hispanic students are significantly underrepresented at highly selective colleges. Sean F. Reardon, et al., *Race, Income, and Enrollment Patterns in Highly Selective Colleges, 1984-2004*, at 5-11 (Stanford Center for Education Policy Analysis, 2012).

“Poverty rates for blacks and Hispanics” also “greatly exceed the national average.” National Poverty Center, *Poverty Facts: Poverty in the U.S.*, available at <http://www.npc.umich.edu/poverty/#2>. Indeed, even when controlled for educational attainment, the African-American poverty rate is almost double that of white Americans. See U.S. Census Bureau, Current Population Survey, 2010 Annual Social and Economic Supp., *Years of School Completed by Poverty Status, Sex, Age, Nativity and Citizenship*. Wealth gaps between racial groups are at an all-time high. See Paul Taylor, et al., *Twenty-to-One: Wealth Gaps Rise to Record Highs Between Whites, Blacks, and Hispanics*, Pew Research Center (2011). Among the poor and the middle class, residential and employment spheres remain largely

segregated by race. See George Wilson, *Racialized Life-Chance Opportunities Across the Class Structure: The Case of African Americans*, 609 *Annals Am. Acad. Pol. & Soc. Sci.* 215, 216 (2007). These conditions contribute to poorer life outcomes for minorities. People who live and work in low socioeconomic circumstances are at increased risk for mortality, morbidity, unhealthy behaviors, reduced access to health care, and inadequate quality of care. Center for Disease Control and Prevention, *Health Disparities and Inequalities Report – United States, 2011*, at 13. Disparity in access to healthy and adequate housing is also significant: non-Hispanic blacks experience the highest percentage of householders living in inadequate and unhealthy housing, followed by Hispanics and American Indians or Alaskan Natives. *Id.* at 21.

Studies show that race also still matters in the juvenile justice system. According to the most recent Civil Rights Data Collection, more than 70% of students who were arrested or referred to law enforcement from public schools were Hispanic or black. Black youths are more likely than their white peers to be arrested for the same crimes and more likely to be detained; and, while black youths represented 34% of the overall delinquency caseload in 2008, they made up 41% of the detention caseload. See Office of Juvenile Justice & Delinquency Prevention, U.S. Dept. of Justice, *Juvenile Offenders and Victims: Juvenile Arrests 2009* (Dec. 2011).

The significance of race elsewhere in the criminal justice system is well documented. For example, black and Hispanic defendants on average receive longer sentences than white defendants. See Stephen Demuth & Darrell Steffensmeier, *Ethnicity Effects on*

Sentence Outcomes in Large Urban Courts: Comparisons Among White, Black, and Hispanic Defendants, 85 Soc. Sci. Q. 994 (2004) (noting that black and Hispanic defendants receive harsher sentences than white defendants, particularly in drug and property crimes).

B. Students of Different Races Contribute Diverse Viewpoints, Perspectives, and Experiences

Because race still plays such an influential role in so many spheres of life, it is not surprising that a person's race tends to inform his or her identity, experiences, and perspectives. See Mitchell J. Chang, et al., *The Educational Benefits of Sustaining Cross-Racial Interaction Among Undergraduates*, 77 J. Higher Ed. 430, 431-32 (2006). Minority youth—in particular, African-American and Latino children—are more likely to attend segregated schools, suffer more severe school discipline, live in poverty, and have relatives in the criminal justice system. Whether minority youths have experienced such hardships firsthand or not, they are more likely than others to feel stigmatized by or sensitized to racial disparities in society. Thus, both directly and indirectly, racial disparities in society affect individuals' experiences and their perspectives. In turn, and as explained in more detail below, “because of the persistent power of race to shape life experiences, racial and ethnic compositional diversity can create a rich and complex social and learning environment that can subsequently be applied as an educational tool to promote students' learning and development.” *Id.* at 432.

To be sure, individuals of any given race will have varied experiences and a wide range of perspectives. *See Grutter*, 539 U.S. at 333. One student of color may have a parent, friend, or relative in jail and develop strong views, of whatever valence, regarding criminal justice and punishment. Another may have parents who have never received so much as a traffic ticket; she may feel frustrated or stigmatized by a prison system filled disproportionately with racial minorities or by media portrayals that correlate race and crime. A third student of color may study law or law enforcement in order to break down stereotypes and combat disparities in incarceration rates. A fourth may be focused on pursuing her dream of becoming a doctor and be indifferent to criminal justice issues. For each, the “unique experience of being a racial minority in [our] society” has the potential to enrich classroom and dormitory discussion and the exchange of ideas within a university. *Id.*

Furthermore, students’ interactions with peers with different racial backgrounds may reveal more similarities than differences. Students of different races will sometimes discover that they have far more in common than they anticipated. *See* Sylvia Hurtado, *Preparing College Students for a Diverse Democracy: Final Report to the U.S. Department of Education* 37-38 (Univ. of Mich., Ctr. for the Study of Higher & Postsecondary Educ. 2003) [hereinafter *Preparing College Students*]. Discovery of such similarities is just as important as exposure to different opinions, as it “promotes ‘cross-racial understanding’ [and] helps to break down racial stereotypes.” *Grutter*, 539 U.S. at 330; *see also* *Preparing College Students*, *supra*, at 37 (explaining that realization of “commonalities” in cross-racial

interaction can “facilitate self-reflection about [students’] own assumptions”).

