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 Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE* CALIFORNIA ASSOCIATION OF SCHOLARS AND CENTER FOR CONSTITUTIONAL JURISPRUDENCE, IN SUPPORT OF PETITIONER

EDWIN MEESE III
214 Massachusetts Ave. N.E.
Washington D.C. 20002

JOHN C. EASTMAN
Counsel of Record
KAREN J. LUGO
Center for Constitutional Jurisprudence
c/o Chapman Univ. Sch. of Law
One University Drive
Orange, California 92886
(714) 628-2500
jeastman@chapman.edu

Counsel for Amici Curiae

QUESTION PRESENTED

1. Whether this Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Grutter v. Bollinger*, 539 U.S. 306 (2003), require deference to *non-academic* determinations by the University of Texas at Austin to use race in undergraduate admissions decisions in order to achieve classroom-level racial balance.

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INTEREST OF AMICI CURIAE[1]

The California Association of Scholars ("CAS") is an organization devoted to higher education reform. An affiliate of the National Association of Scholars, it is composed of professors, graduate students, college administrators and trustees, and independent scholars committed to rational discourse as the foundation of academic life in a free and democratic society. The CAS believes it is in a special position to inform the Court about the importance of the constitutional issues presented in *Fisher v. University of Texas* on campuses.

The Center for Constitutional Jurisprudence ("CCJ") was founded in 1999 as the public interest law arm of the Claremont Institute for the Study of Statesmanship and Political Philosophy, the mission of which is to restore the principles of the American founding to their rightful and preeminent authority in our national life. The CCJ advances that mission through strategic litigation and the filing of *amicus curiae* briefs in cases of constitutional significance, including cases such as this in which the core principle of individual equality is at stake. Of direct relevance, the CCJ previously appeared as *amicus cu-*

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amici Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6, *Amici Curiae* affirm that no counsel for any 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*, their members, or their counsel made a monetary contribution to its preparation or submission.

riae before this Court in *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003).

SUMMARY OF ARGUMENT

Since *Grutter v. Bollinger*, 539 U.S. 306 (2003), many colleges and universities have ramped up their race-based admissions policies.[2] Indeed, *Fisher* itself amply illustrates this trend. None of this is remarkable: Most government programs expand over time; they seldom contract unless serious efforts are made to impose limits. This is true even when, as here, voters oppose those programs.[3]

Underlying the expansion of race-based admissions policies is the mistaken belief that *Grutter* requires courts to give broad and all-encompassing deference to the judgments of colleges and universities on all matters relating to admissions. But an expansive interpretation of "*Grutter*-deference" is wholly inappropriate. *Grutter* was intended as a narrow exception to an otherwise robust ban on race discrimination. It should not be allowed to swallow the rule.

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[2] *See* Althea Nagai, *Racial and Ethnic Preferences in Undergraduate Admission at the University of Michigan*, Center for Equal Opportunity (October 17, 2006) (empirical study finding that preferential treatment for minority students increased at the University of Michigan following *Grutter*). *See also* United States Commission on Civil Rights, *Affirmative Action in American Law Schools* 124-37, 174-85 (April 2007) ("USCCR-AAALS Report") (discussing post-*Grutter* expansion of law school diversity accrediting standards by the ABA and describing evidence of several law schools' capitulation to that body's demands for greater racial preferences).

[3] *See infra* at n. 7.

Grutter permits deference in only one narrow situation—when an individual college or university has made a good faith *academic* judgment that the need to secure the educational benefits of a *student body* with "critical-mass" diversity is compelling. *Grutter* does not give a college or university the right to insist upon critical-mass diversity in each of its classrooms. Neither does it give a college or university the authority to judge whether its own racially discriminatory admissions policies are narrowly tailored to serve its purpose. Perhaps most important of all, no deference whatsoever is due to a *political* (as opposed to an *academic*) judgment. Insofar as a college or university is reacting to the demands of a state legislature, an accrediting agency, students, or wealthy donors, *Grutter*-deference does not apply at all. In such a case, the college or university must demonstrate a compelling purpose for its racially discriminatory admissions policies without resort to any artificial presumption in its favor.

