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 FOR THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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Regents of University of California v. Bakke, 438 U.S. 265 (1978) 5, 6, 7

OTHER AUTHORITIES

American Bar Association, *Diversity in the Legal Profession: The Next Steps* (April 2010) 12

The Association of the Bar of the City of New York, *2010 Law Firm Diversity Benchmarking Report* (2011) 12

The Association of the Bar of the City of New York, *Statement of Diversity Principles* 11

Center for American Progress, *Prosperity 2050: Is Equity the Superior Growth Model* (2011) 9

Nalty, Kathleen & Aris Reeves, Center for Legal Inclusiveness, *Beyond Diversity: Inclusiveness in the Legal Workplace* (Jan. 2012) 9

New York Times, *Pushed by Clients, Law Firms Step Up Diversity Efforts* (July 21, 2006) 10

Shields, Allison, *Are Today's Law Firms Committed to Diversity?*, Law Practice Today (April 2010) 9

The Stanford Daily, *Student group works to educate students about diversity in law firms* (2010) 10

U.S. Census Bureau, *Statistical Abstract of the United States: 2011* 9

Vault.com, *And the Best Law Firms for Diversity Are...* (July 31, 2012) 10

Wall Street Journal Blog, *Clients Demand Diversity at Law Firms* (December 28, 2006) 10

STATEMENT OF INTEREST OF THE AMICUS CURIAE[1]

The Association of the Bar of the City of New York (New York City Bar), founded in 1870, is a voluntary association of lawyers and law students. Today the New York City Bar has over 23,000 members. Among its purposes are: "cultivating the science of jurisprudence, promoting reforms in the law, facilitating and improving the administration of justice."

The New York City Bar has 150 committees that focus on legal practice areas and issues. Through testimony, reports, amicus briefs, statements, and letters drafted by committee members, the New York City Bar comments on legal issues and public policy. This brief was prepared by the Committee on Education and the Law. This Committee addresses issues surrounding education from pre-K through higher education, including education finance, governance, legislative proposals, and special education. The New York City Bar has a long-standing interest in protecting civil rights and has submitted a number of amicus curiae briefs to this Court in cases addressing education and civil rights.

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus* or its counsel, make a monetary contribution intended to fund the preparation or submission of this brief. This brief is submitted pursuant to the blanket consent letters from all parties, on file with this Court.

SUMMARY OF ARGUMENT

The University of Texas admissions policy is fully consistent with constitutional requirements, as set forth in Supreme Court jurisprudence, because it gives holistic, individualized attention to each applicant and does not permit race to be a single or predominant factor in determining whether to review. Indeed, the role of race in the University of Texas admissions process is even more modest than it was in the Harvard University or the University of Michigan Law School procedures approved by prior decisions of this Court.

The effort of the University of Texas to increase the diversity of its student body is not only commendable but is essential to increase the number of students of color who go on to professional careers and thus take leadership roles in society. We write to stress the importance of an undergraduate institution's promotion of diversity from the perspective of the legal community, specifically the New York City legal community. The legal profession recognizes the importance of diversity and has made major efforts to foster it. Over one-third of the nation's population is comprised of African American, Latino, Asian and other people of color. And as law practice becomes increasingly globalized, the world it is servicing is overwhelmingly comprised of people of color. In order to serve these individuals, and the businesses, institutions and organizations they lead, lawyers must have a range of cultural experiences and insights and a keen understanding of those they represent.

Despite the diversity efforts that have been undertaken and the progress that has been made to date, lawyers of color are still underrepresented in the legal community. The New York City Bar has helped the lawyers in New York City focus on diversity, has obtained commitments from firms to improve it, and has been tracking the progress of law firms in achieving it. Nevertheless, the latest data still show that only 16.6 percent of lawyers in the law firms that have signed our Statement of Diversity Principles, and only 6.3 percent of law firm partners, are lawyers of color.

If these numbers are to improve, there must be a broader pool of students of color at the undergraduate level who are interested in pursuing a legal career: students who have the ability to negotiate and mediate, to exercise leadership, to persevere and to see a matter through to its conclusion; in other words, students who some day would be effective in understanding and serving clients' legal needs.

In the context of undergraduate admissions, these are the kinds of skills and attributes that may not necessarily be reflected in grades and standardized test scores, but which may instead be identified by examining the totality of an applicant's background and experience. Understanding the context of an applicant's circumstances, including race, can be a valuable indicator for a college as to what the applicant has achieved and whether the applicant can use the college degree and experience to be a productive member of his or her community.