II. REALIZING THE EDUCATIONAL BENEFITS OF DIVERSITY REQUIRES MEANINGFUL INTERACTIONS AMONG STUDENTS OF MANY BACKGROUNDS AND PERSPECTIVES

As this Court has held, the compelling interest in diversity is specifically an interest in “*obtaining the educational benefits* that flow from a diverse student body.” *Grutter*, 539 U.S. at 343 (emphasis added). That interest is decidedly “*not* simply ‘to assure within [a school’s] student body some specified percentage of a particular group merely because of its race or ethnic origin.’” *Grutter*, 539 U.S. at 329-30 (emphasis added) (quoting *Bakke*, 438 U.S. at 307 (opinion of Powell, J.)). “That would amount to outright racial balancing,” which the Court has held is “patently unconstitutional.” *Id.* Instead, obtaining the “substantial” educational benefits of diversity, *Grutter*, 539 U.S. at 330, requires creating an educational community that fosters those benefits by supporting meaningful interactions among diverse students.

Of course, numbers do matter. *See Grutter*, 539 U.S. at 336 (“[S]ome attention to numbers without more, does not transform a flexible admissions system into a rigid quota.”) (internal quotation marks omitted). A university cannot even hope to foster meaningful interactions among diverse students without some sufficient number of enrolled minority students. *Id.* at 340. But a university may properly conclude that sterile enrollment numbers alone are of limited use. Percentages alone may be a limited

predictor of the interactions that fuel diversity's benefits, and they may miss the significant diversity of individual applicants *within* racial groups. For these reasons, social science compels the same conclusion the Court has reached on constitutional grounds: that the "critical mass" a school may seek to enroll through its admissions decisions should be defined in a manner more nuanced than sheer numbers—"by reference to the educational benefits that diversity is designed to produce." *Id.* at 330.

Having admitted certain numbers or percentages of diverse students must not preclude a university from considering race in its individualized admissions decisions in order to promote meaningful interactions among diverse students. While enrolling some number of students is obviously a necessary element of a university's effort to further its compelling educational interest in diversity, a university may properly adopt an admissions strategy that looks beyond numbers. In this section, Amici first explain further the critical role of meaningful interactions among students in achieving diversity's benefits and then identify, with reference to empirical evidence, the educational benefits that those interactions yield.

**A. The Educational Benefits of Diversity
Are Realized Primarily Through
Meaningful Interactions Among
Students of Different Backgrounds**

Part of the benefit of a college education, this Court has recognized, is that students "are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world." *Bakke*, 438 U.S. at 313 & n. 48 (quoting

Bowen, *Admissions and the Relevance of Race*, Princeton Alumni Weekly 7, 9 (Sept. 26, 1977)). These educational benefits are realized primarily when students have meaningful interactions with one another. Nicholas A. Bowman, *College Diversity Experiences and Cognitive Development*, 80 Rev. Educ. Res. 4, 22-23 (2010) [hereinafter *Cognitive Development*]. Campus diversity “operates through students’ experiences,” and in key part through their “actual interactions with diverse peers.” Patricia Gurin et al., *Diversity and Higher Education: Theory and Impact on Educational Outcomes*, 72 Harv. Educ. Rev. 330, 360 (2002) [hereinafter *Theory and Impact*].

These interactions may occur productively in multiple contexts on campus. They may occur formally or informally, inside or outside of the classroom. *See id.* at 351–58. In some circumstances, structured classroom discussions provide the operative interactions. *See id.* Other times, “unplanned, casual encounters with roommates, fellow sufferers in an organic chemistry class, student workers in the library, teammates on a basketball squad, or other participants in class affairs or student government can be subtle and yet powerful sources of improved understanding and personal growth.” *Bakke*, 438 U.S. at 313 & n. 48 (quoting Bowen, *Admissions and the Relevance of Race*, at 7, 9).

The frequency of students’ cross-racial interactions affects the educational benefits they derive from campus diversity. *See Interaction Among Undergraduates, supra*, at 449. As a student’s level of cross-racial interaction increases, he or she demonstrates more significant gains in cognitive development, self-confidence, and understanding and tolerance of members of other racial groups, among

other characteristics. *See id.* In a survey of 6,049 alumni of four major research institutions, researchers found that individuals reporting “substantial” levels of cross-racial interaction in college demonstrated significantly higher skill development in seven areas, including formulating creative ideas or solutions and developing awareness of complex social problems, than individuals reporting “some” or “little” cross-racial interaction. *See* Jiali Luo & David Jamieson-Drake, *A Retrospective Assessment of the Education Benefits of Interactions Across Racial Boundaries*, 50 J. Cal. Student Dev. 67, 80 (2009). The frequency of interaction also matters at a macro level; a campus’s overall level of cross-racial interaction may affect the extent to which individual students experience diversity’s benefits. *See Interaction Among Undergraduates, supra*, at 449–50. A university must therefore be allowed to foster formal and informal interactions among students of different races by, among other things, considering race as one factor in its individualized admissions decisions.