Furthermore, *Grutter* does not create an irrebuttable presumption in favor of a college or university's good faith. In this case, the facts point not towards a concern over obtaining the educational benefits of critical-mass diversity of any kind, but rather towards a desire to racially balance the student body so that it mirrors the demographics of the State of Texas. Such a purpose is never compelling. *Regents of the University of California v. Bakke*, 438 U.S. 265, 307 (1978) (Opinion of Powell, J.).

Grutter contemplates the winding down of race-based admissions policies by the year 2028. That can only happen if the Court stops the expansion of *Grutter*-deference that is illustrated by this case.

REASONS FOR GRANTING THE PETITION

I. Runaway Expansions of *Grutter* Must Be Brought To Heel If the *Grutter* Court's Vision of Race Neutrality By the Year 2028 Is To Be Realized.

Judicial deference—even to well-meaning discriminators—is a concept that is alien to strict scrutiny. Consider, for example, *Sweatt v. Painter*, 339 U.S. 629 (1950), and *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950), two historic cases in the struggle against racial segregation. At the time, there were academics who firmly (and probably sincerely) believed that students of all races learn better in racially segregated settings. If the Court had deferred to that judgment, we would be living in a considerably less desirable world now.[4]

Deference to academic judgment in matters involving race discrimination can be justified, if at all, only if it is narrowly circumscribed. *Grutter* deferred to a particular "academic" judgment—that securing the educational benefits of "critical-mass" diversity in a student body as a whole is a compelling purpose. *See Grutter*, 539 U.S. at 332 ("The Law School's *educational* judgment that *such* diversity is essential to its educational mission is one to which we defer.... Our holding today is in keeping with our tradition of

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[4] Much to *amici*'s regret, the concept of racially segregated education has enjoyed a resurgence lately. CNN reports that a Pennsylvania high school was experimenting with separating students "by race, gender and language" for part of the school day "in an effort to boost academic scores." Monika Plocienniczak, *Pennsylvania School Experiments with Segregation*, CCN (Jan. 27, 2011).

giving a degree of deference to a university's *academic* decisions, within constitutionally prescribed limits." (emphasis added)). It should be extended no further.

A. *Grutter* Does Not Permit a Court to Defer to a University's Expansive Interpretation of Critical-Mass Diversity. The Limits of that Concept Are an Issue of Law.

Grutter-deference was intended to be self-limiting. It allows universities to discriminate only in a relatively few cases—only insofar as is necessary to obtain some minimum minority-student enrollment on campus.[5] The point was to ensure that minority students would not feel like isolated tokens on campus. The term "critical mass" is used fourteen times in the majority opinion; at no point is it suggested that a university may discriminate in such a way as to produce a separate "critical mass" in each and every classroom.

If a university could insist on critical mass in each classroom, the ultimate result would be that almost every admissions decision could be influenced by considerations of race. The issue wouldn't be whether a school has a critical mass of under-represented minorities overall, but whether it has "enough" African-American physics majors, Asian-Americans majoring in English and whites majoring in Ethnic Studies. Indeed, it would mean the deci-

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[5] *Grutter*, of course, does not in any way permit schools to keep minority enrollment to a minimum. If the non-racial aspects of a school's admissions policy would yield high numbers of previously under-represented minority students, that would be a welcome event.

sions on course offerings and registration could be driven by race as well. Students could be given registration priority for courses where their group is relatively under-represented. Courses that don't attract a sufficient number of minorities could be cancelled.

If critical-mass diversity at the classroom level is Texas's goal, it must start from scratch and fully prove that education is enhanced by that goal. It must prove that any such enhancement is not outweighed by the pedagogical challenges created when students with very different academic credentials are placed in the same classroom. It must prove its admissions policy is narrowly tailored to achieve its goal of classroom critical-mass diversity. *Grutter*-deference does not apply to any of those considerations.

