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 *AMICI CURIAE* OF FORDHAM UNIVERSITY, BOSTON COLLEGE, DEPAUL UNIVERSITY, GEORGETOWN UNIVERSITY, COLLEGE OF THE HOLY CROSS, MARQUETTE UNIVERSITY, UNIVERSITY OF NOTRE DAME and UNIVERSITY OF SAN FRANCISCO IN SUPPORT OF RESPONDENTS

FLOYD ABRAMS
Counsel of Record
SUSAN BUCKLEY
VICTOR SUTHAMMANONT
PHILIP TISNE
CAHILL GORDON & REINDEL LLP
80 Pine Street
New York, New York 10005
(212) 701-3000
fabrams@cahill.com

Counsel for Amici Curiae

TABLE OF CONTENTS

INTEREST OF *AMICI* 1

SUMMARY OF ARGUMENT 8

ARGUMENT 9

A. Academic Freedom Has Long Been Protected by this Court and Is a Special Concern of the First Amendment 9

B. The First Amendment Rights of Universities Must Be Considered in Reviewing a University's Admission Program 18

CONCLUSION 29

TABLE OF AUTHORITIES

CASES

Adarand Constructors, Inc. v. *Pena*, 515 U.S. 200 (1995) 20

Adler v. *Board of Education of City of New York*, 342 U.S. 485 (1952) 11, 12

Board of Curators of the University of Missouri v. *Horowitz*, 435 U.S. 78 (1978) 17, 28n

Board of Regents of University of Wisconsin System v. *Southworth*, 529 U.S. 217 (2000) 20

Bracken v. *Visitors of William & Mary College*, 7 Va. (3 Call.) 573 (1790) 11n

Brown v. *Board of Education*, 347 U.S. 483 (1954) 20

Christian Legal Society v. *Martinez*, 561 U.S. __, 130 S. Ct. 2971 (2010) 18n, 19, 21

Farrington v. *Tokushige*, 273 U.S. 284 (1927) 11

Fisher v. *University of Texas at Austin*, 631 F.3d 213 (5th Cir. 2011) 23

Fisher v. *University of Texas at Austin*, 645 F. Supp. 2d 587 (W.D. Tex. 2009) 23

Gratz v. *Bollinger*, 539 U.S. 244 (2003) 22, 24n, 27

Grutter v. *Bollinger*, 539 U.S. 306 (2003)..... passim

Healy v. *James*, 408 U.S. 169 (1972)..... 28n

Keyishian v. *Board of Regents of University of State of N.Y.*, 385 U.S. 589 (1967)..... 9, 14

Parents Involved in Community Schools v. *Seattle School Dist. No. 1*, 551 U.S. 701 (2007)..... passim

Princeton University v. *Schmid*, 455 U.S. 100 (1982)..... 28n

Regents of the University of California v. *Bakke*, 438 U.S. 265 (1978)..... 15, 20, 27

Regents of the University of Michigan v. *Ewing*, 474 U.S. 214 (1985)..... 17, 18

Ricci v. *DeStefano*, 129 S. Ct. 2658 (2009)..... 20, 21

Richmond v. *J.A. Croson Co.*, 488 U.S. 469 (1989)..... 19

Rosenberger v. *Rector*, 515 U.S. 819 (1995)..... 9, 20, 28n

Rumsfeld v. *Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006)..... 28n

Sweezy v. *New Hampshire*, 354 U.S. 234 (1957)..... 12, 13, 14

Trustees of Dartmouth College v. *Woodward*, 17 U.S. (4 Wheat.) 518 (1819)..... 10

University of Pennsylvania v. *E.E.O.C.*, 493 U.S. 182 (1990) 18n

Vidal v. *Girard's Executors*, 43 U.S. (2 How.) 127 (1844) 10

Wieman v. *Updegraff*, 344 U.S. 183 (1952) 11, 12

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I ..... passim

U.S. Const. amend. XIV ..... passim

STATUTES AND REGULATIONS

20 U.S.C. § 1070a-11 et seq. 7

8 N.Y. Comp. Codes R. & Regs. § 27-1.1(a) 7n

OTHER AUTHORITIES

Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 GEO. L.J. 945 (2009) 10n

Association of Jesuit Colleges and Universities, The Jesuit, Catholic Mission of U.S. Jesuit Colleges and Universities, *available at* http://www.ajcunet.edu/The-

Jesuit-Catholic-Mission-of-U.S.-Jesuit-Colleges-and-Universities 1

Boston College, Office for Institutional Diversity, About Us, *available at* http://www.bc.edu/content/bc/offices/diversity/about.html 3

Boston College, The Mission of Boston College, *available at* http://www.bc.edu/cwis/mission/mission.html 3

J. Peter Byrne, Academic Freedom: *A "Special Concern of the First Amendment"*, 99 YALE L.J. 251 (1989) 10n

Campus Ethnic Diversity, U.S. NEWS AND WORLD REPORT (Sept. 12, 2012), available at http://colleges.usnews.rankingsandreviews.com/best-colleges/rankings/national-universities/campus-ethnic-diversity 5

Congregation of Holy Cross, College Mission Statement, *available at* http://offices.holycross.edu/about/president/mission 4

Congregation of Holy Cross, Constitution 2 Mission, *available at* http:// holycrosscongregation.org/resources-and-links/constitutions/constitution-2/ 2

Congregation of Holy Cross, History and Traditions, *available at* http://offices.holycross.edu/about/history 4

DePaul University, Mission Statement, *available at* http://www.depaul.edu/AboutUs/Pages/MissionStatement.aspx 3