B. Empirical Evidence Shows That Diversity Yields Important Educational Benefits When Meaningful Cross-Racial Interactions Occur

Powerful empirical evidence shows that, when accompanied by meaningful cross-racial interactions, diversity yields substantial educational benefits. *Cf. Grutter*, 539 U.S. at 387–88 (Kennedy, J., dissenting) (“[this Court’s] precedents provide a basis for the Court’s acceptance of a university’s considered judgment that racial diversity among students can further its educational task, when supported by empirical evidence”). The benefits fall loosely into

two categories: improved learning outcomes and improved preparation for work and citizenship. *Cf. Fisher v. University of Texas*, 631 F.3d 213, 219-20 (CA5 2011) (identifying educational benefits of diversity, including “Increased Perspectives,” “Professionalism,” and “Civic Engagement”).

1. Improved Classroom Experiences and Learning Outcomes

In *Grutter*, this Court recognized that diversity contributes to improved classroom discussion. *Grutter*, 539 U.S. at 330 (“[C]lassroom discussion is livelier, more spirited, and simply more enlightening and interesting’ when the students have ‘the greatest possible variety of backgrounds.’”) (citation omitted). In addition, the *Grutter* Court found that “numerous studies show that student body diversity promotes learning outcomes.” *Id.* at 330. *See also Bakke*, 438 U.S. at 312 (opinion of Powell, J.) (diversity promotes “[t]he atmosphere of ‘speculation, experiment, and creation’ . . . [that is] so essential to the quality of higher education.”).

These benefits—many of which were identified by the University of Texas in its 2004 *Proposal to Consider Race and Ethnicity in Admissions*—find substantial support in the empirical literature. *See Univ. of Tex. at Austin, Proposal to Consider Race & Ethnicity in Admissions* 24 (2004) (discussing improved learning, cross-racial understanding, classroom discussions, workforce preparation, civic participation, and leadership in public and private life). Students’ informal and curricular interactions with diverse peers is “positively associated with a wide range of student outcomes in the higher education context, including improving academic

skills; academic and social self-concept; cognitive outcomes; personal growth/development; teamwork and leadership skills; prejudice reduction; . . . perceived exposure to diverse ideas; racial/cultural understanding and engagement; pluralistic orientation; social agency and civic development; retention; well-being; and satisfaction with college.” See Mitchell James Chang, *Quality Matters: Achieving Benefits Associated with Racial Diversity*, at 11–12 (Kirwan Institute 2011) (listing studies); Uma M. Jayakumar, *Can Higher Education Meet the Needs of an Increasingly Diverse and Global Society? Campus Diversity and Cross-Cultural Workforce Competencies*, 78 Harv. Educ. Rev. 615, 620–21 (2008) (same). Evidence indicates that personal interactions with students of diverse races promote cognitive growth and that the positive effects of such interactions are greater than the effects of either formal instruction about diversity or interactions with students who are diverse only in respects other than race. *Cognitive Development*, *supra*, 20–22 (2010).

2. Preparing Students for Work and Citizenship

As this Court found in *Grutter*, diversity in higher education furthers the “overriding” educational goal “of preparing students for work and citizenship,” in addition to improving learning outcomes. *Grutter*, 539 U.S. at 331. Students who experience a racially diverse educational environment are better prepared for success in the workforce, because “the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.” *Id.* at 330.

In the years since *Grutter*, numerous studies have confirmed that cross-racial interaction increases students' professional competency by improving their ability to see the world from others' perspectives, fostering openness to opposing viewpoints, reducing prejudice, increasing tolerance of others with different beliefs, improving their ability to negotiate controversial issues, and enhancing their social self-confidence. See, e.g., Jayakumar, *supra*, at 641; see also Mark E. Engberg, *Educating the Workforce for the 21st Century: A Cross-Disciplinary Analysis of the Impact of the Undergraduate Experience on Students' Development of a Pluralistic Orientation*, 48 Res. Higher Educ. 283, 310–312 (2007) (finding diversity experiences in college are key to achieving students' workforce preparation); *Theory and Impact*, *supra*, at 361 (same); cf. Thomas F. Pettigrew & Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 J. Personality & Soc. Psychol. 751, 757 (2006) (meta-analysis finding that intergroup interaction consistently reduced individuals' prejudice levels).³

This Court's precedents also recognize that student-body diversity helps facilitate diverse leadership