Amici doubt that any such proof can be offered. There is no such thing as a Swedish or a Hispanic perspective on astrophysics or an African-American or Japanese perspective on calculus. Science is science; mathematics is mathematics. Insofar as Texas's declared policies encourage students to think otherwise, it is performing a disservice to them.[6]

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[6] Even the case for the educational benefits of critical-mass diversity at the study body level is difficult to make. *See, e.g.,* Stanley Rothman et al., *Does Enrollment Diversity Improve University Education?*, 15 Int'l J. Public Opin. Res. 8 (2003) (extensive empirical study finding that, all other things being equal, faculty, students and administrators at more racially diverse universities tend to rate their general educational experience lower than those at less racially diverse universities); Stephen Cole & Elinor Barber, *Increasing Faculty Diversity: The Occupational Choices of High Achieving Minority Students* (2003) (empirical study finding that affirmative action mis-

Moreover, if Texas were truly concerned about racial diversity in science and engineering, it would shun rather than embrace race preferences. *See* U.S. Commission on Civil Rights, *Encouraging Minority Students to Pursue Science, Technology Engineering and Math Careers* (2010) ("USCCR-STEM Report") (reviewing empirical studies concluding that affirmative-action beneficiaries, as well as other students whose entering academic credentials place them towards the bottom of the class, abandon their ambition to major in science and engineering in radically disproportionate numbers while their similarly-credentialed counterparts persevere and succeed at somewhat less competitive universities). Race preferences are a significant part of the reason that Texas has relatively few African-American and Hispanic students in science and engineering courses. Wrongheaded affirmative action is the problem, not the solution.

B. *Grutter*-Deference Applies Only to Academic Judgments.

Observers sometimes wonder why, despite strong evidence that faculty members are hardly of one mind on race-based preferences, colleges and univer-

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match discourages students from pursuing academic careers); Richard Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 Stan. L. Rev. 367 (2004) (finding that affirmative action mismatch reduces the number of African-American students who graduate and pass the bar); Rogers Elliott et al., *The Role of Ethnicity in Choosing and Leaving Science in Highly Selective Institutions*, 37 Res. Higher Ed. 681 (Dec 1996) (finding that affirmative action mismatch reduces the number of minority students who pursue their ambition to major in science).

sities march in lockstep on this issue.[7] The answer is complex: It might be possible for an individual institution to buck the zeitgeist in a world of robust academic freedom like that envisioned in *Grutter*. In the world in which we live, however, complex webs of state and federal oversight authority combined with outside funding sources that heavily promote race-based admissions make that very difficult. *Cf. Berea College v. Kentucky*, 211 U.S. 45 (1908) (concerning a college attempting to operate outside the zeitgeist of

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[7] *See, e.g.,* Carl A. Auerbach, *The Silent Opposition of Professors and Graduate Students to Preferential Affirmative Action Programs: 1969 and 1975*, 72 Minn. L. Rev. 1233 (1988); Thomas Wood, *Who Speaks for Higher Education on Group Preferences?*, 14 Academic Questions 31 (Spring 2001).

The public's opposition to race-based admissions has also been consistent over the decades—a point that is relevant to whether *Fisher* presents a question of national importance. Paul M. Sniderman & Thomas Piazza, The Scar of Race (1993). *See also* Rasmussen Reports, *32% Favor Affirmative Action, 46% Oppose It* (July 13, 2010); David W. Moore, *Public: Only Merit Should Count in College Decisions*, Gallup Poll News Service (June 24, 2003). The notion that if Americans oppose these policies or regard them as unconstitutional they can always overturn them politically appears to be erroneous. Like many special-interest policies, they have been effectively insulated from public opinion almost everywhere. Issues of their constitutionality must be addressed head-on by the Court; the political process is unlikely to make such questions go away if it has been unable to do so already.