It is essential that colleges be able to consider these attributes, and to view them in the context of an individual's race and attendant circumstances, in making admissions decisions. From the perspective of the legal profession, this individualized approach can give increased opportunities to students whose skills will be well matched to ultimately serve an increasingly diverse population that has a vast array of legal needs.

ARGUMENT

I. THE ADMISSIONS PROCESS OF THE UNIVERSITY OF TEXAS INCLUDES AN INDIVIDUALIZED ASSESSMENT OF EACH CANDIDATE, IN WHICH RACE IS NOT A PREDOMINANT FACTOR, AND IT THUS COMPORTS WITH CONSTITUTIONAL REQUIREMENTS

In a series of three cases, *Regents of University of California v. Bakke*[2], *Gratz v. Bollinger*[3], and *Grutter v. Bollinger*[4], this Court described the acceptable use of race in the university admissions process. In these cases, the Court barred universities from conferring discrete benefits based solely on race but permitted universities to consider the race of applicants on an individualized, holistic basis, so long as race is not considered in a way which insulates minorities from competition with all other candidates. *Bakke*, 438 U.S. at 317; *Grutter*, 539 U.S. at 334.

In *University of California v. Bakke*, the Court held that setting aside a certain number of seats in a class for minority students violated the Equal Protection Clause. In *Gratz v. Bollinger*, the Court

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[2] 438 U.S. 265 (1978).

[3] 539 U.S. 244 (2003).

[4] 539 U.S. 306 (2003).

barred a university from giving candidates twenty points, one-fifth of the points needed to earn admission, just for being a minority. This automatic award assured admission for virtually every minimally qualified minority applicant. *Id.* at 266, 272.

While the holdings in *Bakke* and *Gratz* specified what a university could not do when considering an applicant's race, these decisions also made it clear that universities *can* constitutionally use race as an aspect of the admissions process. *Bakke*, 438 U.S. at 317; *Gratz*, 539 U.S. at 244. Indeed, the Court upheld just such an approach in *Grutter v. Bollinger* because consideration of race among other factors is critical to a school's right to assemble a heterogeneous student body. The *Grutter* Court held that universities cannot "insulate applicants who belong to certain racial or ethnic groups from the competition for admission." 539 U.S. at 334 (citing *Bakke*, 438 U.S. at 315); *see also Gratz*, 539 U.S. at 276 (O'Connor, J., concurring, noting that what made the Michigan undergraduate admissions process unconstitutional was its lack of "meaningful individualized review"). An admissions program is constitutional where it "treats each applicant as an individual in the admissions process." *Bakke*, 438 U.S. at 318. "The importance of this individualized consideration in the context of a race-conscious admissions program is paramount." *Grutter*, 539 U.S. at 337.

Bakke and *Grutter* map out constitutionally acceptable race-conscious admissions processes which do not isolate minorities from meaningful

competition and, more fundamentally, do not consider applicants' race in a vacuum. Rather, race is used to contextualize the background of a candidate. In *Bakke*, Justice Powell cited Harvard College as an example of a constitutional race-conscious admissions process. At Harvard, admissions officials were allowed to consider racial and ethnic background among other factors that would help contribute to a diverse student body, the definition of "diversity" being necessarily fluid. 438 U.S. at 316. Race could "tip a decision" just as "geographic origin" or a "life spent on a farm." *Id.* In such an admissions process, being a member of a minority group does not necessarily become "decisive" to a disposition. 438 U.S. at 317. An Italian-American would still be chosen over an African-American if the Italian-American had overall qualities that would be more likely to promote "educational pluralism." *Id.* No goals or quotas existed for the number of racial minorities to be admitted, but Harvard did keep some track of the numbers of students in various categories that it was admitting. *Id.* at 316-17.

The Harvard system also was used as a model of acceptable race-conscious admissions in *Gratz*, as compared with the University of Michigan's undergraduate admissions program. *Gratz*, 539 U.S. at 270-73. The unconstitutionality of the undergraduate Michigan program was rooted in its formulaic approach to reaching a pre-determined measure of diversity at the school. *See id.* at 271 (stating that the Harvard plan did not assume that a person's race "automatically ensured a specific and identifiable contribution to a university's diversity.").