³ Petitioner thus creates a false dichotomy when she argues that *Grutter* “endorses an inward-facing concept of diversity focused on enhancing the university experience,” but “not an outward-facing concept of diversity focused on achieving a level of minority enrollment that is in proportion to the general population.” Pet. Br. 26. As the studies above demonstrate, a university's desire to avoid a student-body composition that significantly under-represents racial minorities is itself an inward-facing effort that serves the educational mission of preparing leaders and citizens.

within society, because universities “represent the training ground for a large number of our Nation’s leaders,” *Grutter*, 539 U.S. at 332, and leaders must be “expos[ed] to the ideas and mores of students as diverse as this Nation of many peoples,” *Bakke*, 438 U.S. at 313 (opinion of Powell, J.) (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)). This Court has further acknowledged that a university’s training of diverse future leaders is crucial to an essential attribute of our democracy—the public’s trust in government: “In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.” *Grutter*, 539 U.S. at 332.

Meaningful interactions with a racially diverse student body, both in and out of the classroom, also prepare students to be better citizens. Through such interactions, students discover that there is not “some characteristic minority viewpoint on any issue,” which in turn “diminish[es] the force of [racial] stereotypes.” *Grutter*, 539 U.S. at 333 (internal quotation marks omitted). Learning in a diverse environment “promotes ‘cross-racial understanding,’ helps to break down racial stereotypes, and ‘enables [students] to better understand persons of different races.’” *Id.* at 330 (alteration in original) (citation omitted).

Research confirms that interaction with racially diverse peers has positive effects on students’ ability and willingness to participate in civic life. *See, e.g.*, Nicholas A. Bowman, *Promoting Participation in a Diverse Democracy: A Meta-Analysis of College Diversity Experiences and Civic Engagement*, 81 Rev. Educ. Res. 29, 46–50 (2010) (finding a significant

positive relationship between studying in a diverse environment and improved leadership skills and civic engagement); *see also* Patricia Gurin et al., *The Benefits of Diversity in Education for Democratic Citizenship*, 60 J. Soc. Issues 17, 24 (2004) [hereinafter *Benefits of Diversity*] (finding interactions with diverse fellow students increased students' appreciation for democracy and commitment to civic activities).

III. THE NATURE OF THE COMPELLING INTEREST IN DIVERSITY MAKES CLEAR THAT A UNIVERSITY MUST HAVE LATITUDE TO CONSIDER RACE AS PART OF AN INDIVIDUALIZED ADMISSIONS ASSESSMENT

Three conclusions follow from the fact that meaningful interactions among diverse students lead to important educational benefits:

First, to realize the benefits of a racially diverse student body, a university must have the latitude to consider how individual applicants of particular races will fit into university life inside and outside the classroom—an analysis that requires holistic, flexible, and individualized treatment of applicants. In other words, social science supports the use of the same holistic, applicant-by-applicant assessment that the *Grutter* Court deemed constitutionally required if race is to be considered in admissions.

Second, Petitioner's approach to this case is fundamentally at odds with the University's interest—recognized by this Court in *Grutter* and elsewhere as compelling—in realizing the educational benefits of racial diversity, and doing so without relying on rigid numerical racial percentages or

quotas. Petitioner wishes to define the University's compelling interest very narrowly, as merely reaching a "percentage of [the University's] student body that must be filled by underrepresented minorities in order to achieve critical mass." Pet. Br. 34. As demonstrated above, however, merely admitting certain numbers of various racial groups is, by itself, not a reliable way to promote meaningful cross-racial interaction.

Third, designing an admissions program that will result in a racially diverse student body and promote meaningful cross-racial interactions within a particular educational environment—without sacrificing other educational objectives—requires nuanced expert judgments about both individual applicants and the overall educational context. Such judgments fall squarely within the core of the educational prerogative of a university and are therefore entitled to a measure of deference within the strict scrutiny framework.

A. Obtaining Diversity's Full Benefits Requires Attention to Individual Applicants

Because the benefits of a diverse student body depend on the character and frequency of students' cross-racial interactions, a narrowly tailored means of obtaining diversity's benefits requires attention to individual applicants and assessment of their likely contributions to all facets of student life. A school must, as the University of Michigan Law School did in *Grutter*, "focu[s] on each applicant as an individual, and not simply as a member of a particular racial group," *Parents Involved*, 551 U.S. at 722, and give "serious consideration to all the ways

an applicant might contribute to a diverse educational environment,” *Grutter*, 539 U.S. at 337.

Contrary to Petitioner’s argument, such an admissions program may properly consider diversity within classrooms as one component of its analysis. The classroom is obviously a crucial forum for the types of interactions and discourse that lead to the educational benefits of diversity.⁴ See, e.g., Robert D. Reason et al., *Faculty and Institutional Factors that Promote Student Encounters with Difference in First-Year Courses*, 33 Rev. Higher Educ. 391 395 (2010) (noting that academic coursework is “[o]f course” “the most influential mechanism by which an institution of higher education can shape its students’ learning experiences” and that “among the most consistent findings in studies of college effects is that students’ classroom activities relate to a number of student outcomes”). Moreover, for some students, the classroom may be the primary site of meaningful interaction with other students. See Resp. Br. 43. By making individualized admissions decisions with an eye to promoting diversity within classrooms and departments, a university substantially furthers its compelling interest in realizing the educational benefits of diversity.

