



No. 11-345

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IN THE  
**Supreme Court of the United States**

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ABIGAIL NOEL FISHER, PETITIONER

v.

UNIVERSITY OF TEXAS AT AUSTIN, ET AL.,  
RESPONDENTS

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ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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BRIEF OF *AMICI CURIAE* BOSTON BAR ASSOCIATION  
ET AL. IN SUPPORT OF RESPONDENTS

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<i>Beauharnais v. Illinois</i> , 343 U.S. 250 (1952).....	7
<i>Fisher v. Univ. of Texas at Austin</i> , 631 F.3d 213 (5th Cir. 2011).....	27
<i>Fisher v. Univ. of Texas at Austin</i> , 644 F.3d 301 (5th Cir. 2011) (Jones, C.J., dissenting).....	9
<i>Grutter v. Bollinger</i> , 539 U.S. 306 (2003).....	15, 26
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<i>San Antonio Indep. Sch. Dist. v. Rodríguez</i> , 411 U.S. 1 (1973).....	7, 8

<i>Sweatt v. Painter</i> , 339 U.S. 629 (1950).....	14
<i>Sweezy v. New Hampshire</i> , 354 U.S. 234 (1957).....	14
<b>Constitutional and Statutory Provisions, Regulations and Legislative History</b>	
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Del. Const. art. X, § 1 .....	10
Ga. Const. art. VIII, § I, para. I.....	10
Md. Const. art. VIII, § 1.....	10
Mass. Const. pt. II, ch. V, § II.....	10, 11
N.H. Const. pt. II, art. 83.....	10, 11
N.J. Const. art. VIII, § IV, para. 1.....	10
N.Y. Const. art. XI, § 1.....	10
N.C. Const. art. I, § 15 .....	10
Pa. Const. art. III, § 14 .....	10
R.I. Const. art. XII, § 1.....	10, 12
S.C. Const. art. XI, § 3 .....	10
Tex. Const. art. VII, § 1.....	13, 29
Va. Const. art. I, § 15 .....	10, 12

**Miscellaneous**

- ABA Presidential Advisory Council on  
Diversity in the Profession, THE CRITICAL  
NEED TO FURTHER DIVERSITY THE LEGAL  
ACADEMY & THE LEGAL PROFESSION (2005),  
[http://apps.americanbar.org/op/pipelineconf  
/acdreport.pdf](http://apps.americanbar.org/op/pipelineconf/acdreport.pdf)..... 18**
- ABA Presidential Initiative Comm'n on  
Diversity, DIVERSITY IN THE LEGAL  
PROFESSION: THE NEXT STEPS (2010),  
[http://www.americanbar.org/content/dam/  
aba/administrative/diversity/next\\_steps\\_20  
11.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/diversity/next_steps_2011.authcheckdam.pdf)..... 19, 26**
- John Adams, PAPERS OF JOHN ADAMS  
(Gregg L. Lint et al. eds., 1989)..... 10**
- John Adams, THE WORKS OF JOHN ADAMS  
(C.F. Adams ed., 1851) ..... 11**
- William J. Brennan, Jr., *A Tribute to Justice  
Thurgood Marshall*, 105 HARV. L. REV. 23  
(1991)..... 23**
- Kevin Burke & Steve Leben, *Procedural  
Fairness: A Key Ingredient in Public  
Satisfaction*, 44 CT. REV. 4 (2007-2008),  
*available at* [http://www.proceduralfairness.  
org/~media/Microsites/Files/procedural-  
fairness/CR44-1-2.ashx](http://www.proceduralfairness.org/~media/Microsites/Files/procedural-fairness/CR44-1-2.ashx)..... 20**

- Karen Donovan, *Pushed by Clients, Law Firms Step Up Diversity Efforts*, N.Y. TIMES, June 21, 2006, <http://www.nytimes.com/2006/07/21/business/21legal.html>..... 28**
- Hon. John R. Dunne, Comm. for Modern Courts, Testimony at N.Y. State Senate Public Forum: A Lasting Blueprint for Judicial Diversity (Dec. 4, 2006), <http://www.moderncourts.org/advocacy/diversity/index.html>..... 20, 21**
- Catherine Horn & Stella M. Flores, Harvard Univ., PERCENT PLANS IN COLLEGE ADMISSIONS: A COMPARATIVE ANALYSIS OF THREE STATES' EXPERIENCES (2003) ..... 27**
- Inst. for Inclusion in the Legal Profession (IILP), IILP REVIEW 2011: THE STATE OF DIVERSITY AND INCLUSION IN THE LEGAL PROFESSION (2011), [http://www.theiilp.com/resources/Documents/IILP2011\\_Review\\_final.pdf](http://www.theiilp.com/resources/Documents/IILP2011_Review_final.pdf)..... 17**
- Melanie Lasoff Levs, *Call to Action - Sara Lee's General Counsel: Making Diversity A Priority*, DIVERSITY & THE BAR (Feb. 2005), available at [http://0350474.netsolhost.com/FileLib/9/cr\\_handouts.pdf](http://0350474.netsolhost.com/FileLib/9/cr_handouts.pdf) ..... 24, 25**
- Patricia Marin & Edgar K. Lee, Harvard Univ., APPEARANCE AND REALITY IN THE SUNSHINE STATE: THE TALENTED 20 PROGRAM IN FLORIDA (2003) ..... 27**

- Samuel Eliot Morison, A HISTORY OF THE  
CONSTITUTION OF MASSACHUSETTS (1917) ..... 10**
- NALP, Women and Minorities in Law Firms -  
By Race and Ethnicity (Jan. 2011),  
[http://www.nalp.org/women\\_minorities\\_jan\\_2012](http://www.nalp.org/women_minorities_jan_2012) ..... 16**
- Kathleen Nalty & Arin Reeves, Ctr. for Legal  
Inclusiveness, BEYOND DIVERSITY:  
INCLUSIVENESS IN THE LEGAL WORKPLACE  
(2012), [http://www.legalinclusiveness.org/  
clientuploads/pdf/CLI%20Inclusiveness%20  
Manual\\_2012%20Beyond%20Diversity%20  
-%20Introduction.pdf](http://www.legalinclusiveness.org/clientuploads/pdf/CLI%20Inclusiveness%20Manual_2012%20Beyond%20Diversity%20-%20Introduction.pdf)..... 16, 17**
- Sandra Day O'Connor, *Thurgood Marshall:  
The Influence of a Raconteur*, 44 STAN. L.  
REV. 1217 (1992) ..... 23**
- Roderick Palmore, Sara Lee, A Call to Action:  
Diversity in the Legal Profession (2004),  
[http://www.acc.com/vl/public/Article/loader.  
cfm?csModule=security/getfile&pageid=160  
74](http://www.acc.com/vl/public/Article/loader.cfm?csModule=security/getfile&pageid=16074). ..... 15, 27**
- John Payton, *Democracy and Diversity*, 35  
PEPPERDINE L. REV. 569, 582 (2008),  
[http://digitalcommons.pepperdine.edu/plr/v  
ol35/iss3/1](http://digitalcommons.pepperdine.edu/plr/vol35/iss3/1)..... 22**