Matthew W. Finkin, *On "Institutional" Academic Freedom*, 61 TEX L. REV. 817 (1983) 10

Fordham University, Mission Statement, *available at* http://www.fordham.edu/discover_fordham/mission_26603.asp 1

Georgetown University, University Mission Statement, *available at* http://www.georgetown.edu/about/governance/mission-statement/index.html 3

JURGEN HERBST, FROM CRISIS TO CRISIS: AMERICAN COLLEGE GOVERNMENT 1636-1819 (1982) 10

RICHARD HOFSTADTER & WALTER P. METZGER, THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES (1955) 10n

John Paul II, *Ex Corde Ecclesiae* (August 15, 1990), *available at* http://www.vatican.va/holy_father/john_paul_ii/apost_constitutions/documents/hf_jp-ii_apc_15081990.ex-corde-ecclesiae_en.html 6, 25n

Marquette University, Our Mission, *available at* http://www.marquette.edu/about/mission.shtml 2

Marquette University, Statement on Human Dignity and Diversity, *available at* http://www.marquette.edu/about/diversity.shtml 4

Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America,* 66 TEX. L. REV. 1265 (1988) 11

Saint Vincent de Paul, Letter 180: Observance of the Rules (May, 17 1658), *in* CORRESPONDENCE, CONFERENCES, DOCUMENTS (John Marie Poole ed., Helen Marie Law et al. trans., New City Press 1985), *available at* http://via.library.depaul.edu/coste_en/16. 1

THE OPEN UNIVERSITIES IN SOUTH AFRICA (Albert van de Sandt Centlivres et al. eds. 1957) 13

University of Notre Dame, Mission Statement, *available at* http://nd.edu/about/mission-statement/ 5

University of San Francisco, Vision, Mission, Values, *available at* http://www.usfca.edu/about/values/. 5

INTEREST OF *AMICI*[1]

Amici curiae Fordham University, Boston College, DePaul University, Georgetown University, College of the Holy Cross, Marquette University, University of Notre Dame, and University of San Francisco are private, Catholic universities subject to Title VI of the Civil Rights Act of 1964. The Society of Jesus (known as the Jesuits) established Boston College, Holy Cross, Fordham, Georgetown, Marquette, and U.S.F. The Congregation of the Mission (known as the Vincentians) founded DePaul University. Notre Dame was established by the Congregation of Holy Cross. As expressed by Fordham University, each of the *amici* universities "strives for excellence in research and teaching, and guarantees the freedom of inquiry required by rigorous thinking and the quest for truth."[2] Whether rooted in the Jesuit tradition of teaching and scholarship "vital" to the Jesuits' "intellectual apostolate,"[3] the Vincentian mission to serve the poor,[4] or the Congregation of Holy Cross's expres-

---

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or its counsel made a monetary contribution to its preparation or submission. Counsel for the parties have consented to its filing.

[2] Fordham University, Mission Statement, *available at* http://www.fordham.edu/discover_fordham/mission_26603.asp.

[3] Association of Jesuit Colleges and Universities, The Jesuit, Catholic Mission of U.S. Jesuit Colleges and Universities (2012), *available at* http://www.ajcunet.edu/The-Jesuit-Catholic-Mission-of-U.S.-Jesuit-Colleges-and-Universities.

[4] Saint Vincent de Paul, Letter 180: Observance of the Rules (May, 17 1658), *in* CORRESPONDENCE, CONFERENCES,

sion of mission through the education of youth in colleges and universities,[5] each *amici* aspires to foster "the intellectual, moral, and religious development of its students,"[6] and "personal and professional excellence, . . . a life of faith, and . . . leadership expressed in service to others."[7] Each of the *amici* colleges and universities believes that both a qualitatively and a quantitatively diverse student body is necessary to accomplish its educational mission.

- Fordham University is a Jesuit university in New York City founded in 1841 to serve the immigrant Church in New York. "In order to prepare citizens for an increasingly multicultural and multinational society, Fordham seeks to develop in its students an understanding of and reverence for cultures and ways of life other than their own."[8] Fordham has concluded that a diverse student body is necessary to develop such understanding and reverence.
- Boston College is a Jesuit University founded in 1863 to serve the sons of Irish immigrants and other working class Catholics. Boston Col-

---

DOCUMENTS 1-12 (John Marie Poole ed., Helen Marie Law et al. trans., New City Press 1985), *available at* http://via.library.depaul.edu/coste_en/16/.

5 Congregation of Holy Cross, Constitution 2 Mission ¶ 16, *available at* http://www.holycrosscongregation.org/resources-and-links/constitutions/constitution-2/.

6 Fordham University, Mission Statement, *supra* note 2.

7 Marquette University, Our Mission, *available at* http://www.marquette.edu/about/mission.shtml.

8 Fordham University, Mission Statement, *supra* note 2.

lege believes that a diverse student body is important to the fulfillment of its mission.[9] Boston College was one of the first colleges in the country to establish an administrative office dedicated to diversity.[10]

- DePaul University is a Vincentian university in Chicago established in 1898. With a long history of educating underserved populations, DePaul "seeks diversity in students' special talents, qualities, interests, and socio-economic backgrounds."[11] Today, DePaul "continues its commitment to the education of first generation college students, especially those from diverse cultural and ethnic groups in the metropolitan area."[12]
- Georgetown University, founded in 1789, is the oldest Catholic and Jesuit university in the nation. Georgetown believes that a diverse student body is important to its founding principle that "serious and sustained discourse among people of different faiths, cultures, and beliefs promotes intellectual, ethical and spiritual understanding."[13]

---

9 Boston College, The Mission of Boston College, *available at* http://www.bc.edu/cwis/mission/mission.html.

10 Boston College, Office for Institutional Diversity, About Us, *available at* http://www.bc.edu/content/bc/offices/diversity/about.html.