In her concurring opinion in *Gratz*, Justice O'Connor emphasized that what made the University of Michigan's process unconstitutional was its lack of "meaningful individualized review" and that the award of twenty points was given to *every* minority *automatically*. *Id.* at 276 (emphasis in original).

In contrast, the Michigan Law School admissions program held constitutional in *Grutter* essentially adopted the Harvard model by engaging in "a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment....Unlike the program at issue in *Gratz v. Bollinger*, the Law School awards no mechanical, predetermined diversity 'bonuses' based on race or ethnicity." *Grutter*, 539 U.S. at 337 (internal citations omitted).

The University of Texas affords all of its candidates individualized review similar to that conducted at Harvard College and Michigan Law School. Its admissions process has been fashioned to assure that "individual assessment is safeguarded through the entire process."[5] An applicant's race is

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[5] *Grutter*, 539 U.S. at 392 (Kennedy, J., dissenting). Justice Kennedy, in his dissent in *Grutter* expressed concern that race was "likely outcome determinative" in the decisions about who would fill the seats in the bottom 15% to 20% of the class. 539 U.S. at 389. This concern arose because admissions officials monitored the racial composition of the incoming class on a "day-to-day" basis and could "recalibrate the plus factor given to race depending on how close they were to achieving the Law's School's goal of critical mass." *Id.* at 392. The monitoring of racial composition and the concurrent failure to limit the size of the plus factor created a likelihood that

one of many factors considered in a broad assessment called a "personal achievement score," which is used to assess candidates whose merit as applicants is not fully reflected by their academic achievement. *Fisher v. University of Texas*, 631 F.3d 213, 228 (5th Cir. 2011). The "personal achievement score" includes an "applicant's demonstrated leadership qualities, awards and honors, work experience, and involvement in extracurricular activities and community service." *Id.* at 228. Additionally, "the personal achievement score includes a 'special circumstances' element that may reflect the socioeconomic status of the applicant and his or her high school, the applicant's family status and family responsibilities, the applicant's standardized test score compared to the average of her high school, and—beginning in 2004—the applicant's race." *Id.* The use of race at the University therefore fits the basic parameter for a constitutional use of race because it requires individualized review and does not award candidates any discrete benefit based solely on race.

Perhaps most importantly, the University does not keep a running tally of the racial composition of its incoming class. 631 F.3d at 236 ("[D]emographics are not consulted as part of any individual admissions decision, and UT's admissions procedures do not treat certain racial groups or minorities differently than others when reviewing

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"individual consideration" was not preserved at the end of the admission season. *Id.* at 390.

individual applications."). As the admissions season comes to a close, admissions officials will not alter the admissions in an effort to meet a particular racial goal. The University of Texas procedure thus does not raise the concern that candidates at the bottom of the admitted class were being selected solely, or almost solely, based on their race.

By carefully confining the role that race can play in any particular admissions decision, the University of Texas admissions process comports with constitutional requirements.

II. DIVERSITY IS NECESSARY FOR THE LEGAL PROFESSION AND IS DEPENDENT UPON A RACIALLY-MIXED PIPELINE OF STUDENTS WITH THE QUALITIES TO BE SUCCESSFUL LAWYERS

A. Diversity is Essential to an Effective Legal Profession

The legal profession has to adapt to a changing country and a changing world. People of color comprise 36 percent of this nation's population and contributed 92 percent of the nation's population growth over the past decade.[6] Not only more people

[6] Center for American Progress, *Prosperity 2050: Is Equity the Superior Growth Model* (2011), http://www.americanprogress.org/issues/2011/04/prosperity_2050.html.

of color, but more businesses, institutions and governmental bodies with diverse leadership, are seeking legal professionals who have an understanding of their viewpoints and needs. In addition, the profession is more global, with a growing number of U.S. law firms providing services in parts of the world dominated by people of color, such as Asia, Africa and Latin America, whose inhabitants comprise over 80 percent of the world's population.[7]

By contrast, lawyers of color comprised only 11 percent of the nation's legal profession as of 2011.[8] As a result, there are too many American legal teams that do not have the benefit of diverse perspectives and experiences in serving this changing client base.

The need for a diverse pool of lawyers has not been lost on the business community. In 1999, approximately 500 chief legal officers of major companies signed "Diversity in the Workplace: A Statement of Principle," reinforced in a 2004 "Call to

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[7] U.S. Census Bureau, *Statistical Abstract of the United States: 2011.*

[8] Nalty, Kathleen & Aris Reeves, Center for Legal Inclusiveness, *Beyond Diversity: Inclusiveness in the Legal Workplace* at 40 (Jan. 2012).