- Malia Reddick et al., *Racial and Gender Diversity on State Courts*, JUDGES' JOURNAL, Summer 2009, available at [http://www.judicialselection.us/uploads/documents/Racial\\_and\\_Gender\\_Diversity\\_on\\_Stat\\_8F60B84D96CC2.pdf](http://www.judicialselection.us/uploads/documents/Racial_and_Gender_Diversity_on_Stat_8F60B84D96CC2.pdf)..... 21**
- Mark Roellig, Mass. Mut. Life Ins. Co., "WHY" Diversity is Critical to the Success of Your Law Department (2012), [http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2012\\_cccle\\_materials/6\\_value.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2012_cccle_materials/6_value.authcheckdam.pdf)..... 25**
- David B. Rottman, Nat'l Ctr. for State Courts, TRUST AND CONFIDENCE IN THE CALIFORNIA COURTS (2005), [http://www.courts.ca.gov/documents/4\\_37pubtrust1.pdf](http://www.courts.ca.gov/documents/4_37pubtrust1.pdf)..... 20**
- David B. Rottman & Randall M. Hansen, How Recent Court Users View the State Courts: Perceptions of Whites, African-Americans, and Latinos (2001), [http://www.flcourts.org/gen\\_public/family/diversity/bin/perceptions2.pdf](http://www.flcourts.org/gen_public/family/diversity/bin/perceptions2.pdf) ..... 20**
- Paul Arthur Schilpp, THE PHILOSOPHY OF ERNST CASSIRER (1949)..... 9**
- U.S. Census Bureau, OVERVIEW OF RACE AND HISPANIC ORIGIN: 2010 (Mar. 2011), <http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf> ..... 16**

- U.S. Census Bureau, *Statistical Abstract of the United States: 2012*, Table 10, <http://www.census.gov/compendia/statab/2012/tables/12s0010.pdf> ..... 18
- U.S. Census Bureau, *U.S. Interim Projections by Age, Sex, Race, and Hispanic Origin (Mar. 2004)*, <http://www.census.gov/population/www/projections/usinterimproj/natprojtab01a.pdf> ..... 16
- U.S. Dep't of Educ., Nat'l Ctr. for Educ. Statistics, *The Condition of Education 2012 (NCES 2012-045)*, Indicator 33, <http://nces.ed.gov/fastfacts/display.asp?id=16>)..... 18
- U.S. Dep't of Educ., Nat'l Ctr. for Educ. Statistics, *Digest of Education Statistics: 2011 (NCES 2012-001)*, Table 213, [http://nces.ed.gov/programs/digest/d11/tables/dt11\\_213.asp](http://nces.ed.gov/programs/digest/d11/tables/dt11_213.asp)..... 17
- Vernon's Ann. Tex. Const. art. VII, § 1, *Interpretive Commentary (2007)* ..... 12
- Byron R. White, *A Tribute to Justice Thurgood Marshall*, 44 STAN. L. REV. 1215 (1992)..... 23

## INTEREST OF *AMICI CURIAE*<sup>1</sup>

*Amicus* the Boston Bar Association (“BBA”) was founded in 1761 by John Adams and other Boston lawyers and is the nation’s oldest bar association. The BBA’s mission is to facilitate access to justice, advance the highest standards of excellence for the legal profession, and serve the community at large. This case implicates two of the most significant aspects of the BBA’s mission: promoting education and diversity.

The Education Clause of the Massachusetts Constitution, the oldest functioning state constitution, was drafted by Adams and reportedly was his favorite provision of the document. *McDuffy v. Sec’y of the Exec. Office of Educ.*, 615 N.E.2d 516, 533 & n.40 (Mass. 1993). Consistent with that history, the BBA strives to further educational interests in the legal profession and in society. At the same time, the BBA has developed and implemented a number of diversity initiatives, including formally partnering with various affinity bar associations,<sup>2</sup> establishing a “Diversity and

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<sup>1</sup> This brief is filed with the consent of the parties. The letters of consent have been filed with the Court. Pursuant to this Court’s Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amici* and their counsel made such a monetary contribution.

<sup>2</sup> Affinity bar associations (sometimes referred to as special purpose bar associations) are formed to promote the administration of justice, improve relations between communities within the legal profession and the public, and serve the interests of local legal communities.

Inclusion” section for its members, administering mentoring and judicial internship programs, and engaging in other pipeline and recruitment work with law schools and public schools. It respectfully submits this brief to advise the Court of the essential relationship between diversity in undergraduate educational institutions and the current and compelling needs of the legal profession.

*Amicus* the Asian American Lawyers Association of Massachusetts (“AALAM”) is a professional bar association devoted to serving the Asian American legal community and improving and facilitating the administration of law and justice.

*Amicus* the Bar Association of San Francisco (“BASF”) is a nonprofit voluntary membership organization of attorneys, law students, and legal professionals in the San Francisco Bay Area. Founded in 1872, BASF enjoys the support of more than 7,500 individuals, law firms, corporate legal departments, and law schools. Through its board of directors, committees, volunteer legal services programs, and other community efforts, BASF has worked to promote and achieve equal justice for all and to oppose discrimination in all its forms, including, but not limited to, discrimination based on race, sex, disability, and sexual orientation. BASF also engages in many efforts to increase diversity in the legal profession, including a dedicated Diversity Department that manages several college and law school programs focusing on diversity in the legal profession.

*Amicus* the Beverly Hills Bar Association (“BHBA”) was established in 1931 and has over 5,000 members, most of whom are California

attorneys living or practicing in the Beverly Hills and Century City areas of Los Angeles County, California. Its mission is to serve its members, to lead the profession, and to advocate for justice in the community.