⁴ To be sure, *Grutter* made numerous references to “student body” diversity. See Pet. Br. 29 (emphasizing *Grutter*’s “repeated[] reference[s] [to] ‘student body’ diversity”). But, while overall student-body diversity is necessary to realizing diversity’s benefits, it may not be sufficient.

B. University Admissions Policies Must Be Permitted To Look Beyond Numbers Alone and Consider Race at an Individual Level

1. Petitioner's Reliance on Numbers Alone Is Misplaced and Constitutionally Impermissible

Petitioner claims that the University of Texas “had already achieved educational critical mass as early as 2000,” based on the University’s aggregate Hispanic, African-American, and Asian-American enrollment. Pet. Br. 35–36. Petitioner’s argument misunderstands both the nature of the University’s diversity interest and this Court’s precedents.

As discussed above, an attempt to realize diversity’s benefits without consideration of individual applicants’ potential contributions to the student community—including their pre-college background, academic interests, possible major, and likely extracurricular pursuits—may fail to ensure a diverse campus-wide environment in which quality interactions can flourish. Using numbers alone, a university might admit high percentages of Latino students, but largely those who have excelled in the humanities and few with an interest in science. Or a university might admit high percentages of African-American students, but only those who hail from suburban areas and none from urban environments. Such outcomes limit the university’s ability either to foster a broad-range of cross-racial interactions and the educational benefits that follow or to expose students to the varying experiences and perspectives *within* racial groups—exposure that breaks down racial stereotypes.

Petitioner's position is, moreover, defective as a matter of constitutional law. Petitioner urges that diversity's benefits have been realized, and individualized consideration of race is impermissible, because over 20% of admitted students in 2004 were Latino or African-American. Pet. Br. 35. But "[t]he entire gist of the analysis in *Grutter* was that the admissions program at issue there focused on each applicant as an individual, and not simply as a member of a particular racial group." *Parents Involved*, 551 U.S. at 722–23. "The classification of applicants by race upheld in *Grutter* was only as part of a 'highly individualized, holistic review,'" for "[t]he importance of . . . individualized consideration in the context of a race-conscious admissions program is paramount." *Id.* (quoting *Grutter*, 539 U.S. at 337). Declaring victory based solely on percentages blithely assumes that whatever benefit is to be gained by having racial diversity within a university is satisfied merely by counting the number of students of each particular race. In doing so, Petitioner's position flies squarely in the face of both this Court's explicit rejection of racial quotas and the relevant educational research.

2. Petitioner's Reliance on Aggregate Data Is Improper and Misleading

Petitioner's reliance on data that aggregate members of different racial groups under the single rubric of "racial minorities" is also improper.

Petitioner's figures mask one minority's underrepresentation with another's strong representation, and vice-versa. For example, while UT ranked fifth in the nation in undergraduate degrees awarded to African-American, Latino, Native

American, and Asian-American students, *collectively*, in 2003–2004, UT failed to break the top one hundred schools in degrees awarded to African Americans, *considered alone*. See Amicus Brief of the Black Student Alliance at the University of Texas at Austin and the NAACP Legal Defense & Educational Fund, Inc. in Support of Appellees at 9–10, *Fisher*, 631 F.3d 213 (No. 09-50822) (citing *Top 100 Degree Producers*, Black Issues in Higher Education, June 2, 2005, at 44).

In *Parents Involved*, this Court faulted Seattle and Jefferson County for “employ[ing] only a limited notion of diversity, viewing race exclusively in white/nonwhite terms in Seattle and black/‘other’ terms in Jefferson County.” *Parents Involved*, 551 U.S. at 723; see also *id.* at 787 (Kennedy, J., concurring) (criticizing the Seattle district’s “blunt distinction between ‘white’ and ‘non-white’” students). Thus, in addition to failing as a mechanism for helping realize the educational benefits of racial diversity, lumping minority groups together runs afoul of the Court’s prohibition of binary race classifications. Holistic, individualized decision-making seeks, among other things, specifically to avoid such simplistic, potentially counterproductive, classifications based on race.