Two prominent academic experts in public opinion have declared that the race-preferential policy agenda "is controversial precisely because most Americans do *not* disagree about it." In their careful examination of the attitudes of whites on race issues, they found "scarcely any support" for "preferences in hiring and promotion in jobs" or for "racial quotas in college admissions." Sniderman & Piazza at 130 (emphasis in original).

an earlier era). The result is a clear lack of diversity among colleges and universities on the subject of diversity.

It was hardly the intent of *Grutter* to help foster that conformity; *Grutter* permits deference only to truly academic judgments. Once a plaintiff demonstrates the likelihood of non-academic motives, the university should have to prove by clear and convincing evidence that its faculty would have adopted the racial preferences even in the absence of non-academic motives in order to avail itself of *Grutter*-deference; otherwise, it should independently have to prove the compelling need for its policy. *Cf. McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).

Many are tempted to think of admissions policies as products of well-reasoned academic judgment. And they sometimes are—in part. But they are also the products of pressure from state legislatures, individual state legislators, and accrediting agencies appointed by the U.S. Department of Education. Private foundations and alumni donors get their say, too, by offering carrots to institutions that do their bidding. Student groups also demand more diversity—sometimes in a civil and reasoned manner and sometimes not.[8] Admissions policies, like laws, are

[8] Last month at the University of Wisconsin, a student mob, egged on by the University's Vice Provost for Diversity and Climate, overpowered hotel staff, knocking some to the floor, to interrupt a press conference at which the speaker was critical of race-based admissions policies. *See* Peter Wood, *Mobbing for Preferences*, Chronicle of Higher Education (September 22, 2011). Too often over the years, university faculty and administrators have allowed themselves to be pressured by such conduct. If this Court were to clarify that *Grutter*-deference does

like sausages. The less one knows about how they are made, the more one can respect the result.[9]

Non-academic actors are not due *Grutter*-deference, and neither is a college or university acting at their behest. It is highly unlikely that this Court would have deferred to the University of Michigan if the explanation for its racially-discriminatory policies had been: "This is what our state legislature wants, and it is our faculty's collective judgment that without the legislature's support, our education mission will suffer"; or "Our accreditor requires this, and we have no choice but to obey"; or "The Ford Foundation is very enthusiastic about race-based admissions, and that's where the money is."[10] Such a

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not extend to judgments made under pressure from unruly mobs, *amici* are confident this would have a salutary effect on all concerned.

[9] See Marcia Synott, The Half-Opened Door: Discrimination and Admissions at Harvard, Yale, and Princeton, 1900-1970 (1979) (chronicling anti-Jewish Ivy League admissions policies). *Amici* find regrettable Justice Powell's favorable mention of Harvard University's former policy of preferential treatment for students from the nation's under-represented regions in his opinion in *Bakke*, 438 U.S. at 316. Justice Powell was apparently unaware that the policy was part of Harvard's strategy to prevent what Harvard's then-president A. Lawrence Lowell indelicately called "a dangerous increase in the proportion of Jews." Synott at 108. The intent was to minimize the number of Jewish students, who tended to be concentrated in the Northeast.

[10] *Grutter* cited *Regents of the University of Michigan v. Ewing*, 474 U.S. 214 (1985), to support its call for academic deference. *Grutter* at 328. In *Ewing*, a student sought re-admission to a university on due process grounds after the university declined to allow him to take his qualifying examination again. It is difficult to imagine that deference would have been applied if the

judgment may be sincerely aimed at increasing a University's resources (and hence improving education), but it is a political, not an academic, judgment.

Indeed, any contrary interpretation would be inconsistent with the *Grutter* opinion. In *Grutter*, the Court stated that the "Law School's *educational* judgment that such diversity is essential to its *educational* mission is one to which we defer." *Grutter* at 332 (emphasis supplied). The double use of the word "educational" would be redundant unless the Court intended deference to be available only for true academic judgments rather than mere political ones. Academic judgments are made by college or university *faculties* based on academic considerations. They are not made by outsiders to the academic enterprise or by those bowing to pressure from outsiders.