11 DePaul University, Mission Statement, *available at* http://mission.depaul.edu/AboutUs/Pages/MissionStatement.aspx.

12 *Id.*

13 Georgetown University, University Mission Statement,

- The College of the Holy Cross was founded in 1843 in Worcester, Massachusetts. From 1847-1865, Holy Cross was denied a charter by the Commonwealth of Massachusetts, in part because of lingering anti-Catholic sentiment on the part of some state legislators.[14] In fact, during that period, graduates' diplomas were signed by the president of Georgetown. "Informed by the presence of diverse interpretations of the human experience, Holy Cross seeks to build a community marked by freedom, mutual respect, and civility."[15] Holy Cross seeks to achieve diversity within each entering class, including socio-economic diversity, geographic diversity, and ethnic diversity.
- Marquette University is a Jesuit university in Milwaukee, founded in 1881. Marquette's Statement on Human Dignity and Diversity states that "a diverse university community helps us achieve excellence by promoting a culture of learning, appreciation and understanding."[16]

---

available at http://www.georgetown.edu/about/governance/mission-statement/index.html.

[14] Congregation of Holy Cross, History and Traditions, *available at* http://offices.holycross.edu/about/history.

[15] Congregation of Holy Cross, College Mission Statement, *available at* http://offices.holycross.edu/about/president/mission.

[16] Marquette University, Statement on Human Dignity and Diversity, *available at* http://www.marquette.edu/about/diversity.shtml.

- The University of Notre Dame was founded in 1842 in South Bend, Indiana. Notre Dame's Mission Statement asserts that: "The intellectual interchange essential to a university requires, and is enriched by, the presence and voices of diverse scholars and students."[17]
- The University of San Francisco was founded in 1855 by the Jesuits. During its early years, U.S.F. served the children of Italian and Irish immigrants. U.S.F. is ranked among the most diverse universities in the nation by *U.S. News and World Reports*.[18] One of its missions is to advance a "diversity of perspectives, experiences and traditions as essential components of a quality education in our global context."[19]

In order to promote diversity, each of the *amici curiae* considers race in aspects of its admission program consistent with this Court's holding in *Grutter* v. *Bollinger*, 539 U.S. 306 (2003). Each of the *amici* has an admission program tailored to its particular circumstances, which includes geography, peer institutions, specific missions, and competitiveness. Each of the *amici* conducts a holistic review of every application received. In doing so, the *amici* institutions may consider some or all of a variety of factors, including

---

[17] University of Notre Dame, Mission Statement, *available at* http://nd.edu/about/mission-statement/.

[18] Campus Ethnic Diversity, U.S. NEWS AND WORLD REPORT (Sept. 12, 2012), *available at* http://colleges.usnews.rankingsandreviews.com/best-colleges/rankings/national-universities/campus-ethnic-diversity.

[19] University of San Francisco, Vision, Mission, Values, *available at* http://www.usfca.edu/about/values/.

high-school performance (including grade-point average), high-school quality, class rank, standardized-testing results,[20] letters of recommendation, writing ability, participation in extracurricular activities, whether the applicant is a first-generation college attendee or has special artistic talents, community service experience, state (or country) of residence, ethnic background and race. Predictors of academic ability (test scores, class rank, high-school performance) are the primary factors considered in the admissions process. The other factors, including an applicant's race or ethnic background, are secondary considerations.

The *amici* institutions illustrate the need for institutional discretion in evaluating the efficacy of competing admission programs. In order to achieve the necessary student-acceptance rates to build their incoming classes, *amici* extend offers at rates of approximately 18% (for the most competitive universities) to 50%. The differing applicant pools and recruitment goals require each *amici* to consider independently how best to achieve the diversity necessary to further its educational mission and to tailor its holistic evaluation accordingly. In addition, the ability of the universities to determine how they conduct their admission process is imperative to fulfilling their obligation that "Catholic ideals, attitudes and principles penetrate and inform university activities."[21] Considering an applicant's race or ethnicity as

---

[20] DePaul and Holy Cross are "testing optional" schools, meaning that the submission of standardized-testing scores is not required.

[21] John Paul II, *Ex Corde Ecclesiae* ¶ 14 (August 15, 1990), *available at* http://www.vatican.va/holy_father/john_paul_ii/apost_constitutions/documents/hf_jp-ii_apc_15081990.ex-corde-

a factor (but not a defining one) in a holistic review of a student is more than a means of promoting diversity, it enables *amici* to more fully realize their missions of recognizing the dignity and uniqueness of each person during the admission process.

Amici have concluded that race-blind admission practices frustrate or impede the achievement of a diverse student body. Several of the *amici*'s admission programs include a program targeted at first-generation, underprivileged students. By way of example, Fordham administers a program under the aegis of New York State's Higher Education Opportunity Program ("HEOP"). This program admits approximately 125 economically disadvantaged students per year and provides support and resources to assist in the transition to college and to help such students succeed in their studies.[22] Marquette and DePaul participate in similar programs administered through the U.S. Department of Education. *See* 20 U.S.C. § 1070a-11 *et seq*. These programs identify students from economically disadvantaged backgrounds and provide services in order to improve retention and degree attainment. Although each of these programs has a higher percentage of racial minorities than is found in the general student population, they are insufficient in themselves to achieve diversity as they focus only on the economically disadvantaged. It

---

ecclesiae_en.html.