**C. A University’s Constitutional Interests
in Academic Freedom, Including the
Freedom To Decide Whom To Admit,
Should Inform the Strict Scrutiny
Analysis**

“Context matters when reviewing race-based governmental action under the Equal Protection Clause.” *Grutter*, 539 U.S. at 327. In particular, the

narrow-tailoring 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 334. Here, universities’ First Amendment interest in academic freedom should shape the way in which the Court applies strict scrutiny to their admissions policies. As explained above, realizing diversity’s benefits may require fine-grained analysis of students’ individual attributes and the fit of those attributes with a university’s particular curricular and extracurricular environment. At the same time, admissions decisions must account for all of a university’s other educational objectives, such as ensuring students are adequately prepared and are diverse across a range of other characteristics. *See id.* at 339 (“Narrow tailoring does not require . . . a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups.”); *id.* at 340 (university need not adopt alternative that “would effectively sacrifice all other educational values, not to mention every other kind of diversity”). Sound judgments about these issues depend upon the peculiar experience and expertise of education professionals within the university. For that reason, even in the context of strict scrutiny, the courts should give significant deference to a university’s judgments concerning what admissions policies will realize the educational benefits of racial diversity without sacrificing the institution’s other important educational objectives.

This Court has long afforded deference to a university’s educational judgments. The Court has interpreted the First Amendment to give universities wide discretion to make decisions, including about admissions policies, that will further their legitimate

educational goals. As Justice Kennedy explained in *Grutter*, the “approval of the use of race in university admissions reflect[s] a tradition, grounded in the First Amendment, of acknowledging a university’s conception of its educational mission.” *Id.* at 387 (Kennedy, J., dissenting). Because the classroom is “peculiarly the ‘marketplace of ideas,’” *Keyishian*, 385 U.S. at 603, and “expansive freedoms of speech and thought [are] associated with the university environment, universities occupy a special niche in our constitutional tradition,” *Grutter*, 539 U.S. at 329; *see also Wieman v. Updegraff*, 344 U.S. 183, 196-97 (1952) (Frankfurter, J., concurring) (noting that academic freedom is essential to “extending the bounds of understanding and wisdom”). Consequently, academic freedom is a “special concern of the First Amendment.” *Keyishian*, 385 U.S. at 603; *see also Bakke*, 438 U.S. at 312 (Powell, J., concurring) (“Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment.”).

1. Under the First Amendment, Universities’ Educational Judgments Are Entitled to Deference

In light of this constitutional interest and universities’ particular expertise, courts have refrained from “substitut[ing] their own notions of sound educational policy for those of the school authorities.” *Christian Legal Soc’y Chapter of Univ. of Cal., Hastings Coll. of Law v. Martinez*, 130 S. Ct. 2971, 2988 (2010) (quoting *Bd. of Ed. of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley*, 458 U.S. 176, 206 (1982)). For example, in *Board of Curators of the University of Missouri v. Horowitz*,

the Court “decline[d] to ignore the historic judgment of educators” and upheld a student’s dismissal from medical school without a hearing because the university’s decision “rested on the academic judgment of school officials that [the student] did not have the necessary clinical ability to perform adequately as a medical doctor.” 435 U.S. 78, 89-90 (1978). Because such academic determinations are inherently “subjective and evaluative” and “require[] an expert evaluation of cumulative information,” the Court found that they were “not readily adapted to the procedural tools of judicial or administrative decisionmaking.” *Id.* at 90.

Similarly, in *Regents of the University of Michigan v. Ewing*, the Court recognized that “judges [who] are asked to review the substance of a genuinely academic decision . . . should show great respect for the faculty’s professional judgment.” 474 U.S. 214, 225 (1985) (upholding a university’s decision not to allow a student to retake a required examination). Respecting a university’s “professional judgment” does not, of course, mean that courts abdicate their responsibility to interpret the Constitution. Rather, as the *Ewing* Court recognized, courts give universities’ educational judgments a measure of deference out of “a reluctance to trench on the prerogatives of state and local educational institutions and [a] responsibility to safeguard their academic freedom.” *Id.* at 226.

2. Educational Judgments Entitled to Deference Include University Admissions Policies

Academic freedom protects specifically a university’s ability to “make its own [educational]

judgments as to . . . the selection of its student body.” *Grutter*, 539 U.S. at 329 (quoting *Bakke*, 438 U.S. at 312 (Powell, J., concurring)). In *Sweezy v. New Hampshire*, Justice Frankfurter stated that the “four essential freedoms of a university” are: “to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.” 354 U.S. at 263 (Frankfurter, J., concurring); see also *Ewing*, 474 U.S. at 226 n.12 (“Discretion to determine, on academic grounds, who may be admitted to study, has been described as one of ‘the four essential freedoms’ of a university.”). This freedom means “[j]udicial review of academic decisions, including those with respect to the admission or dismissal of students, is rarely appropriate, particularly where orderly administrative procedures are followed.” *Id.* at 230 (Powell, J., concurring). Thus, in the context of college admissions, a university’s decision to seek racial diversity should be entitled to deference when based on “available empirical data.” See *Grutter*, 539 U.S. at 388 (Kennedy, J., dissenting).

