

No. 11-345

In the
Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, et al.,

Respondents.

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

**AMICUS BRIEF OF GAIL HERIOT, PETER
KIRSANOW & TODD GAZIANO, MEMBERS OF
THE UNITED STATES COMMISSION ON CIVIL
RIGHTS, IN SUPPORT OF THE PETITIONER**

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QUESTION PRESENTED

1. Did the Fifth Circuit err in upholding Respondents' race-preferential admissions policy against a Fourteenth Amendment challenge?

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IDENTITY AND INTEREST OF AMICI CURIAE

Amici¹ Gail Heriot, Peter Kirsanow, and Todd Gaziano (collectively “the Commissioner Amici”) are three members of the eight-member United States Commission on Civil Rights. Commission members are part-time appointees of the President and Congress. This up-dated brief is being filed in the Commissioner Amici’s individual capacities.²

The Commission was established pursuant to the Civil Rights Act of 1957, P.L. 85-315, 71 Stat. 634 (1957)—the first civil rights law passed by Congress since Reconstruction. One of the Commission’s core duties is to gather evidence on civil rights issues and make recommendations to Congress, the President and the American people. As then-Senate Majority Leader Lyndon Johnson put it, the Commission’s task is to “gather facts instead of charges.” “It can sift out the truth from the fancies; and it can return

¹ Pursuant to this Court’s Rule 37.3(a), all parties have consented to the filing of this brief by filing blanket consents with the clerk. 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 or their counsel made a monetary contribution to its preparation or submission.

² An earlier version of this amicus brief was submitted in support of the Petition for a Writ of Certiorari. This up-dated amicus brief differs from the original brief primarily in Parts III.B (additional paragraphs added at the end), III.F (new section), and IV (additional material in Conclusion).

with recommendations which will be of assistance to reasonable men.”³

In 2010, the Commission, with the support of the Commissioner Amici, released a report entitled *Encouraging Minority Students to Pursue Science, Technology, Engineering, and Math Careers*. This report examined the extensive empirical research indicating that students who attend schools where their entering academic credentials put them in the bottom of the class are less likely to follow through with an ambition to major in science or engineering than similarly-credentialed students who attend schools where their credentials put them in the middle or top of the class. Affirmative action thus works to the detriment of its supposed beneficiaries, who are seldom informed of this risk. Three years earlier, the Commission, with the support of the two Commissioner Amici then on the Commission, released a report entitled *Affirmative Action in American Law Schools*, in which it examined similar evidence in the legal education context. The research examined in that Report indicates that students, regardless of race, are less likely to graduate from law school and pass the bar if they are the beneficiaries of preferential treatment in admissions than if they attend a law school at which their entering academic credentials are like the average student’s. The Commissioner Amici believe that they are in a special position to inform the Court about this research. They believe that on account of this research there is a strong public

³ 103 CONG. RECORD 13,897 (1957) (statement of Sen. Lyndon Johnson).

interest in preventing the Court's decision in *Grutter v. Bollinger*, 539 U.S. 306 (2003), from being expanded.

SUMMARY OF ARGUMENT⁴

This Court's ruling in *Grutter v. Bollinger* was unusual. Racial discrimination, when practiced by a State, is almost always a violation of the Fourteenth Amendment's Equal Protection Clause. But in *Grutter*, the Court ruled that an exception could be made when a state university gives preferential treatment to certain racial minority applicants for admission.

That limited exception, however, applied only to efforts to admit a "critical mass" of minority students when those efforts are aimed at capturing any educational benefits that a diverse student body might bring. While the Court did not specifically define "critical mass" in its opinion, it was clear that the concept was a crucial limiting factor to a state university's authority to discriminate.

In this case, the Fifth Circuit has given the concept of "critical mass" an expansive reading—one that is inconsistent with the letter and spirit of *Grutter* and with the Equal Protection Clause. Even if it could be said that *Grutter* left ambiguous the meaning of "critical mass," it is an important question of Constitutional law that should be settled by this Court and not various lower courts. The evidence discussed in this brief underlines that question's crucial importance. If *Grutter* is allowed to expand, the results will be unfortunate for the

⁴ The argument in this brief is based on the writings of Professor Gail Heriot, one of the amici herein.

very persons that affirmative action was originally designed to benefit.

ARGUMENT

THE UNIVERSITY OF TEXAS'S RACE PREFERENCE PLAN SHOULD BE INVALIDATED IN ORDER TO PREVENT THIS COURT'S DECISION IN *GRUTTER v. BOLLINGER* FROM BEING EXPANDED BEYOND ITS INTENDED LIMITS

A. Race-Preferential Admissions Were Intended to Facilitate the Entry of Minorities Into Higher Education and Eventually into High-Prestige Careers. There Is Considerable Evidence, However, That They Have the Opposite Effect.

Over forty years ago, universities with selective admissions policies began to adopt affirmative action policies. By lowering admissions standards for African-American and Hispanic students, well-meaning administrators hoped to increase the number of minority students on campus and ultimately to promote their integration into high-prestige careers and mainstream society.

While nearly all Americans saw those goals as laudable, reasonable minds differed on the wisdom of this approach. No less a liberal icon than Justice Stanley Mosk warned of the risks associated with such temporary compromises with the principle of color-blindness, when, writing for the California Supreme Court many decades ago in *Bakke v. Regents of the University of California*, 18 Cal. 3d 34, 62-63 (1976), *aff'd in part, rev'd in part*, 438 U.S. 265

(1978), he held racially discriminatory admissions to be unconstitutional:

To uphold the University would call for the sacrifice of principle for the sake of dubious expediency and would represent a retreat in the struggle to assure that each man and woman shall be judged on the basis of individual merit alone, a struggle which has only lately achieved success in removing legal barriers to racial equality.