This is no small point. Non-academic actors have a profound effect on admissions policies. Consider, for example, the American Bar Association Council of the Section on Legal Education and Admissions to the Bar (the "ABA"). The ABA is the U.S. Department of Education's duly-appointed accreditor for law schools. In most states, it also holds the authority to designate which law schools' students sit for the bar examination. It thus has life or death authority over law schools; yet it is not remotely an academic institution.[11]

University in *Ewing* had dismissed a student because the state legislature or an angry student organization had so demanded.

[11] Council members include law school professors and deans, judges, practicing lawyers, and non-lawyers. No single group holds a majority. Given the tendency of law school accreditors dominated by law professors to act in law professors' narrow

For some time, the ABA has required law schools to demonstrate their commitment to diversity. In essence, it has created a "diversity cartel" among law schools, effectively insulating schools that give large preferences from competition on issues like bar passage rate with schools that would rather give smaller preferences or none at all. In the 1990s, fully 31 percent of law schools reported that they "felt pressure" "to take race into account in making admissions decisions" for "accreditation agencies."[12] Not long after the decision in *Grutter*, the ABA revised and strengthened those standards.[13]

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interest (or accreditors dominated by practitioners to act in practitioners' interest), the council's mixed membership is probably for the best. It is not, however, even arguably an academic body and hence not entitled to *Grutter*-deference.

[12] Susan Welch & John Gruhl, Affirmative Action in Minority Enrollments in Medical Schools and Law Schools 80 (1998). The 31% figure may understate the pressure. The authors asked law and medical schools if they had felt pressure from "Federal government," "State or local government" and/or "Any group." If respondents answered "yes" to the last category, they were asked to specify which groups, and 24% of medical school respondents and 31% of law school respondents *volunteered* that accreditation agencies had done so. For law schools, 15% said they "felt pressure" from "Federal government," 15% from "State or local government" and 46% from "Any Group." The corresponding figures for medical schools were 16%, 23% and 32%. See also Ben Wildavsky, *The Diversity Issue, Again*, San Francisco Chronicle (Feb. 11, 1994) ("When New York's Baruch College was threatened with loss of accreditation … [i]t was told it had not hired enough minority faculty and had not tried hard enough to retain black and Latino students").

[13] See USCCR-AAALS Report at 90-137, 175-80 (discussing ABA revisions). For example, its standard on student diversity's title was changed from "Equal Opportunity Effort" to "Equal Opportunity and Diversity," thus making it clear that

The ABA is fully aware that the only way to comply with its standards is to give preferential treatment to students from under-represented minorities. In its amicus brief in *Grutter*, it told the Court that "[r]ace-[c]onscious [a]dmissions [a]re [e]ssential to [i]ncreasing [m]inority [r]epresentation in the [l]egal [s]ystem." "[I]t is unquestionable," the

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the emphasis will no longer be on effort. Compare old Standard 211 to new Standard 212. Results will matter. This theme is made more concrete in the official interpretations that accompany the standards. The original version stated that the "satisfaction of [each law school's] obligation is based on the totality of *its actions*." The new version expands the basis on which law schools will be judged to add "and the results achieved." Compare old Interpretation 211-1 to new Interpretation 212-3 (emphasis supplied.) The new interpretations inform law schools for the first time that they "may use race and ethnicity" in their admissions decisions. See new Interpretation 212-2. A clause in the original text of the standards that stated "a law school is not obligated to apply standards for the award of financial assistance different from those applied to other students" for diversity purposes was deleted. See old Standard 211. The implication is that law schools may well be obligated to do so. In addition, the old Standard had required law schools to provide opportunities for the study of law to "qualified members" of minority groups. The new version deletes the word "qualified" and requires schools to provide opportunity to "members" of those groups. Compare old Standard 211 to new Standard 212. As originally proposed, the new Interpretation 212-1 would have read, "The requirement of a constitutional provision or statute that purports to prohibit consideration of gender, race, ethnicity or national origin in admissions or employment decisions is not a justification for a school's non-compliance with Standards 212." Following public criticism, an additional sentence was added. It read, "A law school that is subject to such constitutional or statutory provisions would have to demonstrate the commitment required by Standard 212 by means other than those prohibited by the applicable constitutional or statutory provision." *Id*. at 177-78.