Action."[9] Many companies have made it their stated policy to have diverse legal teams handle their matters.[10] To this end, there are increasing efforts to evaluate and rank major law firms on the basis of their diversity efforts,[11] and these rankings go beyond the standard measures of the percentage of lawyers of color at various positions in the firm to consider more broadly their diversity and inclusion practices. In addition, law students are increasingly expecting law firms to have strong diversity policies and a diverse workforce.[12]

Beyond the business community, there are myriad other areas of the legal profession that are

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[9] *See* http://www.acc.com/vl/public/Article/loader.cfm?csModule=security/getfile&pageid=16074. *See also* Shields, Allison, *Are Today's Law Firms Committed to Diversity?*, Law Practice Today (April 2010).

[10] *See, e.g.*, New York Times, *Pushed by Clients, Law Firms Step Up Diversity Efforts* (July 21, 2006), http://www.nytimes.com/2006/07/21/business/21legal.html?pagewanted=all); Wall Street Journal Blog, *Clients Demand Diversity at Law Firms* (December 28, 2006), http://blogs.wsj.com/law/2006/12/28/clients-demand-diversity-at-law-firms/.

[11] *See, e.g.*, Vault.com, *And the Best Law Firms for Diversity Are...* (July 31, 2012), http://blogs.vault.com/blog/workplace-issues/and-the-best-law-firms-for-diversity-are-/.

[12] *See, e.g.*, The Stanford Daily, *Student group works to educate students about diversity in law firms* (2010), http://www.stanforddaily.com/2010/11/16/student-group-works-to-educate-law-students-about-diversity-in-firms/.

in need of more lawyers of color to broaden the perspectives that are brought to bear, and to create more racially mixed legal teams. More lawyers of color, for example, are needed in government agencies, including law enforcement, policy making and administration; in community lawyering; in educational settings and as judges. In short, there is a heavy demand in all corners of the profession for more lawyers of color.

B. Law Firms Have Worked to Respond to the Need for Diversity

Law firms have long recognized the importance of having diverse groups of lawyers working on their clients' matters. In 1990, the New York City Bar formed a committee, chaired by former Association President and former Secretary of State Cyrus Vance and comprised of major law firm leaders, to coordinate diversity efforts among the City's major firms. Over the years, the committee has developed various policies and statements, including a Statement of Diversity Principles[13] signed by 108 firms and 18 corporations. The Statement acknowledges the importance of diversity in the legal profession:

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[13] The Association of the Bar of the City of New York, *Statement of Diversity Principles*, http://www2.nycbar.org/pdf/diversity_principles2.pdf.

> With greater diversity, we can be more creative, effective and just, bringing more varied perspectives, experiences, backgrounds, talents and interests to the practice of law and the administration of justice. A diverse group of talented legal professionals is critically important to the success of every law firm, corporate or government law department, law school, public service organization and every other organization that includes attorneys.

The signatory law firms also participate in an annual Diversity Benchmarking Survey to evaluate various statistical categories of diversity, and the aggregated results are made public.

The Statement of Principles recognizes that achieving diversity in the profession is "an evolutionary process." As has been well documented, progress has been notable but slow; people of color are underrepresented in the profession, especially in the higher levels of law firms. According to the last published benchmarking survey the Association conducted, covering the year 2010, lawyers of color

comprised only 16.6% of law firm associates and 6.3% of partners in the surveyed firms.[14]

The profession widely acknowledges that its ongoing diversity efforts have not been as successful as desired, and in large part this is due to an insufficient pipeline of students of color in law school.[15] To overcome this challenge, there obviously needs to be a more diverse pipeline of undergraduate students, and for that to happen, undergraduate institutions, in their admissions evaluations, must be allowed to consider race in the overall context of an individual applicant's circumstances and experiences. In other words, a more diverse undergraduate student body is ultimately a prerequisite for a more diverse legal profession, and the key to achieving this lies with the undergraduate admissions process.

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[14] The Association of the Bar of the City of New York, *2010 Law Firm Diversity Benchmarking Report* (2011) at 8, http://www.nycbar.org/images/stories/pdfs/diversity/2010report.pdf.

[15] *See generally* American Bar Association, *Diversity in the Legal Profession: The Next Steps* (April 2010), http://www.americanbar.org/content/dam/aba/migrated/2011_build/diversity/041511_aba_nextsteps.authcheckdam.pdf.