*Amicus* the Cincinnati Bar Association (“CBA”) is a professional bar association founded in 1872 whose members include over 4,000 attorneys principally practicing in Hamilton County, Ohio. Its mission is to maintain the highest professional standards among attorneys, to improve the administration of justice, to serve the needs of its members, and to provide law-related service and education to the public. The CBA and its members promote diversity and inclusion across the legal profession in many ways including the Round Table, a joint venture with the Black Lawyers Association of Cincinnati, the Summer Work Experience in Law, an initiative that serves as a pipeline program supporting racially diverse students in high school, college undergraduate programs, and law schools. Because of the ongoing critical need to improve diversity, in particular racial and ethnic diversity, to promote public confidence in our legal system, the CBA joins the other *amici* and resolutely supports diversity-conscious admissions policies at institutions of higher learning such as the University of Texas.

*Amicus* the City of Boston is a municipal corporation. Its Chief Executive, Mayor Thomas M. Menino, is the appointing authority of the Corporation Counsel of the City of Boston, whose office represents the City of Boston in all legal matters. The Office of Corporation Counsel is a

diverse and inclusive legal office which promotes diversity because it recognizes the great value of maintaining a legal workforce which embraces the broad range of ethnic, religious, and cultural backgrounds and perspectives in a diverse and dynamic city. Mayor Menino also serves as the appointing authority for the chief executives or boards of the Boston Public Health Commission, the Boston Housing Authority, and the Boston Redevelopment Authority. These agencies have diverse and inclusive legal departments which share the City's and Mayor Menino's prioritization of diversity and inclusion in the legal workforce. All of the above legal offices maintain that an undergraduate "pipeline" of diverse students is essential to a strong, effective, and representative legal profession.

*Amicus* the Massachusetts Association of Hispanic Attorneys ("MAHA") is a professional bar association that promotes service and excellence in the Hispanic legal community and seeks to provide opportunities for professional growth to its members in order to increase the participation of Hispanic leaders in the civic arena, and elevate the standard of integrity, honor, and courtesy in the legal profession.

*Amicus* the Massachusetts Black Lawyers Association ("MBLA"), a professional bar association since 1973, provides a valuable network and visible presence for attorneys of color within the Massachusetts legal community. The MBLA is responsible for providing its membership professional development and career advancement through trainings, continued education, and

mentorship programs. The MBLA also sponsors forums on current topics of interest to persons in the legal community and seeks collaborations with other bar associations and professional organizations, particularly in the interest of providing services to the communities of color.

*Amicus* the Massachusetts Black Women Attorneys (“MBWA”) is a professional bar association committed to the advancement of justice and equality for all people, with a particular emphasis on people of color. The MBWA seeks to eradicate sexism and racism in the legal profession, advance equal employment opportunities and actively support the career development of its membership.

*Amicus* the Massachusetts LGBTQ Bar Association is a professional bar association of lesbian, gay, bisexual, transgender and queer lawyers and allies that promotes the administration of justice throughout Massachusetts for all persons without regard to their sexual orientation or gender identity or expression.

*Amicus* the Women’s Bar Association (“WBA”) is a professional association of over 1,500 attorneys, judges, and policy makers committed to the full and equal participation of women in the legal profession and in a just society. The WBA has been active in advocating for diversity in the legal profession and other professions as well as in educational institutions and other institutions in our society because only when the basic foundations of our society reflect all its members can they be just, fair, and strong.

*Amicus* South Asian Bar Association Greater Boston (“SABA GB”) is a professional bar association that serves as the regional voice for the concerns and opinions of South Asians in the community and in the legal profession. SABA GB’s mission includes supporting attorneys and law students of South Asian heritage to advance their careers and promoting greater access to and involvement in the American legal system for all, including the South Asian community.

*Amici* EMC Corporation and National Grid USA are businesses and employers who share a desire to attract, retain, and secure a talented, diverse workforce and customer base. In order to succeed, their employees and the law firms who represent them must have a broad range of perspectives and the ability to comprehend and negotiate a range of cultural differences. These *amici* wish to advise the Court of their legitimate and compelling needs to promote diversity in today’s modern, and increasingly global, economy.

*Amici* Anderson & Kreiger LLP; Brennan, Dain, Le Ray, Wiest, Torpy & Garner, P.C.; Brown Rudnick LLP; Burns & Levinson LLP; Collora LLP; Davis, Malm & D’Agostine, P.C.; Edwards Wildman Palmer LLP; Foley Hoag LLP; Goulston & Storrs – A Professional Corporation; Greater Boston Legal Services; Krokidas & Bluestein; Looney & Grossman LLP; Medical-Legal Partnership | Boston, a program of Third Sector New England, Inc.; Morgan, Brown & Joy, LLP; Nixon Peabody LLP; Office of the General Counsel, Partners HealthCare System, Inc.; Prince Lobel Tye LLP; Rackemann, Sawyer & Brewster; Rose, Chinitz & Rose; Sherin and Lodgen

LLP; Sugarman, Rogers, Barshak & Cohen, P.C.; Sunstein Kann Murphy & Timbers LLP; Verrill Dana LLP; Yurko, Salvesen & Remz, P.C.; and Zalkind, Rodriguez, Lunt & Duncan, LLP are law firms that promote diversity because of its importance to the civil and criminal justice system, the essential role that diversity and cultural competence plays in a law firm's ability to effectively represent its clients in the modern, increasingly global economy, and because it is consistent with their values. As lawyers, these *amici* recognize the important role undergraduate programs play in the ability of law schools to admit and train talented and diverse candidates needed for the legal profession to attain its goal of representing all parts of society.

### SUMMARY OF ARGUMENT

Justice Frankfurter once stated that “[o]nly those lacking responsible humility will have a confident solution for problems as intractable as the frictions attributable to differences of race, color or religion.” *Beauharnais v. Illinois*, 343 U.S. 250, 262 (1952). Similarly, when addressing the “persistent and difficult questions of educational policy,” the Court’s “lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels.” *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973).

Because the science of government “is the science of experiment,” it is “utopian” to think that “government can exist without leaving the exercise of discretion somewhere.” *Anderson v. Dunn*, 19 U.S. 204, 226 (1821). The judiciary thus is “well advised to refrain from imposing on the States

inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions.” *Rodriguez*, 411 U.S. at 43.

The experimentation underway at the University of Texas is an attempt to promote an educational “atmosphere of ‘speculation, experiment and creation’” by placing a limited, flexible value on diversity in the admissions process. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978). It is based on the belief that the “‘nation’s future depends upon leaders trained through wide exposure’ to the ideas and mores of students as diverse as this Nation of many peoples,” or, one might add in today’s global economy, as diverse as the nations of the world. *Id.* at 313.