[22] Students in Fordham's HEOP program are chosen from a separate admission pool as a consequence of New York's requirement that those who participate in the program must be students who would otherwise not have been admitted to the university. 8 N.Y. Comp. Codes R. & Regs. 27-1.1(a).

would be entirely inconsistent with the missions of these *amici* to be forced to rely only on programs such as these to increase diversity thereby helping to perpetuate a stereotype that minorities are more often poor. Therefore, use of socio-economic factors alone does not enable these Catholic universities to achieve the diverse student bodies necessary to fulfill their educational and religious missions.

SUMMARY OF ARGUMENT

In the course of the wrenching legal and public policy debate about university admission programs that take account of race to some degree or other, little has been said about the First Amendment rights of the universities themselves. Academic freedom has frequently been said by this Court to be a "special concern of the First Amendment" and the right of a university to determine whom to admit has been said to constitute a central element of academic freedom. But the core question in cases such as this has commonly been phrased in a one-dimensional way, just as Petitioner has phrased it here, by simply asking whether a university's "use of race in undergraduate admissions decisions is lawful under this Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment." Brief for Petitioner at i.

What this debate has failed to recognize is that there is another constitutional provision at issue—the First Amendment—and that it should be understood to *limit* the power of the government to require all universities—public and private—to adopt completely race-neutral admission programs. We urge that First Amendment interests can be accommodated and

Fourteenth Amendment and Title VI interests still vindicated by providing, as this Court often has, a degree of deference to a university's good-faith determination as to how to further its academic mission. We urge specifically that when a university (especially a private university) determines that a constitutionally permissible goal—such as diversity within its student body—is essential to providing the highest quality educational experience for its students, a university's judgment about whether a race-conscious admission program is necessary to achieve that goal should not be easily ignored. This is not an abdication of the judiciary's duty strictly to scrutinize such programs as it leaves to the courts the ultimate determination as to what interests are compelling and whether a particular university has employed means narrowly tailored to achieve its goal.

ARGUMENT

A. Academic Freedom Has Long Been Protected by this Court and Is a Special Concern of the First Amendment

Since its earliest decisions, this Court has adhered to the principle that academic institutions must remain free from interference if they are to engender the "tradition of thought and experiment that is at the center of our intellectual and philosophic tradition." *Rosenberger* v. *Rector*, 515 U.S. 819, 835 (1995). Indeed, long before this Court recognized academic freedom as a "special concern of the First Amendment," *Keyishian* v. *Board of Regents of University of State of N.Y.*, 385 U.S. 589, 603 (1967), it afforded academic

institutions the breathing space necessary to pursue their educational missions.

As early as *Trustees of Dartmouth College* v. *Woodward*, 17 U.S. (4 Wheat.) 518 (1819), this Court recognized the damaging effects of government interference with academic institutions.[23] In that case, the New Hampshire legislature enacted measures effectively usurping control of Dartmouth College after the college's trustees took certain controversial actions. *See* JURGEN HERBST, FROM CRISIS TO CRISIS: AMERICAN COLLEGE GOVERNMENT 1636-1819, at 235-36 (1982); Matthew W. Finkin, *On "Institutional" Academic Freedom*, 61 TEX L. REV. 817, 831 (1983). In striking down those measures, Chief Justice John Marshall acceded to the argument that it would be "a most dangerous experiment, to hold these institutions subject to the rise and fall of popular parties and the fluctuation of political opinions." *Dartmouth College*, 17 U.S. (4 Wheat.) at 599; *see also Vidal* v. *Girard's Executors*, 43 U.S. (2 How.) 127, 197, 199 (1844) (permitting testamentary devise establishing school free from sectarian influence and refusing to second-guess whether "the [challenged] scheme of education . . . is

---

[23] In fact, the tradition of institutional academic freedom is far older than the *Dartmouth* decision. It has its roots in the tradition that existed in the medieval universities of Europe and particularly England, after which the earliest colonial colleges were consciously modeled. *See* RICHARD HOFSTADTER & WALTER P. METZGER, THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES 120-44 (1955); *see also* Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 GEO. L.J. 945, 949-51 (2009); J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment"*, 99 YALE L.J. 251, 951-53 (1989).

such as we ourselves should approve, or as is best adapted to accomplish the great aims and ends of education").[24]

Although the term "academic freedom" would not appear in the United States Reports until the middle of the twentieth century, when it did, the concept of academic institutional autonomy "was no Johnny-come-lately to education law." Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265, 1315 (1988); *see also Farrington* v. *Tokushige*, 273 U.S. 284, 298 (1927) (invalidating law proscribing extensive controls over school curriculum). In a series of decisions arising out of state and federal efforts to eliminate communist and other supposed "subversive" influences from public institutions, however, this Court for the first time expressly grounded its long-standing protection of academic institutions in the First Amendment's guarantees of freedom of thought and expression. Beginning with the separate opinions in *Adler* v. *Board of Education of City of New York*, 342 U.S. 485, 508 (1952) (Douglas, J., dissenting), and *Wieman* v. *Updegraff*, 344 U.S. 183, 194 (1952) (Frankfurter, J., concurring), members of this Court described the chilling effect such laws would have on the scholastic environment:

---

[24] Chief Justice Marshall made the same argument as an attorney in *Bracken* v. *Visitors of William & Mary College*, 7 Va. (3 Call.) 573 (1790), where the Virginia Supreme Court agreed that, because actions by the Visitors of William & Mary College were authorized by that College's charter, "it is not for this Court to enquire, whether they have legislated wisely, or not, and if the change should even be considered as not being for the better."