The decisions that universities make to shape their student bodies are integral to their academic missions. Admissions decisions intended to increase meaningful interaction among students of different backgrounds, including different races, are judgments made on academic grounds. As discussed above, studies have shown that students who interact more frequently with members of different racial and ethnic groups gain better critical thinking skills and are more prepared to participate in a diverse society and workforce. A university may conclude that it is insufficient for cross-racial interactions to occur only in dormitories or dining halls, and that classroom interaction more effectively promotes students’

intellectual and social growth. *See supra* Part II. As this Court has recognized, “[e]ducation is a kind of continuing dialogue, and a dialogue assumes, in the nature of the case, different points of view.” *Wieman*, 344 U.S. at 197 (Frankfurter, J., concurring); *see also Keyishian*, 385 U.S. at 603 (“The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues”) (internal quotation marks omitted). Because realizing the educational benefits of a diverse student body is therefore “at the heart” of UT’s “proper institutional mission,” its decision to implement admissions policies that promote interaction among students of different races implicates the First Amendment. *Grutter*, 539 U.S. at 329.

3. Because a University’s Judgments About Its Educational Mission Are Entitled to First Amendment Protection, Its Conclusions That Race-Conscious Admissions Policies Will Further Its Academic Goals Should Be a Factor in the Strict Scrutiny Analysis

Recognizing that “First Amendment interests give universities particular latitude in defining diversity” does not require courts to relax the exacting standard of judicial scrutiny required under the Equal Protection Clause. *Parents Involved*, 551 U.S. at 792 (Kennedy, J., concurring). It does, however, require that courts take those First Amendment interests into account when applying strict scrutiny. Doing so is not a departure from common constitutional analysis. To the contrary, this Court often balances multiple interests and enforces one constitutional

right in light of the competing interests underlying another. *See, e.g., Burson v. Freeman*, 504 U.S. 191, 198 (1992) (reconciling the right to engage in political discourse with the right to vote); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 564 (1980) (considering whether and when a criminal trial can be closed to the public to protect the defendant's right to a fair trial); *Simmons v. United States*, 390 U.S. 377, 393-94 (1968) (considering whether a defendant's testimony to support a motion to suppress evidence on Fourth Amendment grounds can subsequently be admitted against him at trial without violating the Fifth Amendment). Moreover, as noted, this Court has expressly held that "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause." *Grutter*, 539 U.S. at 327. Universities' important First Amendment interest in academic freedom, including the right to decide who shall be admitted to study, is an essential part of the context in this case. The Court should not ignore it.

Just as the *Grutter* Court deferred to "[t]he Law School's educational judgment that [student body] diversity is essential to its educational mission," *Grutter*, 539 U.S. at 328, this Court should give the University of Texas freedom, within bounds, to craft admissions policies that will promote cross-racial interaction among students. Strict scrutiny is "no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university." *Id.* Rather, taking the university's judgment into consideration properly acknowledges that it has "invoke[d] a countervailing constitutional interest, that of the First Amendment." *Bakke*, 438 U.S. at 313 (Powell, J., concurring). Flexible, race-conscious admissions policies are

therefore not only “in keeping with [the Court’s] tradition of giving a degree of deference to a university’s academic decisions,” *Grutter*, 539 U.S. at 328, but also entirely consistent with the Equal Protection Clause and the application of strict scrutiny.

CONCLUSION

For the foregoing reasons, the Fifth Circuit’s decision should be affirmed.

Respectfully submitted,

JON GREENBAUM
BRENDA SHUM
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
1401 New York Avenue, NW
Washington, D.C. 20005
(202) 662-8315

BRADLEY S. PHILLIPS
Counsel of Record
MICHELLE FRIEDLAND
DANIEL B. LEVIN
MIRIAM SEIFTER
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue
Los Angeles, CA 90071
(213) 683-9100
brad.phillips@mto.com

WADE HENDERSON
LISA M. BORNSTEIN
DIANNE PICHE
THE LEADERSHIP CONFERENCE
ON CIVIL AND HUMAN RIGHTS
1629 K Street, NW
Washington, DC 20006
(202) 466-3311

August 13, 2012

APPENDIX
LIST OF ADDITIONAL AMICI CURIAE

Appleseed

Appleseed, the national office of a network of 17 public-interest justice centers, works to open doors to opportunity and justice for all through research and advocacy. Much of Appleseed's work relates to promoting educational opportunities for diverse populations and supporting institutional structures that promote meaningful interaction among diverse populations.

Chicago Lawyers' Committee for Civil Rights Under Law, Inc.

The Chicago Lawyers' Committee, established in 1969, is the public-interest law consortium of Chicago's leading law firms. The Committee's mission is to promote and protect civil rights, particularly of poor, minority, and disadvantaged people in our nation's social, economic, and political systems. The preservation of diversity programs is a crucial interest of the Chicago Lawyers' Committee.

Children's Defense Fund (CDF)

The Children's Defense Fund (CDF), a national organization, has worked for nearly 40 years to ensure a level playing field for all children, with particular attention to poor and minority children and those with disabilities. The issues of this case relate to CDF's efforts in character and leadership development, intergenerational mentoring, and interracial and interfaith dialog about children's issues.