ABA wrote, "that the improvement in minority participation in our law schools, and thus in our legal system, has been achieved largely by the use of race-conscious admissions policies such as those under attack here." According to the ABA, prohibiting racially preferential admissions policies nationwide, as California, Washington, Michigan and Nebraska have done statewide, would cause "a precipitous decline in minority participation in the institutions of our legal system" and "undo much of what has been accomplished in the last several decades." Brief for the ABA as Amicus Curiae in *Grutter* at 18-21.

The ABA has not been afraid to overrule the judgment of the law schools it regulates. In 2006, for example, Charleston School of Law unexpectedly failed to win accreditation from the ABA after a favorable recommendation from its Accreditation Committee. According to news reports, the ABA's concerns focused in part on race. *See* James T. Hammond, *Charleston School of Law: New School Fails to Win Accreditation so Students Can Take Bar*, The State (Columbia, S.C.) (July 12, 2006). Final accreditation was not awarded until the dean had declared that "[w]hatever we have to do [to win accreditation], we'll do it" and a new "director of diversity" was publicly announced. *Id.*; *College Notes: Charleston Law Taps Diversity Director*, The State (Columbia, S.C.) B3 (August 13, 2006). *See also* David Barnhizer, *A Chilling Discourse*, 50 St. Louis L. J. 361 (2006) (describing ABA influence on faculty diversity-hiring).

The case of George Mason University Law School is very instructive. Its story—recounted in a report of the U.S. Commission on Civil Rights—began with

the ABA's site-evaluation team visit in 2000. The site-evaluation team was unhappy that only 6.5 percent of entering day students and 9.5 percent of its entering evening students were minorities. USCCR-AAALS Report at 181.

Nobody could argue that GMU's problem was lack of outreach. Even the site evaluation report conceded that GMU had a "very active effort to recruit minorities." Indeed, it described those efforts at length. It noted, however, that GMU had been "unwilling to engage in any significant preferential affirmative action admissions program." Since most law schools were willing to admit minority students with dramatically lower entering academic credentials, GMU was at a recruitment disadvantage. *Id.* at 182.

GMU's faculty members did not all have the same views on affirmative action. Some members considered even small admissions preferences morally repugnant; others believed they would hurt rather than help their intended beneficiaries. But some were willing to put a slight thumb on the scale in favor of African Americans and Hispanics. What set GMU apart from many law schools was that a strong majority opposed the overwhelming preferential treatment commonly practiced elsewhere. The site-evaluation report noted its "serious concerns" with GMU's policy. *Id.*

Over the next few years, the ABA repeatedly refused to renew GMU's accreditation, citing its lack of a "significant preferential affirmative action program" and supposed lack of diversity. Back and forth the negotiations went. Although GMU could and did step up its already-extensive recruitment ef-

forts, it was forced to back away from its opposition to significant preferential treatment. It was thus able to raise the proportion of minorities in its entering class to 10.98 percent in 2001 and 16.16 percent in 2002. *Id.* at 183.

None of this was enough. The ABA didn't want slow, deliberate movement in its direction; it wanted a headlong dive into political correctness. Shortly after the Court's decision in *Grutter*, an emboldened ABA summoned the GMU president and the law school dean to appear before it personally and threatened the institution with revocation of its accreditation on account of its alleged diversity problem. GMU responded by further lowering minority admissions standards. It also increased spending on outreach, appointed an assistant dean to serve as minority coordinator and established an outside "Minority Recruitment Council," all in hopes of soothing the ABA's wrath. As a result, 17.3 percent of its entering students were minority members in 2003 and 19 percent in 2004. USCCR-AAALS Report at 183.