> Supineness and dogmatism take the place of inquiry. A "party line"—as dangerous as the "party line" of the Communists—lays hold. It is the "party line" of the orthodox view, of the conventional thought, of the accepted approach. . . . [Such a system] cannot go hand in hand with academic freedom. It produces standardized thought, not the pursuit of truth. Yet it was the pursuit of truth which the First Amendment was designed to protect. A system which directly or inevitably has that effect is alien to our system and should be struck down.

Adler, 342 U.S. at 510-11 (Douglas, J., dissenting); *see also Wieman*, 344 U.S. at 197 (Frankfurter, J., concurring) ("The functions of educational institutions in our national life and the conditions under which alone they can adequately perform them are at the basis of [the First Amendment's] limitations upon State and national power.").

The same concerns animated this Court's decision in *Sweezy* v. *New Hampshire*, 354 U.S. 234 (1957). *Sweezy* arose out of the contempt citation of a professor who refused to answer questions about the content of his lectures during the course of an investigation by the Attorney General of New Hampshire. In vacating the citation, a plurality of this Court identified the "essentiality of freedom in the community of American universities" and agreed that "[t]o impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation." *Id.* at 250.

In a concurring opinion that has been analyzed and relied upon for over a half century, Justice Frankfurter warned of the "grave harm resulting from governmental intrusion into the intellectual life of a university," *id.* at 261 (Frankfurter, J., concurring), and remarked that "[p]olitical power must abstain from intrusion into this activity of freedom," *id.* at 262. According to Justice Frankfurter, "[t]his means the exclusion of governmental intervention in the intellectual life of a university." *Id.*

In its most celebrated portion, Justice Frankfurter's opinion quoted with approval a report written by two South African universities opposing their government's efforts to enforce racial segregation in that nation's universities. *See* THE OPEN UNIVERSITIES IN SOUTH AFRICA 5 (Albert van de Sandt Centlivres et al. eds. 1957) [hereinafter "OPEN UNIVERSITIES"] (stating that "legislative enactment of academic segregation on racial grounds is an unwarranted interference with university autonomy and academic freedom"). In the portion relied on by Justice Frankfurter, the report stated:

> "It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university—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."

Sweezy, 354 U.S. at 263 (quoting OPEN UNIVERSITIES at 10-12).

A decade after this seminal articulation, a majority of this Court again invoked academic freedom in *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967), this time to invalidate New York's Feinberg Law. That law required the removal of any teacher in a New York school who engaged in certain "subversive" activities. After describing how the law would "stifle 'that free play of the spirit which all teachers ought especially to cultivate and practice,'" *id.* at 601 (quoting *Wieman*, 344 U.S. at 195), the Court observed:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.

Id. at 603. Finding that the Feinberg Law infringed this "vital" and "most precious" freedom, the Court invalidated the law as impermissibly vague.

Since *Sweezy* and *Keyishian*, this Court has consistently acknowledged that the First Amendment protects academic institutional autonomy. As a consequence, it has deferred to those institutions when called upon to review their legitimate academic decisions, especially those pertaining to the fourth of the "four essential freedoms" identified in *Sweezy*—the right to determine "who may be admitted to study."

In his critical concurring opinion in *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 311 (1978), Justice Powell relied upon that freedom in offering his analysis of the very issue now before this Court. The attainment of a diverse student body, Justice Powell wrote, is "clearly . . . a constitutionally permissible goal for an institution of higher education." *Id.* at 311-12.

> Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body.

Id. at 312. Summarizing the university's argument, Justice Powell wrote:

> Thus, in arguing that its universities must be accorded the right to select those students who will contribute the most to the "robust exchange of ideas," petitioner invokes a countervailing constitutional interest, that of the First Amendment. In this light, petitioner must be viewed as seeking to achieve a goal that is of paramount importance in the fulfillment of its mission.

Id. at 313. Justice Powell concluded that (a) the special admission program at issue in *Bakke* involving an explicit racial quota could not pass Fourteenth Amendment review but that (b) race could constitutionally be considered as one factor in university admission programs as a part of a broader review of a

variety of factors determined by the university to serve its pedagogical ends.

This Court adopted Justice Powell's view in upholding the University of Michigan Law School's race-conscious admission program in *Grutter* v. *Bollinger*, 539 U.S. 306, 326 (2003). In concluding that the interest in achieving diversity in higher education was compelling, this Court relied on its "tradition of giving a degree of deference to a university's academic decisions" and deferred to the law school's "educational judgment that such diversity is essential to its educational mission." *Id.* at 328. This conclusion "informed" the Court's ultimate conclusion that the challenged race-conscious admission program advanced an interest that was compelling. *Id.* at 329.

In deciding that the challenged admission program was narrowly tailored, the Court concluded that the law school's program: (i) did not establish quotas for select racial or ethnic groups, *id.* at 335-36; (ii) considered race only as a "plus factor" in a holistic review of each application, *id.* at 337; and (iii) gave substantial weight to "all pertinent elements of diversity," not merely racial diversity, *id.* at 337-39. This Court refused, however, to second-guess the law school's determination that a race-conscious admission program was necessary to achieve its pedagogical goals. Instead, given the law school's "serious, good faith consideration of workable race-neutral alternatives," *id.* at 339, this Court held that flaws in those alternatives identified by the law school rendered them an inadequate substitute for its race-conscious program, *see* Brief for Respondents at 33-38, *Grutter* v. *Bollinger*, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 402236 at *33-38.