*Amici*, like most lawyers, are not professional educators. They submit, however, that the benefits of diversity in the educational process proffered by respondents in this case mirror the ways in which the legal decision-making process—whether related to jury trials, business negotiations, legal analysis, or client relations—directly benefits from diversity in our ranks. It is why we seek out colleagues with experiences different from ours before we try cases before a jury, particularly in venues where we are not known. It is why we do moot courts before appellate arguments, and carefully pick our panels of moot “judges” in the hopes that they will see things about the case, our argument, or us, that we do not see. It is why we consult with others about how to approach sensitive negotiations, or how to

repair or build a client relationship. These are the oldest forms of continuing legal education, and they are practiced and valued throughout our profession by prosecutors, criminal defense lawyers, legal services providers, public servants, private practitioners, and law firms.

Judges may have similar experiences when zealous advocates comprehend the complexities of an adversary's position, or when the life story of a colleague brings an invaluable perspective to a legal issue, or when exchanges with judicial colleagues from foreign countries highlight the differences between the political and cultural challenges they face and those of our own. The professional satisfaction, engagement, and sometimes even joy, that comes from these experiences mirrors what diversity in the educational setting is designed to achieve.

*Amici* have no doubt that respondents and other professional educators will explain from their own experiences the ways in which a diverse student body improves academic analyses, solutions, and processes.<sup>3</sup> *Amici* seek to be heard in this case

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<sup>3</sup> Educators also are far more qualified than lawyers to assess the value of diversity to the educational and creative processes of various disciplines, including, for example, mathematics and science. As the great mathematician David Hilbert once said of a former student, "He is all right. You know, for a mathematician he did not have enough imagination. But he has become a poet and now he is doing fine." Paul Arthur Schilpp, *THE PHILOSOPHY OF ERNST CASSIRER* 35 (1949). Compare *Fisher v. Univ. of Texas at Austin*, 644 F.3d 301, 307 (5th Cir. 2011) (Jones, C.J., dissenting from denial of en banc rehearing) (questioning the

because the effect of the Court's decision likely will extend to law school and other graduate admissions programs. The legal profession's efforts to diversify its ranks cannot succeed without a pipeline of diverse law school candidates rising from undergraduate student bodies. As shown below, efforts to diversify the undergraduate student population thus serve a compelling state interest that is essential to the effective delivery of legal services by our profession.

### ARGUMENT

#### I. STATE EFFORTS TO PROMOTE DIVERSITY IN EDUCATION SERVE COMPELLING GOVERNMENTAL INTERESTS DIRECTLY RELEVANT TO THE GOALS OF THE LEGAL PROFESSION.

All parties to this case (and likely all *amici*) agree that education is both the lifeblood of our democracy and an area of traditional state and local expertise. These propositions are underscored by the fact that the state constitutions adopted by all thirteen former colonies contain provisions making specific reference to the education of the citizenry. See Conn. Const. art. VIII, § 1; Del. Const. art. X, § 1; Ga. Const. art. VIII, § I, para. I; Md. Const. art. VIII, § 1; Mass. Const. pt. II, ch. V, § II; N.H. Const. pt. II, art. 83; N.J. Const. art. VIII, § IV, para. 1; N.Y. Const. art. XI, § 1; N.C. Const. art. I, § 15; Pa. Const. art. III, § 14; R.I. Const. art. XII, § 1; S.C. Const. art. XI, § 3; Va. Const. art. I, § 15.

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value of diversity when teaching subjects such as mathematics).

The oldest functioning state constitution containing an education clause was drafted in principal part by John Adams. See Samuel Eliot Morison, *A HISTORY OF THE CONSTITUTION OF MASSACHUSETTS* 18-20 (1917); 8 John Adams, *PAPERS OF JOHN ADAMS* editors' note at 235 (Gregg L. Lint et al. eds., 1989). The clause reflected his beliefs that "education here intended is not merely that of the children of the rich and noble, but of every rank and class of people, down to the lowest and the poorest," and that the "revenues of the state would be applied infinitely better, more charitably, wisely, usefully, and therefore politically, in this way, than even in maintaining the poor." 6 John Adams, *THE WORKS OF JOHN ADAMS* 168 (C.F. Adams ed., 1851).

In keeping with those principles, the education clause Adams drafted provides:

Wisdom, and knowledge, as well as virtue, *diffused generally among the body of the people*, being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education in the various parts of the country, *and among the different orders of the people*, it shall be the duty of legislatures and magistrates, in all future periods of this commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them; especially the university at Cambridge, public schools and grammar schools in the towns ....

Mass. Const. pt. II, ch. V, § II (emphases added). See *generally McDuffy*, 615 N.E.2d at 525-28 & 533-37.

Adams was by no means the only leader of his generation to emphasize the unique role and duty of the states in educating their populations. *See, e.g.*, N.H. Const. pt. II, art. 83 (“Knowledge and learning, generally diffused through a community, being essential to the preservation of a free government; and spreading the opportunities and advantages of education through the various parts of the country, being highly conducive to promote this end; it shall be the duty of the legislators and magistrates, in all future periods of this government, to cherish the interest of literature and the sciences, and all seminaries and public schools”); Va. Const. art. I, § 15 (“That free government rests, as does all progress, upon the broadest possible diffusion of knowledge, and that the Commonwealth should avail itself of those talents which nature has sown so liberally among its people by assuring the opportunity for their fullest development by an effective system of education throughout the Commonwealth.”); R.I. Const. art. XII, § 1 (“The diffusion of knowledge, as well as of virtue among the people, being essential to the preservation of their rights and liberties, it shall be the duty of the general assembly to promote public schools and public libraries, and to adopt all means which it may deem necessary and proper to secure to the people the advantages and opportunities of education and public library services.”).<sup>4</sup>

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<sup>4</sup> Just as the Equal Protection Clause initially was intended to protect the “newly-made freeman and citizen from the oppressions of those who had formerly exercised dominion over him” and only later was “gradually extended to all ethnic groups,” so too do education clauses of state constitutions now extend beyond their original intended beneficiaries to all racial

Neglect of public education was one of the chief grievances charged against the Mexican Government in the Texas Declaration of Independence. Vernon's *Ann. Tex. Const. art. VII, § 1, Interpretive Commentary* (2007). The state constitution of Texas reflects the Founders' tradition of emphasizing the central role of education in state government:

A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.<sup>5</sup>

No party to this case (and presumably none of the *amici*) disputes that, as the Framers recognized, the "foundation of every state is the education of its youth."<sup>6</sup> Instead, their differences center on the belief of the state of Texas that the very process of education—so critical to a functioning democracy—directly benefits from a diversity of thought, culture, and experience that exists "among the different

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and ethnic groups. *Bakke*, 438 U.S. at 291-92 (quoting *Slaughter-House Cases*, 83 U.S. 36, 71 (1873) (internal quotations omitted)). The history of the clauses, however, confirms the unique state interest involved.