C. Holistic Evaluations of Undergraduate Applicants' Credentials Can Best Identify the Skills Needed to be an Effective Lawyer

When lawyers enter the profession, they must call upon many skills that are not necessarily reflected in their law school grade performance. They must learn how to understand clients, identify what they need and consider how to find solutions, many of which require creative problem-solving and consensus-building. Lawyers seeking to establish a private practice must learn how to attract clients, develop contacts within the profession, manage a law practice and generally make their way in the legal world. Lawyers need leadership ability, strong interpersonal skills, perseverance, resilience and the appropriate temperament for law practice. Few of these attributes are tested in law school courses or on the bar exam. Yet they are necessary both to succeed as a lawyer and to serve clients effectively.

These skills are developed over many years, beginning in one's youth, and by high school many are apparent. They can be reflected in a student's participation in or captaining an athletic team, leading a school club or performing community service. They also can be reflected in how a student copes with his or her environment, deals with family stresses or poverty, and handles peer pressure. From the vantage point of the legal profession, a

college or university must be able to identify and nurture students who have these skills, as they ultimately will be of great importance in addition to academic preparation. Therefore, these institutions must have the necessary flexibility to make individualized, holistic determinations of high school applicants that look beyond pure numerical measures of academic success if they are to identify effectively students of color who will become successful professionals in the future.

It is especially important to permit this type of holistic evaluation because many of the students who have the skills to succeed as a professional grow up in circumstances which can put them at a disadvantage in presenting themselves effectively to admissions officers, and because some might be overlooked in a process which considers grades and test scores alone. To address this disadvantage, the New York City Bar, like many other professional organizations, has established a "diversity pipeline" program to reach back to high school for high school students in the City's inner-city neighborhoods, most of whom are students of color, and who have the interest and potential to become good lawyers. In conducting this program, we learned much about how different their circumstances are in looking ahead to college and a career.

The Program is run by a Diversity Pipeline Committee. Reflecting the commitment to this issue

from major New York City legal employers, the committee consists of representatives of 10 law firms, 4 corporations, 6 law schools and 11 nonprofit and government agencies. The committee operates the Thurgood Marshall Summer Law Internship Program,[16] which places inner-City high school students in summer positions with legal employers. The purpose of the program is to expose these students to the possibility of a legal career. This summer, the program placed over 50 students with employers, about a third of the number that applied. Entrance to the program is based partially on grade point average, but also on teacher recommendations, a resume and an in-person interview where the candidate's qualifications and experiences are explored, in order to provide a more complete picture of whether the student is poised to succeed in the program.

To help these students develop their skills, the Pipeline Committee conducts resume and interview training, including one-on-one counseling; provides workshops regarding preparing for the workplace; and presents sessions on college admission and preparation. To provide a connection with older students, the program uses staff and alumni

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[16] *See* http://www.nycbar.org/index.php/diversity/student-pipeline-program/programs/185-thurgood-marshall-summer-law-internship-program.

volunteers who are in frequent contact with the students throughout the course of the program.

Over the years, we have found that our holistic approach to admission into the program, and to the preparation of individual students, has been effective. The performance of the interns in the summer employment settings has been outstanding, and it is not uncommon for an employer to ask the student to continue the employment during the year or return the next summer. Most of the students attend college and many continue their involvement with the program, serving as volunteers and mentors. In order to maintain their focus on a legal career, the Pipeline Committee has established a mentoring program connecting college students with law students.

The Diversity Pipeline Program is one of a number of programs that reflect the determination of the legal profession to identify students of color whose potential can be recognized by the totality of their skills and experiences. Legal employers of all kinds have become involved in these programs, recognizing the necessity of finding potential lawyers who reflect the diversity of the population, and nurturing them through the pipeline to what hopefully will be a successful legal career. If programs like this are to succeed, however, undergraduate admissions departments must have the ability to mirror this approach of identifying and

nurturing a broad and diverse pool of students through a holistic, individualized assessment which takes race into account as one factor in the context of an admissions evaluation. A contrary process which precludes such an assessment of race and other contextual factors will inevitably exclude promising candidates, like many in our Diversity Pipeline Program, to the ultimate disadvantage of the legal profession and our society as a whole.

CONCLUSION

For the foregoing reasons, the Court should rule in the University of Texas's favor and hold its admission process constitutional.

Respectfully submitted,

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