Elsewhere, the Court has exercised the same deference to academic decisions. In *Board of Curators of the University of Missouri* v. *Horowitz*, 435 U.S. 78 (1978), a student challenged her dismissal from the University of Missouri-Kansas City Medical School. Rejecting the claim, this Court distinguished disciplinary and academic decisions and refused "to further enlarge the judicial presence in the academic community" by requiring review of the latter:

> Like the decision of an individual professor as to the proper grade for a student in his course, the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking.

Id. at 90. This Court made the same point more forcefully in *Regents of the University of Michigan* v. *Ewing*, 474 U.S. 214 (1985), emphasizing its limited ability to review an institution's decision to dismiss a student on academic grounds:

> 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 as to demonstrate that the person or committee responsible did not actually exercise professional judgment.

Id. at 225 (footnote omitted); *see also id.* at 227 (prescribing a "narrow avenue for judicial review" solely into whether "the faculty did not exercise professional judgment"). This injunction resulted not merely from the recognition that courts are not well "suited to evaluate the substance of the multitude of academic decisions that are made daily by faculty members," *id.* at 226, but also from this Court's "reluctance to trench on the prerogatives of state and local educational institutions and [its] responsibility to safeguard their academic freedom," *id.*[25]

B. The First Amendment Rights of Universities Must Be Considered in Reviewing a University's Admission Program

Because it implicates Fourteenth Amendment concerns, an admission program that considers an applicant's race is subject to strict scrutiny. *See, e.g.*, *Grutter*, 539 U.S. at 326. When that legal framework is applied in the context of higher education, however, it must also reflect the First Amendment rights of academic institutions. *See id.* at 327 ("Context matters when reviewing race-based governmental action under the Equal Protection Clause."). That accommodation is achieved in this context in two modest respects:

---

[25] In *University of Pennsylvania* v. *E.E.O.C.*, 493 U.S. 182 (1990), this Court again confirmed the principle that government may not interfere with "legitimate academic decisionmaking," *id.* at 199, and as recently as *Christian Legal Society* v. *Martinez*, 561 U.S. ___, 130 S. Ct. 2971, 2988 (2010), this Court observed that its tradition of affording deference to academic decisions was consistent with its ultimate role as the arbiter of constitutional questions.

first, the Court should defer to a university's determination that diversity will yield educational benefits; and second, the Court should defer to a university's ultimate conclusion that employing a race-conscious admission program is necessary to achieve the educational benefits of diversity. This approach best synthesizes the First Amendment rights of academic institutions with this Court's obligation to subject racial classifications to "searching judicial inquiry." *Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

1. A University's Determination that Diversity Will Yield Educational Benefits Is Entitled to Deference under the First Amendment

An academic institution's determination that diversity yields educational benefits is a uniquely pedagogical one within the institution's exclusive prerogative. *See Parents Involved in Community Schools* v. *Seattle School Dist. No. 1* (*"Parents Involved"*), 551 U.S. 701, 792 (2007) (Kennedy, J., concurring) ("First Amendment interests give universities particular latitude in defining diversity[.]"). Such a determination is functionally equivalent to the determination that educational benefits will result from the use of a particular curriculum or the promotion of extracurricular activities, decisions which this Court has consistently consigned to an academic institution's sole judgment. *See Christian Legal Society*, 561 U.S. at ___, 130 S. Ct. at 2988-89 ("A college's commission—and its concomitant license to choose among pedagogical approaches—is not confined to the classroom, for extracurricular programs are, today, essential parts of the educational process."); *see also Board of Regents of Universi-*

ty of Wisconsin System v. *Southworth*, 529 U.S. 217, 233 (2000); *Rosenberger*, 515 U.S. at 833.

Affording deference in this narrow manner does not undermine judicial review because this Court still must determine whether the asserted interest is a compelling one. Of course, this Court has already concluded that achieving diversity in higher education is a compelling interest, *see Grutter*, 539 U.S. at 328-33; *Bakke*, 438 U.S. at 311-14; *see also Parents Involved*, 551 U.S. at 722; *id.* at 791 (Kennedy, J., concurring), but nothing would prevent it from concluding that a different interest—for example, that of achieving racial segregation in higher education—is not constitutionally compelling, *see Grutter*, 539 U.S. at 365-66 (Thomas, J., dissenting). Indeed, were such an interest advanced, this Court would be free to reject it so long as it remained willing to distinguish between the interest in achieving racial diversity and the interest in achieving racial isolation. *See Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 228 (1995) ("[T]he point of strict scrutiny is to 'differentiate between' permissible and impermissible governmental use of race."); *see also Parents Involved*, 551 U.S. at 832-33 (Breyer, J., dissenting) (stating that *Adarand* "sought to '*dispel the notion* that strict scrutiny' is as likely to condemn *inclusive* uses of 'race-conscious' criteria as it is to invalidate *exclusionary* ones" (emphases in *Parents Involved*)); *cf. Brown* v. *Board of Education*, 347 U.S. 483 (1954).