<sup>5</sup> *Tex. Const. art. VII, § 1*. Over time since the desegregation of Texas state universities in 1969, Respondent has sought to discharge this duty such that the liberties and rights of *all* its people are preserved.

<sup>6</sup> Library of Congress, Inscription on the North tablet of The West Corridor of The Great Hall of The Thomas Jefferson Building.

orders of the people,” including those of different race and ethnicity.

Thus, in addition to presenting important issues about racial equality, this case presents an important question about the scope of the “four essential freedoms” that constitute academic freedom: the right to determine on academic grounds “who may teach, what may be taught, how it shall be taught, and who may be admitted to study.” *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (quoted in *Bakke*, 438 U.S. at 312 (internal quotations omitted)). Among other benefits, these freedoms ensure that educators have sufficient discretion to account for the limits of their ability to “objectively” assess the depth and breadth of the talents and potential of applicants.

The constitutional principles of racial equality and academic freedom at issue in this case apply in full force to the legal profession. Like academic institutions, the legal profession embraces diversity of views amongst its ranks. Yet persons of color remain significantly underrepresented in undergraduate student bodies, law schools and, consequently, the legal profession. See § II (A), *infra*.

“[A]lthough the law is a highly learned profession, we are well aware that it is an intensely practical one.” *Sweatt v. Painter*, 339 U.S. 629, 634 (1950). Law firms, legal services organizations, and public sector lawyers “cannot be effective in isolation from the individuals and institutions with which the law interacts.” *Id.* Continued underrepresentation erodes public confidence in the legal system, hinders the profession from fulfilling its responsibilities to

society, and harms its ability to attract, represent, and retain an increasingly diverse client base in the United States and abroad. See § II (B)-(C), *infra*.

## **II. UNDER-REPRESENTATION OF LAWYERS OF COLOR HARMS THE LEGAL PROFESSION AND SOCIETY AS A WHOLE.**

### **A. The Legal Profession Does Not Reflect The Society It Serves.**

In 2004, not long after this Court's decision in *Grutter v. Bollinger*, 539 U.S. 306 (2003), the chief legal officer of one of the country's largest corporations wrote "A Call to Action"—a pledge ultimately signed by numerous general counsel vowing to make diversity a major consideration in their selection of outside counsel. The pledge stated, "[o]ur action is based on the need to enhance opportunity in the legal profession and our recognition that the legal and business interests of our clients require legal representation that reflects the diversity of our employees, customers and the communities where we do business."<sup>7</sup> From private law firms to government legal offices to legal aid organizations, the legal profession as a whole has made this commitment to enhance opportunity within the profession in order to effectively represent the legal and business interests of its clients.

Efforts to attract and include attorneys of diverse backgrounds, however, have been constrained by the disproportionately low number of

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<sup>7</sup> Roderick Palmore, Sara Lee, *A Call to Action: Diversity in the Legal Profession* (2004), <http://www.acc.com/vl/public/Article/loader.cfm?csModule=security/getfile&pageid=16074>.

persons of color within the profession and graduating from law school. According to the 2010 U.S. Census, 36.3% of the population is Hispanic, Black, Asian, American Indian or Native Alaskan, Native Hawaiian or other Pacific Islander, some other race, or two or more races.<sup>8</sup> In contrast, persons of color accounted for only 11.1% of the legal profession as of 2011.<sup>9</sup>

The under-representation of lawyers of color is particularly severe in private law practice at the partnership level. Only 6% of equity partners in America's law firms are persons of color.<sup>10</sup> As many as 29% of law firms nationwide have no attorneys of color in their partnership ranks.<sup>11</sup>

Moreover, while the racial and ethnic diversity of the United States population as a whole is increasing exponentially, the diversity of the legal profession is not. It is forecast that by the year 2050, nearly 50% of all Americans will be African

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<sup>8</sup> U.S. Census Bureau, OVERVIEW OF RACE AND HISPANIC ORIGIN: 2010 4 tbl. 1 (Mar. 2011), <http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf>. Persons identifying themselves as part of these racial and ethnic groups are referred to herein as "persons of color."

<sup>9</sup> Kathleen Nalty & Arin Reeves, Ctr. for Legal Inclusiveness, BEYOND DIVERSITY: INCLUSIVENESS IN THE LEGAL WORKPLACE 40 (2012), [http://www.legalinclusiveness.org/clientuploads/pdf/CLI%20Inclusiveness%20Manual\\_2012%20Beyond%20Diversity%20-%20Introduction.pdf](http://www.legalinclusiveness.org/clientuploads/pdf/CLI%20Inclusiveness%20Manual_2012%20Beyond%20Diversity%20-%20Introduction.pdf).

<sup>10</sup> NALP, Women and Minorities in Law Firms - By Race and Ethnicity (Jan. 2011), [http://www.nalp.org/women\\_minorities\\_jan2012](http://www.nalp.org/women_minorities_jan2012).

<sup>11</sup> *Id.*

American, Hispanic, Asian, or Native American.<sup>12</sup> Representation of persons of color in the legal profession increased by only 1.4% from 9.7% in 2000 to 11.1% in 2011, after experiencing a period of decline in 2010.<sup>13</sup>

This slow growth in the proportion of attorneys of color correlates with the figures for law school enrollment. Between 2000 and 2009, the enrollment of law students of color increased by only 1.3%.<sup>14</sup>

Over the last forty years, the average rates of enrollment in higher education institutions, expressed as a percent of all 18- to 24-year-old high school graduates of the same race or ethnicity, were 48.5% for Whites, 46.3% for Blacks, and 43.7% for Hispanics.<sup>15</sup> The differences between the actual numbers of enrollees is even greater than the percentages reflect because the percentages apply to

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<sup>12</sup> U.S. Census Bureau, U.S. Interim Projections by Age, Sex, Race, and Hispanic Origin, Table 1a (Mar. 2004), <http://www.census.gov/population/www/projections/usinterimproj/natprojtab01a.pdf>.