Gay & Lesbian Advocates & Defenders (GLAD)

Founded in 1978, Gay & Lesbian Advocates & Defenders (GLAD) is New England's leading public-interest legal organization dedicated to ending discrimination based on sexual orientation, HIV status, and gender identity and expression. GLAD has litigated and provided amicus support in a wide range of anti-discrimination matters, including in this Court.

Grand Boule of Sigma Pi Phi Fraternity (the "Boule")

The Grand Boule of Sigma Pi Phi Fraternity (the "Boule"), founded in 1904 and encompassing 129 local chapters in the United States and internationally, is a non-profit organization of college- and university-educated professional men dedicated to the uplift of communities of the African Diaspora through social-action programs concentrated in education. The Boule supports preserving equal educational opportunity in order to ensure full participation in society.

Japanese American Citizens League

Japanese American Citizens League is a national membership organization working to combat discrimination and promote inclusion. The issues of this case are directly related to Japanese American Citizens League's work in these areas.

Lambda Legal

Lambda Legal is a national organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and those with HIV, many of whom are

members of racial and ethnic minorities, through impact litigation, education, and public policy work. Lambda Legal has participated in this Court and lower courts in many cases addressing constitutional principles that apply in public higher education.

National Coalition on Black Civic Participation

The National Coalition on Black Civic Participation is a 501(c)(3), non-profit, non-partisan organization dedicated to increasing civic engagement and voter participation in Black and underserved communities. The National Coalition strives to create an enlightened community by engaging people in all aspects of public life through service/volunteerism, advocacy, leadership development, and voting. The issues in this case directly relate to the National Coalition's work in promoting equity in higher education and economic security and sustainability.

National Council of Negro Women, Inc.

Founded in 1935, the National Council of Negro Women, Inc. (NCNW), a 501(c)3 organization, includes 39 national African American women's organizations and over 240 community based sections, with an outreach to nearly four million women. For over 75 years, at the heart of our national focus have been the issues of education and economic empowerment. As such, the maintenance of diversity is of high value to NCNW as the policy represents a continuing necessary step towards reaching the goal of access to opportunity for all.

National Immigration Law Center (NILC)

National Immigration Law Center (NILC) is a national legal advocacy organization based in Los

Angeles whose mission is to defend and promote the rights and opportunities of low-income immigrants and their family members, which includes working to combat discrimination and promote their inclusion in institutions of higher education. NILC has a direct interest in the outcome of this case.

National Urban League

The National Urban League, founded in 1910, is an historic national civil rights organization dedicated to economic empowerment, combating discrimination, and promoting inclusion in order to elevate the standard of living in significantly underserved urban communities. The organization and its 98 local affiliates work through program development, public policy, research, and advocacy, and provide direct services—including education, employment training and placement, health services, and housing—that improve the lives of over 2.6 million people. The issues of this case relate directly to the National Urban League’s work in education, employment and economic empowerment.

Public Advocates Inc.

Public Advocates Inc., a non-profit and one of the nation’s oldest public-interest law firms, uses litigation and other strategies to challenge the persistent causes and effects of poverty, segregation, and discrimination. Advocacy to advance equal educational opportunities for low-income students, students of color, and English Learners has been a focus of Public Advocates’ work. This case will have long-standing impacts on the educational rights and opportunities enjoyed by children in the communities Public Advocates represents.

The Rainbow PUSH Coalition

The Rainbow PUSH Coalition, a national membership organization with more than 300,000 members and supporters, has worked for 41 years to combat discrimination and promote inclusion, particularly on behalf of African-Americans, other minorities, and women. The issues of this case relate directly to Rainbow PUSH's advocacy of equal educational opportunity.

Southern Poverty Law Center

The Southern Poverty Law Center ("SPLC") is a nonprofit civil rights organization based in Montgomery, Alabama, dedicated to fighting hate and bigotry and to seeking justice for the most vulnerable members of society, including women and persons of color. Founded in 1971, SPLC represents students of color to ensure equal opportunities in secondary and post-secondary educational institutions.

Washington Lawyers' Committee for Civil Rights and Urban Affairs

The Washington Lawyers' Committee is a nonprofit civil rights organization that works to eradicate discrimination through civil rights litigation. In the Committee's 40-year plus history, it has successfully represented tens of thousands of individuals in cases alleging discrimination on the basis of race, national origin, gender, disability, and/or other protected classes, and has thereby amassed expertise regarding the legal questions in this case.

YWCA USA

The YWCA USA is a national organization dedicated to eliminating racism, empowering women and promoting peace, justice, freedom and dignity for all. In over 1300 locations nationwide, YWCAs offer women job training, housing, anti-violence and recovery programs, and more. Our clients are women of all ages and backgrounds, including the elderly, survivors of domestic and sexual violence, military veterans, and low-income and homeless women and their families. The YWCA is committed to promoting equal opportunity in housing, employment, and education and seeks to uphold laws to protect people from discrimination on the basis of race and gender. The issues in this case are directly related to the YWCA's mission.