Notwithstanding the deference owed on this point, Petitioner and her *amici* challenge at length the premise that diversity yields educational benefits, *see* Brief for Amicus Curiae Gail Heriot et al., and, borrowing from this Court's decision in *Ricci* v. *DeStefa-*

no, 557 U.S. 557 (2009), suggest that a university must demonstrate the existence of such benefits by a "strong basis in evidence." Even if this Court were willing to adjudicate matters of pedagogy—a task it has itself previously avoided, *see Parents Involved*, 551 U.S. at 726, and has often described as falling outside the institutional competence of the judiciary, *see, e.g.*, *Christian Legal Society*, 561 U.S. at ___, 130 S. Ct. at 2988 (recognizing that "judges lack the on-the-ground expertise and experience of school administrators" and should therefore "resist substituting their own notions of sound educational policy for those of the school authorities" (internal quotation marks and alterations omitted))[26]—the test announced in *Ricci* would still be inappropriate here because it fails to account for the First Amendment rights this Court has long afforded academic institutions. *Ricci* involved the quantum of evidence an employer must possess of its own Title VII disparate-impact violation before it may permissibly engage in intentional discrimination to remedy that violation. *Ricci*, 557 U.S. at 583-86. The employer in *Ricci*—a municipality—did not enjoy a First Amendment right protecting its decisions from government interference. Far from reflecting such a right to institutional discretion, the *Ricci* standard was specifically intended to restrict discretion. For that reason alone, its application here would not only be inconsistent with, but completely

---

[26] If courts were to engage on such pedagogical matters presumably they would do so by evaluating the views of experts. Such an inquiry would undoubtedly and unfortunately devolve entirely to "the evanescent views of a handful of social scientists." *Parents Involved*, 551 U.S. at 765 (2007) (Thomas, J., concurring).

antithetical to, the First Amendment rights of academic institutions.

2. A University's Determination that Race-Conscious Measures Are Necessary to Achieve Diversity Is Entitled to Deference under the First Amendment

A university's determination that race-conscious measures are necessary to achieve its interest in student body diversity is undeniably an academic decision. The mix of admission programs selected by a university is calibrated to produce the type of diversity that it believes will yield educational benefits based on criteria unique to it. As a result, determining what admission programs are most suitable to achieve the sought-after diversity necessarily reflects the same pedagogic judgment intrinsic in determining whether and what type of diversity will yield the desired educational benefits.

The facts of this case illustrate how this is true. After this Court's decisions in *Grutter* and *Gratz* v. *Bollinger*, 539 U.S. 244 (2003), the University of Texas reviewed the adequacy of its admission program. Its review was based on the premise that "[a] comprehensive education requires a robust exchange of ideas, exposure to differing cultures, preparation for the challenges of an increasingly diverse workforce, and acquisition of competencies required of future leaders." SJA 23a. In the University's judgment, such an educational experience could only be obtained if "the undergraduate experience for each student . . . include[s] classroom contact with peers of differing racial, ethnic, and cultural backgrounds." SJA 24a.

A separate study demonstrated that the University's race-neutral admission program was not meeting this goal. SJA 66a. That study found that the race-neutral program had only maintained aggregate diversity at its historic levels, while classroom diversity had decreased with minority students more concentrated in particular disciplines. SJA 70a (indicating that in 2002, "nearly 90% of UT undergraduate classes with five to twenty-four students had no or only one African American to contribute their experiences or perspectives" and that "[o]ver 40% had no or only one Hispanic or Asian American"). In the University's judgment, "[w]ith so few underrepresented minorities in the classroom, the University is less able to provide an educational setting that fosters cross-racial understanding, provides enlightened discussion and learning, and prepares students to function in an increasingly diverse workforce and society." SJA 25a. This finding was corroborated by a student survey revealing that "[m]inority students reported feeling isolated, and a majority of all students felt there was 'insufficient minority representation' in classrooms for 'the full benefits of diversity to occur.'" *Fisher* v. *University of Texas at Austin*, 631 F.3d 213, 225 (5th Cir. 2011).

As a result, the University concluded that "[t]he use of race-neutral policies and programs ha[d] not been successful in achieving a critical mass of racial diversity at The University of Texas at Austin," SJA 25a, and authorized its admissions office to consider race and ethnicity as one part of a holistic review of students' applications, *see Fisher* v. *University of Texas at Austin*, 645 F. Supp. 2d 587, 596-98 (W.D. Tex.

2009) (describing University's admissions criteria in detail).

As this record demonstrates, the University sought to provide the educational benefits of a particular type of diversity and determined that, based on its experience with race-neutral admission programs and in light of the unique circumstances of its student body and applicant pool, the addition of a race-conscious admission program to its other admission programs was necessary to obtain the desired diversity. This is precisely the discretion that academic institutions require in evaluating admission programs and that the First Amendment protects.

The need for institutional discretion in evaluating the efficacy of competing admission programs is even more profound for institutions like *amici*. Of course, this Court acknowledged in *Grutter* that smaller institutions such as *amici* simply are not capable of implementing plans similar to the Top Ten Percent law utilized in Texas. *See Grutter*, 539 U.S. at 340. Even if they could, however, *amici* could reasonably reject such plans as fundamentally incompatible with their shared educational mission. Such plans typically use social injustice as a proxy for racial and ethnic diversity in a manner that is at its core dishonest.[27] Moreover, in relying on social injustice,

---

[27] Texas's Top Ten Percent law, although facially race-neutral, only achieves diversity as a result of *de facto* statewide racial segregation. *See, e.g.*, *Gratz*, 539 U.S. at 303 n.10 (Ginsburg, J., dissenting). Other purportedly race-neutral programs, such as those that target economically disadvantaged students, only advance diversity by acknowledging the unfortunate reality that minorities more frequently occupy that status.

those plans legitimate it in a way that renders *amici* complicit in the underlying societal inequities from which it arises. Given their institutional commitment to eradicating such ills, *amici* could easily conclude that use of such "race-neutral" plans to achieve diversity conflicts irreconcilably with their educational mission.[28] Using social disadvantage as a proxy for diversity also conflicts, somewhat counter-intuitively, with *amici*'s mission of serving socially disadvantaged students. Using disadvantage as the sole means by which to achieve diversity would discourage *amici* from serving disadvantaged applicants whose admission would *not* advance diversity. In effect, it would force *amici* to decide between providing their students with the educational benefits of diversity and their institutional commitment to aiding a broad range of economically disadvantaged students.