<sup>13</sup> Nalty & Reeves, *supra* note 9, at 40; *see also* Inst. for Inclusion in the Legal Profession (IILP), IILP REVIEW 2011: THE STATE OF DIVERSITY AND INCLUSION IN THE LEGAL PROFESSION, at 10, 13 (2011), [http://www.theiilp.com/resources/Documents/IILP2011\\_Review\\_final.pdf](http://www.theiilp.com/resources/Documents/IILP2011_Review_final.pdf). Because these are national averages, the statistics differ in different parts of the country. Some regions are significantly more or less diverse, particularly with respect to certain racial or ethnic populations.

<sup>14</sup> IILP, *supra* note 13, at 17.

<sup>15</sup> *See* U.S. Dep't of Educ., Nat'l Ctr. for Educ. Statistics, Digest of Education Statistics: 2011 (NCES 2012-001), Table 213, [http://nces.ed.gov/programs/digest/d11/tables/dt11\\_213.asp](http://nces.ed.gov/programs/digest/d11/tables/dt11_213.asp).

populations that are far from equal; White 18- to 24-year olds, regardless of high school completion, outnumber their Hispanic counterparts by a factor of roughly four; they outnumber their Black counterparts by a factor of almost five.<sup>16</sup> These factors are almost certainly larger when only high school graduates are considered.<sup>17</sup>

Confronted with this disturbing reality, the American Bar Association concluded in 2005 that “the pipeline for minority students—from pre-kindergarten into the legal profession—is leaking.”<sup>18</sup> Five years later, a nationwide assessment conducted by the ABA concluded that “the lack of genuine diversity remains a disappointment.”

As America races toward a future where minorities will be the majority and more marginalized groups make their voices heard, the legal profession’s next steps towards advancing diversity must produce more viable, sustained outcomes. Despite our

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<sup>16</sup> See U.S. Census Bureau, Statistical Abstract of the United States: 2012, Table 10, <http://www.census.gov/compendia/statab/2012/tables/12s0010.pdf>.

<sup>17</sup> For the decade covering 2000 to 2010, the average high school dropout rates of 16- to 24-year-olds were 6% for Whites, 10.4% for Blacks, and 22.2% for Hispanics. See U.S. Dep’t of Educ., Nat’l Ctr. for Educ. Statistics, The Condition of Education 2012 (NCES 2012-045), Indicator 33, <http://nces.ed.gov/fastfacts/display.asp?id=16>.

<sup>18</sup> ABA Presidential Advisory Council on Diversity in the Profession, THE CRITICAL NEED TO FURTHER DIVERSITY THE LEGAL ACADEMY & THE LEGAL PROFESSION 2 (2005), <http://apps.americanbar.org/op/pipelineconf/acdreport.pdf>.

efforts thus far, racial and ethnic groups, sexual and gender minorities, and lawyers with disabilities continue to be vastly underrepresented in the legal profession.<sup>19</sup>

Diversity within the legal profession cannot be achieved without a pipeline of diverse law school graduates. That pipeline, in turn, cannot be maintained without diverse representation in undergraduate institutions. In addition, although this case arises in the context of an undergraduate admissions policy, the Court's decision almost surely will affect the admissions policies of all public university higher education programs and institutions, including medical schools, masters and doctorate programs and, of particular importance to *amici*, law schools. Accordingly, and as further shown below, wholly apart from the resulting significant educational benefits, the limited, flexible consideration of race as one factor in the admissions process serves the compelling governmental interest of helping to ensure the ongoing legitimacy and effectiveness of the legal system.

**B. The Lack Of Diversity In The Legal Profession Erodes Public Confidence In The Judicial System.**

As advocates and administrators of justice, attorneys and judges must inspire public confidence in and promote public access to the judicial system. In order to perform these tasks, it is necessary to

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<sup>19</sup> ABA Presidential Initiative Comm'n on Diversity, *DIVERSITY IN THE LEGAL PROFESSION: THE NEXT STEPS 5* (2010), [http://www.americanbar.org/content/dam/aba/administrative/diversity/next\\_steps\\_2011.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/diversity/next_steps_2011.authcheckdam.pdf).

confront the fact that perceptions of the fairness of the judicial system differ sharply based on race and ethnicity.

Blacks and Latinos perceive the probability of fair outcomes in court to be lower than do majority respondents.<sup>20</sup> Responses to a California survey showed that African Americans, Latinos, and Asian Americans all “perceive ‘worse results’ in [court] outcomes for African Americans, low-income people, and non-English speakers.”<sup>21</sup>

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<sup>20</sup> David B. Rottman & Randall M. Hansen, *How Recent Court Users View the State Courts: Perceptions of Whites, African-Americans, and Latinos* 5 (2001), [http://www.flcourts.org/gen\\_public/family/diversity/bin/perceptions2.pdf](http://www.flcourts.org/gen_public/family/diversity/bin/perceptions2.pdf) (among survey participants that had no court experience, 57% of Whites, 21% of African Americans, and 35% of Latinos believed that court outcomes are always or usually fair; among recent court users, 49% of Whites, 15% of African Americans, and 40% of Latinos believed that court outcomes are always or usually fair); Hon. John R. Dunne, Comm. for Modern Courts, Testimony at N.Y. State Senate Public Forum: A Lasting Blueprint for Judicial Diversity (Dec. 4, 2006), <http://www.moderncourts.org/advocacy/diversity/index.html> (describing a “significant racial divide” in a survey of registered voters in New York that asked how fair and impartial New York State judges were, where 71% of registered voters agreed that judges as a whole are fair and impartial, but only 51% of African-American voters agreed judges are fair and impartial).

<sup>21</sup> Kevin Burke & Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction*, 44 CT. REV. 4, 17 (2007-2008), available at <http://www.proceduralfairness.org/~media/Microsites/Files/procedural-fairness/CR44-1-2.ashx>; David B. Rottman, Nat’l Ctr. for State Courts, TRUST AND CONFIDENCE IN THE CALIFORNIA COURTS 30 (2005), [http://www.courts.ca.gov/documents/4\\_37pubtrust1.pdf](http://www.courts.ca.gov/documents/4_37pubtrust1.pdf).

Enhancing racial and ethnic diversity within the bar and on the bench is a significant means of countering both the perception and the underlying reality of unfairness in the judicial system. A diverse legal profession demonstrates that those who wield and uphold the law hale from different racial and ethnic backgrounds, much like those whose interests are at stake, and that the judicial system is open to all people.<sup>22</sup>

Until the composition of the legal profession more closely resembles that of the public whose interests are at stake, the perception will remain that the legal system is entrusted to and accessible to the white majority above all others. Not only does that perception undermine the legitimacy of the judicial system,<sup>23</sup> it further discourages participation by people of color, creating a self-perpetuating cycle of exclusion.