Still the ABA was not satisfied. This time its attacks were focused on African-American students specifically. "Of the 99 minority students in 2003, only 23 were African-American; of 111 minority students in 2004, the number of African Americans held at 23," the ABA complained. It didn't seem to matter that sixty-three African Americans had been offered admission or that the only way to admit more was to lower admissions standards to alarming levels. It didn't even matter that many students admitted under those circumstances would incur heavy debt, but never graduate and pass the bar. GMU's skepticism

about racial preferences was heresy, and the ABA was determined to stamp it out. *Id.* at 184.

GMU finally got its re-accreditation after six long years of abuse–just in time for the next round in the seven-year re-accreditation process. Even then, the ABA could not resist a warning that it would pay "particular attention" to GMU's diversity efforts in the upcoming cycle. *Id.*

Amici do not believe a decisive clarification that *Grutter*-deference applies only to academic judgments would result in a strong and immediate movement away from such policies. It would, however, be an important first step towards the race-neutral future that *Grutter* looks forward to and would have more effect over the long haul than some might realize.

Accrediting agencies acting under federal authority, state legislatures and others evidently currently believe that *Grutter*-deference allows them to pressure schools into affirmative-action orthodoxy. As non-academic actors, however, they are the very ones that academic freedom is supposed to protect academic institutions *from.*

C. *Grutter* Does Not Permit a Court to Assume a University Is Motivated by a Desire to Serve the Educational Benefits of a Student Body with Critical-Mass Diversity In the Face of Contrary Evidence.

In *Grutter*, the Court was willing to assume that the University's only motivation was to secure whatever educational benefits that might follow from a student body with a "critical mass" of students from underrepresented races. Crucially, it had no evi-

dence to the contrary. *Grutter*, 539 U.S. at 329-30. In this case, however, there is evidence of another motivation: Texas has complained that there are "significant differences between the racial and ethnic makeup of the University's undergraduate population and the state's population," and it has adopted an admissions policy that appears on its face to be far more aimed at racial balancing than at achieving any kind of critical mass of minority students. App. 23a.

Texas asserts that it is attempting to ensure that all its classrooms have a critical mass of underrepresented minority students. If so, it has selected an unusually ineffective method for achieving its goal. A more effective method for increasing classroom racial diversity would be for Texas to adopt a strongly traditional curriculum that requires all its students to take more hard science, technology, engineering and mathematics courses.

II. The Importance of the Constitutional Issues Presented in *Fisher* Is Highlighted by the Success Minority Students Have Had Under California's Proposition 209.

The constitutional issues in *Fisher* are critically important for many reasons. Not least among them is the need to make it possible for more minority students to succeed academically. The expansion of race-based admissions will mean fewer minority honor students and more minority students with unacceptably low grades; the contraction of race-based admissions will mean the opposite.

Consider the case of the University of California at San Diego—a highly selective institution, but not

quite as selective as the UC's flagship campus at Berkeley. In 1997, only one African-American student at UCSD had a freshman-year GPA of 3.5 or better–a single African-American honor student in a freshman class of 3,268. In contrast, 20 percent of the white students had such a GPA. Failure rates were similarly skewed. Fully 15 percent of African-American students and 17 percent of American Indian students at UCSD were in academic jeopardy (defined as a GPA of less than 2.0), while only 4 percent of white students were. Other under-represented minority students hovered close to the line. Since UCSD didn't keep separate statistics for those minority students who needed a preference in order to be admitted and those who would have been admitted regardless, it is impossible to say exactly how high the failure rate was for preference beneficiaries in particular. *See* Gail Heriot, *The Politics of Admissions in California,* 14 Academic Questions 29 (2001).