These considerations only make more plain why each academic institution should have discretion to evaluate the efficacy of competing admission programs and determine, based on its particular circumstances, what programs are necessary to achieve its institutional goals. Meanwhile, Petitioner would strip academic institutions of their right to make such decisions and replace it with her own vision of what diversity means and how best to achieve it. For instance, she suggests that because the Top Ten Percent law has maintained historic levels of aggregate diversity in the University's freshman class, that race-neutral

---

[28] *Ex Corde Ecclesiae* ¶ 34 ("The Christian spirit of service to others for the promotion of social justice is of particular importance for each Catholic university, to be shared by its teachers and developed in its students.").

law has achieved "diversity" and race-conscious programs are therefore unnecessary. *See* Brief for Petitioner at 34-36. Likewise, she contends that because the race-conscious facet of the University's admission program ultimately accounts for only a small percentage of each incoming freshman class, it cannot meaningfully alter the percentage of minority students in that class and, perforce, cannot be necessary. *See id.* at 38-40.

Both arguments are premised on a conception of diversity that the University has not sought to pursue and that Petitioner now seeks to impose. The University has determined that the educational benefits of diversity result where each undergraduate student has "classroom contact with peers of differing racial, ethnic, and cultural backgrounds." 2004 REPORT at 24. As its multiple studies show, such educational benefits are not reflected by aggregate levels of diversity in the incoming freshman class; indeed, that metric in fact masks increasing levels of on-campus racial isolation.

No matter, says Petitioner. But in doing so, she ignores the University's First Amendment right to determine for itself on academic grounds what manner of education it will provide. It is no more her prerogative to dictate what type of diversity the University should seek to achieve than it is for her to dictate how the University will teach calculus or chemistry, or how it will assign grades in those courses. To the contrary, the First Amendment commands that such decisions are the University's to make.

Petitioner and her *amici* fall back on the argument that observing this limited degree of deference

will require the Court to "abdicate[] its constitutional duty to give strict scrutiny" to race-conscious admission programs. *Grutter*, 539 U.S. at 395 (Kennedy, J., dissenting); *see* Brief for Petitioner at 54-56. But this confuses "deference to a university's definition of its educational objective with deference to the implementation of this goal." *Grutter*, 539 U.S at 388 (Kennedy, J., dissenting). A university's determination that *some* race-conscious admission program is necessary does not entail the conclusion that *this particular* race-conscious admission program is narrowly tailored. Authority to make that decision remains solely with this Court.

The Court's evaluation of narrow tailoring is not mere window dressing, but preserves meaningful judicial review in several respects. For instance, it requires an academic institution to demonstrate in detail how its race-conscious admission program functions. *See, e.g.*, *Parents Involved*, 551 U.S. at 783-87 (Kennedy, J., concurring).

It also requires an academic institution to demonstrate that its race-conscious admission program ensures individual consideration. This is no simple task. The university must establish that the program (i) only takes race into account as one factor in a holistic review of each application, *see Grutter*, 539 U.S. at 334; (ii) does not implement a system of racial quotas, *see Bakke*, 438 U.S. at 315-16, or otherwise fail to evaluate applicants individually, *see Gratz*, 539 U.S. at 271; *Grutter*, 539 U.S. at 389 (Kennedy, J., dissenting); and (iii) considers "all pertinent elements of diversity," not merely racial diversity, *Grutter*, 539 U.S. at 337-39.

Finally, narrow tailoring requires this Court to ensure that an academic institution's evaluation of necessity results from "serious, good faith consideration of workable race-neutral alternatives." *Id.* at 339. This enables this Court to determine that an academic institution's decision to employ race-conscious measures is one that is entitled to deference under the First Amendment.[29] For instance, the failure adequately to consider alternatives might suggest that the adoption of race-conscious measures was predicated on non-academic grounds not warranting deference.

Amici do not dispute that such searching judicial review is required in the context of college and university admission programs that look to race as one of many factors in the service of achieving a diverse academic environment. But they believe that review must also reflect our nation's fundamental commitment to academic freedom in higher education. The modest deference *amici* suggest should apply gives force to both the Fourteenth Amendment's promise of equal protection and the First Amendment's defense of academic freedom.

---

[29] First Amendment deference extends only to academic decisions; it does not extend, for instance, to a university's decision to exclude military recruiters from on-campus recruiting, *see Rumsfeld* v. *Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 64 (2006), to prohibit non-students from distributing materials on campus, *cf. Princeton University* v. *Schmid*, 455 U.S. 100, 101 (1982), to discipline a student for non-academic reasons, *see Horowitz*, 435 U.S. at 90, or any other decision predicated on ideological inculcation, *see Rosenberger*, 515 U.S. at 836; *Healy* v. *James*, 408 U.S. 169, 187-88 (1972).

CONCLUSION

The judgment of the United States Court of Appeals for the Fifth Circuit should be affirmed.

August 10, 2012

Respectfully submitted,

FLOYD ABRAMS
Counsel of Record
SUSAN BUCKLEY
VICTOR SUTHAMMANONT
PHILIP TISNE
CAHILL GORDON & REINDEL LLP
80 Pine Street
New York, New York 10005
(212) 701-3000
fabrams@cahill.com

Counsel for Amici Curiae