Reduced to essentials, robust participation of persons of color within the legal profession is important because the judicial system is a key component of our democracy. In the words of one advocate before this Court:

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<sup>22</sup> Malia Reddick et al., *Racial and Gender Diversity on State Courts*, JUDGES' JOURNAL, Summer 2009, at 1, available at [http://www.judicialselection.us/uploads/documents/Racial\\_and\\_Gender\\_Diversity\\_on\\_Stat\\_8F60B84D96CC2.pdf](http://www.judicialselection.us/uploads/documents/Racial_and_Gender_Diversity_on_Stat_8F60B84D96CC2.pdf).

<sup>23</sup> See Dunne, *supra* note 20. Indeed, for much the same reason, this Court long ago struck down jury selection procedures that purposefully exclude persons of color not just because of the harm suffered by the juror and defendant, but because the overall effect is to "undermine public confidence in the fairness of our system of justice." *Batson v. Kentucky*, 476 U.S. 79, 87 (1986).

Democracies depend on people seeing each other as peers [in a shared enterprise], that is, people who know and respect each other. Diverse democracies depend on diverse people who know and respect each other.

This is why racial diversity in the legal profession matters. It matters to the legitimacy and health of our democracy.<sup>24</sup>

Stated otherwise, our democracy depends on different perspectives being shared, respected, and valued, which cannot occur absent the inclusion of those different perspectives.

The academic objectives at issue here, moreover, are not limited to providing educational benefits to persons of color. All students need, and benefit from gaining, the cultural competence required to succeed in the modern marketplace. And given the significant underrepresentation of lawyers of color in the legal profession, it is essential for all lawyers to learn cultural competence while in school if they are to effectively serve their clients.

*Amici* can attest to the benefits to the process of legal decision-making generated by diversity of thought and culture. Lawyers and judges, much like jurors, come to reasoned decisions after exchanging views and testing conclusions based on a range of life experiences. For example, lawyers rehearse opening statements, air strategies, and test arguments with their peers to gather thoughts, reactions, and

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<sup>24</sup> John Payton, *Democracy and Diversity*, 35 PEPPERDINE L. REV. 569, 582 (2008), <http://digitalcommons.pepperdine.edu/plr/vol35/iss3/1>.

insights from different perspectives. Judges engage in rigorous discourse with one another as well as their law clerks, whom they often select for the value of viewpoints different from their own. Members of this Court have themselves attested to the value of this exchange. Justice Byron White, for instance, said that Justice Thurgood Marshall shared “things that we knew but would rather forget; and he told us much that we did not know due to the limitations of our own experience.”<sup>25</sup>

Exclusion, or failed inclusion, of people from different backgrounds has the same effect on the legal profession as Justice Marshall once observed in the jury room: it removes from the law office or judges’ chambers, as it removes “from the jury room[,] qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable” and deprives lawyers and judges, as it “deprives the jury[,] of a perspective on human events that may have unsuspected importance in any case that may be presented.” *Peters v. Kiff*, 407 U.S. 493, 503-04 (1972).

In sum, diversity in the bar increases our capacity to provide culturally competent legal services to all clients, including some of the most disenfranchised populations seeking access to justice. The legal profession, those it serves, and public confidence in the judicial system, all suffer

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<sup>25</sup> Byron R. White, *A Tribute to Justice Thurgood Marshall*, 44 STAN. L. REV. 1215, 1216 (1992); see also Sandra Day O’Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 1217 (1992); William J. Brennan, Jr., *A Tribute to Justice Thurgood Marshall*, 105 HARV. L. REV. 23 (1991).

when the perspectives of persons of color are as obscured as they are today. In that sense, all stand to gain from admissions policies like those at the University of Texas that foster a pipeline of diverse students, some of whom may one day find their way to the legal profession.

**C. The Legal Profession Needs Diversity In Its Ranks, And The Additional Skills And Perspectives Diverse Attorneys Possess, To Effectively Attract, Represent, And Retain An Increasingly Diverse Client Base Here And Abroad.**

The legal profession is better able to serve diverse populations if: (1) lawyers have been exposed to various forms of diversity through their educational experience; and (2) the profession is sufficiently diverse to ensure that it has the cultural competency to comprehend the differences its clients present.

For example, the nation's top law firms provide representation to a wide range of businesses whose global footprints are expanding and whose competition for attracting both customers and talent is intensifying. More than ever, these clients specifically recognize racial and ethnic diversity as an important component of the overall diversity that is key to their success.<sup>26</sup>

Companies, particularly those in the service industry, are keenly aware of the rapidly changing

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<sup>26</sup> See generally Melanie Lasoff Levs, *Call to Action - Sara Lee's General Counsel: Making Diversity A Priority*, DIVERSITY & THE BAR, Feb. 2005, available at [http://0350474.netsohost.com/FileLib/9/cr\\_handouts.pdf](http://0350474.netsohost.com/FileLib/9/cr_handouts.pdf).

demographics in the United States and understand that people of color represent a significant and growing share of the consumer market; service firms accordingly are striving to identify the needs of the expanding market segments to maximize profits.

The nation's leading corporations, moreover, are operating and competing in a global economy and understand that "[e]ffective and successful interactions with suppliers and customers require[] a team of individuals who not only reflect these [international] constituents, but also understand their needs and how they can best be met."<sup>27</sup>

Private and public sector legal services organizations face the same challenges. In today's world, a successful lawyer is one who has been exposed—at college and in law school—to the broadest range of perspectives, backgrounds, and personalities. They will be representing the rich and the poor; Black, White, Hispanic, Asian, Native American, and increasingly people of mixed races; gay and straight; domestic and international. They need to graduate with the ability to comprehend and negotiate a range of differences if they, and ultimately the legal system, are to be effective. In a fundamental way, student body diversity—

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<sup>27</sup> Mark Roellig, Mass. Mut. Life Ins. Co., "WHY" Diversity is Critical to the Success of Your Law Department 2 (2012), [http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2012\\_ccle\\_materials/6\\_value.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2012_ccle_materials/6_value.authcheckdam.pdf); Levs, *supra* note 26, at 23 (quoting Eli Lilly & Co.'s general counsel as stating, "As a global corporation, we benefit tremendously from a broad spectrum of perspectives that can be achieved by having people from as widely diverse backgrounds as possible working with us.").

particularly diversity of both colleges and law schools—equips lawyers of all races and backgrounds with necessary skills in today’s world.

“The overarching message is that a diverse legal profession is more just, productive and intelligent because diversity, both cognitive and cultural, often leads to better questions, analyses, solutions, and processes.”<sup>28</sup> For many businesses, diversity is not only a matter of what may be socially desirable or just, it is a matter of sound business practices and economic survival.