This was not because there were no other African-American students capable of doing honors work at UCSD. The problem was that such students were often at Stanford or Berkeley, where in most cases they were not receiving honors. White students were not magically immune from failure, but those who were at high risk for it had not been admitted in the first place. Instead, they were at less competitive schools where their performance was more likely to be acceptable or even outstanding. *Id.*

Being towards the bottom of the class can be demoralizing, and an admissions policy that makes it likely that large numbers of students from particular races will be towards the bottom can be especially

demoralizing. It is easy to develop an attitude under those circumstances. "It's all politics," or "getting good grades isn't really a black thing." Culture comes from shared experiences. Affirmative action was giving California minority students the shared experience of being unsuccessful at academics. *Id.*

Then came Proposition 209. California voters adopted a constitutional amendment in 1996 that held that state universities "shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin." Proposition 209 went into effect in time to affect the undergraduate admissions decisions for the entering class of 1998, causing Berkeley's offers of admission to African Americans, Hispanics and American Indians to go from 23.1 percent of the total offers to 10.4 percent. *Id.*

Of course, the minority students who would have attended Berkeley in the past had not simply vanished. They had been accepted to somewhat less highly ranked campuses–often UCLA and UCSD–based on their own academic record rather than race. In turn, students who previously would have been admitted to UCLA or UCSD on a preference had usually been admitted to schools somewhat less competitive UC campuses. UC-Riverside and UC-Santa Cruz both posted impressive gains in minority admissions. At Riverside, for example, Black and Latino student admissions shot up by 42 percent and 31 percent respectively. UCSD reported mixed results. Black enrollment there was down 19 percent, but Filipino and Latino enrollment was up by 10 percent and 23 percent. *Id.*

At UCSD, the performance of Black students improved dramatically. No longer were African-American honor students a rarity. Instead, a full 20 percent of the African-American freshmen were able to boast a GPA of 3.5 or better after their first year. That was higher than the rate for Asians (16 percent) and extremely close to that for whites that year (22 percent). Suddenly African-American students found themselves on a campus where achieving academic success was not just a "white thing" or an "Asian thing." *Id.*

The sudden collapse in minority failure rate was even more impressive. Once racial preferences were eliminated, the difference between racial groups all but evaporated at UCSD, with Black and American Indian rate falling to 6 percent. Consequently, average GPAs converged. UCSD's internal academic performance report announced that while overall performance has remained static, "underrepresented students admitted to UCSD in 1998 substantially outperformed their 1997 counterparts" and "the majority/majority performance gap observed in past studies was narrowed considerably." *Id.*

"Narrowed" was understatement. The report found that for the first time "no substantial GPA differences based on race/ethnicity." A discreet footnote makes it clear that the report's author knew exactly how this happened: 1998 was the first year of colorblind admissions. *Id.*

Granted, UCSD had twelve fewer African-American freshmen in the first year of Proposition 209, forced as it was to reject students who did not meet its regular academic standards. But it also had seven fewer African-American students with a failing

GPA at the end of that year. Meanwhile, those twelve students probably attended a school where their chances of success were greater. *Id.*

CONCLUSION

In *Grutter*, the Court stated, "We expect that 25 years from now, the use of racial preferences will no longer be necessary …." *Id.* at 342. But preferences are unlikely to fade away on their own. To the contrary, fueled by misinterpretations of *Grutter*, they have been expanding. To encourage a greater diversity of approaches to the problem of diversity, the Court should grant the petition for certiorari and clarify the limits of *Grutter*-deference.

Respectfully submitted,

EDWIN MEESE III
214 Mass. Ave. NE
Washington, DC 20002

JOHN C. EASTMAN
Counsel of Record
KAREN J. LUGO
Center for Constitutional Jurisprudence
c/o Chapman Univ. School of Law
One University Drive
Orange, CA 92886
(714) 628-2500
jeastman@chapman.edu

Counsel for Amici Curiae

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