**III. THE LIMITED USE OF RACE IN EDUCATIONAL ADMISSIONS PROCESSES REMAINS VITAL TO THE LEGAL PROFESSION’S EFFORTS TO ACHIEVE RACIAL AND ETHNIC DIVERSITY.**

Nine years ago, this Court held that “student body diversity is a compelling state interest that can justify the use of race in university admissions,” *Grutter*, 539 U.S. at 325, and that the “goal of attaining a critical mass of under-represented minority students” is entirely constitutional. *Id.* at 335.

No intervening event has challenged the wisdom or rationale of this holding. The “logical end point” of diversity as a compelling academic objective, or as an imperative for the legal profession, simply has not been reached. *Id.* at 342. Unconscious bias (a phenomenon which compounds structural racism) continues to perpetuate damaging homogeneity,

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<sup>28</sup> ABA Presidential Initiative Comm’n on Diversity, *supra* note 19, at 5.

particularly among lawyers and judges. Flexible and limited consideration of race in admissions decisions is one narrowly tailored way to overcome unconscious bias by intentionally putting the issue on the table, and to create structural anti-racism, which is an essential tool in the effort to dismantle the structures that continue to perpetuate racial inequity in this country.

Two studies released by the Harvard Civil Rights Project have demonstrated that programs admitting students at the top of their high school classes—like the “Top Ten Percent Law” utilized by the University of Texas—are not sufficient to achieve the goals of diversity.<sup>29</sup> *See generally Fisher v. Univ. of Texas at Austin*, 631 F.3d 213, 240 (5th Cir. 2011) (“The reality is that the Top Ten Percent Law alone does not perform well in pursuit of the diversity *Grutter* endorsed and is in many ways at war with it. While the Law may have contributed to an increase in overall minority enrollment, those minority students remain clustered in certain programs, limiting the beneficial effects of educational diversity.”).

Nor are ongoing private efforts by themselves sufficient. Nearly one hundred of the country’s largest corporations joined the 2004 “Call to Action,” challenging corporate legal departments and law firms to improve their efforts in hiring and retaining

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<sup>29</sup> *See* Patricia Marin & Edgar K. Lee, Harvard Univ., *APPEARANCE AND REALITY IN THE SUNSHINE STATE: THE TALENTED 20 PROGRAM IN FLORIDA* (2003); Catherine Horn & Stella M. Flores, Harvard Univ., *PERCENT PLANS IN COLLEGE ADMISSIONS: A COMPARATIVE ANALYSIS OF THREE STATES’ EXPERIENCES* (2003).

women and persons of color. The signatory corporations agreed to “end or limit [their] relationships with firms whose performance consistently evidences a lack of meaningful interest in being diverse.”<sup>30</sup> Since 2004, some companies have taken further measures, requiring outside counsel to demonstrate diversity within the ranks of relationship partners and upper levels of the firm.<sup>31</sup>

The legal profession has taken measures of its own, such as establishing organizations like the Leadership Council on Legal Diversity. Law firms and other legal services employers throughout the country have undertaken targeted recruitment efforts, often conducted in tandem with law schools, including diversity job fairs and on-campus interviews; firm-sponsored conferences, workshops, and panel discussions at schools with diverse student populations; specialized mentoring and training programs for summer clerks; and scholarship programs.

Many of the bar association *amici* also have undertaken numerous initiatives to cultivate diversity within the bars of their home states. Examples include, but are not limited to, the BBA’s Summer Job Program, pipeline and diversity initiatives, judicial internship program, and its partnerships with affinity bar associations.

The fact remains, however, that not only have these efforts fallen short of achieving diversity in the

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<sup>30</sup> See *supra* text accompanying note 7.

<sup>31</sup> Karen Donovan, *Pushed by Clients, Law Firms Step Up Diversity Efforts*, N.Y. TIMES, June 21, 2006, <http://www.nytimes.com/2006/07/21/business/21legal.html>.

legal profession, all of them are highly dependent upon the continuing flow of diverse students through the pipeline that leads from high schools to colleges and universities to law schools to the legal profession.

For all of these reasons, *amici* respectfully submit that the limited and flexible consideration of race as one of several factors in an admissions policy remains vital to integrating our nation's colleges and universities and, by extension, the legal profession. It also is essential to the uniquely compelling state interest, expressed in the constitution of Texas and other states, of promoting the "general diffusion of knowledge" that is so "essential to the preservation of the liberties and rights of the people." Tex. Const. art. VII, § 1.

### CONCLUSION

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

Respectfully submitted,

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August 13, 2012

## **APPENDIX**

## **APPENDIX**

### **LIST OF AMICI**

**Anderson & Kreiger LLP**  
**The Asian American Lawyers Association of  
Massachusetts**  
**Bar Association of San Francisco**  
**Beverly Hills Bar Association**  
**Boston Bar Association**  
**Brennan, Dain, Le Ray, Wiest, Torpy & Garner, P.C.**  
**Brown Rudnick LLP**  
**Burns & Levinson LLP**  
**The Cincinnati Bar Association**  
**City of Boston**  
**Collora LLP**  
**Davis, Malm & D'Agostine, P.C.**  
**Edwards Wildman Palmer LLP**  
**EMC Corporation**  
**Foley Hoag LLP**  
**Goulston & Storrs – A Professional Corporation**  
**Greater Boston Legal Services**  
**Krokidas & Bluestein**  
**Looney & Grossman LLP**  
**Massachusetts Association of Hispanic Attorneys**  
**Massachusetts Black Lawyers Association**  
**The Massachusetts Black Women Attorneys**  
**Massachusetts LGBTQ Bar Association**  
**Medical-Legal Partnership | Boston, a program of  
Third Sector New England, Inc.**  
**Morgan, Brown & Joy, LLP**  
**National Grid USA**  
**Nixon Peabody LLP**  
**Office of the General Counsel, Partners HealthCare  
System, Inc.**  
**Prince Lobel Tye LLP**

**Rackemann, Sawyer & Brewster**

**Rose, Chinitz & Rose**

**Sherin and Lodgen LLP**

**South Asian Bar Association Greater Boston**

**Sugarman, Rogers, Barshak & Cohen, P.C.**

**Sunstein Kann Murphy & Timbers LLP**

**Verrill Dana LLP**

**Women's Bar Association**

**Yurko, Salvesen & Remz, P.C.**

**Zalkind, Rodriguez, Lunt & Duncan, LLP**