For good or ill, Mosk's vision of civil rights did not prevail. His opinion in *Bakke* was superseded by this Court's decisions in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), and *Grutter v. Bollinger*. Race-preferential policies mushroomed, and thriving diversity bureaucracies were established to administer them.

If Mosk was right, it will take effort to correct the mistake at this late date. It isn't just the iron rule of bureaucracy at work today—that first and foremost, bureaucracies work to preserve themselves. Many distinguished citizens—university presidents, philanthropists, and legislators—have built their reputations on their support for race-preferential admissions. Their jobs are not at stake, but their sense of accomplishment may be. Overcoming that is not easy.

But if anything should cause thoughtful supporters of race-preferential admissions policies to reverse course—or at least refrain from proceeding further—it is the mounting empirical evidence showing these policies are doing more harm than good for their intended beneficiaries. If this research

is right, we now have fewer minority science and engineering graduates than we would have under race neutral admissions policies. See *infra* Part B. We have fewer minority college professors, see *infra* Part C, and fewer minority lawyers too, see *infra* Part D. Preferential treatment has made it more difficult for talented minority students to enter high-prestige careers.⁵

How can it be that affirmative action reduces the number of minority professionals? One of the consequences of widespread race-preferential policies is that minority students end up distributed among colleges and universities in very different patterns from their white and Asian counterparts. When the highest schools on the academic ladder relax their admissions policies in order to admit more under-represented minority students, schools one rung down must do likewise if they are to have the desired number of minority students, too. The problem is thus passed on to the schools another rung down, which respond similarly. As a result, under-represented minority students are overwhelmingly at the bottom of the distribution of entering academic credentials at most selective schools.

The problem is not that there are no academically gifted minority students. But there are

⁵ After *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), colleges often purported to engage in preferences to confer the benefits of diversity on all students, since that was the only purpose approved in that case. The notion that affirmative action benefits minority students in particular was downplayed rhetorically. But it is doubtful any school willing to acknowledge that minority students were thereby made worse off would continue the practice. Minority students are not public utilities.

simply not enough at the very top tiers to satisfy the demand, and efforts to change that have created a credentials gap up and down the academic pecking order.

Entering credentials matter. Students whose academic credentials are well below those of the average student in a particular school usually earn grades to match. While some students will outperform their academic credentials, just as some students will under-perform theirs, most students perform in the range that their entering credentials suggest. Anyone who thinks differently is engaging in wishful thinking at student expense.⁶

⁶ Many African-American students do not seem to be aware that their relatively low entering credentials mean that they are likely to get relatively low grades once on campus. In another study, several of the same Duke researchers found that both black and white entering Duke freshmen are overly optimistic about the grades that they will receive as freshmen. But black students are more overly optimistic than whites. Despite very serious differences in entering credentials, black and white students have similar expectations as to what their first-year GPAs will be (3.51 and 3.44 respectively.) But blacks receive an average GPA of 2.90 as freshmen, whereas the comparable figure for whites is 3.33.

These findings suggest that black students are not in fact aware of the risk that they will be mismatched at Duke due to low entering credentials. Peter Arcidiacono, Esteban M. Aucejo, Hamming Fang, and Kenneth Spenner, *Does Affirmative Action Lead to Mismatch? A New Test and Evidence*, Economic Research Initiatives at Duke, Working Paper No. 27 at 14, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1384022.

The Commission has repeatedly called on universities to disclose voluntarily more information to all entering students about their likelihood of success in a given program with the

No serious supporter of race-preferential admissions denies this. For example, former Ivy League university presidents William G. Bowen and Derek Bok, leading affirmative action advocates, candidly admit that the problem is serious: “College grades [for affirmative action beneficiaries] present a ... sobering picture,” they wrote. “The grades earned by African-American students at the [elite schools we studied] often reflect their struggles to succeed academically in highly competitive academic settings.” William G. Bowen & Derek Bok, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* 72 (1998) (“*Shape of the River*”).

These so-called affirmative action beneficiaries are not bad students. Many would be honor students elsewhere. But they are subtly being made to feel as if they are less talented than they really are. Many may actually be learning less. Everyone knows that a good student can get in over his head if placed in a classroom with more academically prepared students. (The Commissioner Amici, who are all lawyers, have little doubt, for example, that they would learn less in a physics class at Cal Tech, which specializes in training the best-prepared science

goal of protecting more students from the ill effects of mismatch. See, e.g., *Affirmative Action in American Law Schools* at 140; *Encouraging Minority Students to Pursue Science, Technology, Engineering, and Math Careers* at 4. To our knowledge, no university has actually followed these recommendations —although, as the Duke example indicates, many may be much better equipped to predict what grades an incoming student will receive than incoming students are themselves.

students, than they would at a university with less formidable competition.)

Divorced from the affirmative action context, this phenomenon—that less well-credentialed students usually do less well relative to their better-credentialed peers at a given school—would seem ordinary and unobjectionable.⁷ It is only when it becomes associated with this politically-charged issue that it becomes controversial.

B. Extensive Research Indicates that Race-Preferential Admissions Have the Effect of Discouraging Preference Beneficiaries from Pursuing Science and Engineering Careers.

Majoring in science and engineering can be difficult. Many students who start out doing so switch to something easier. Others drop out or even flunk out. It should surprise no one that those who

⁷ See James Davis, *The Campus as a Frog Pond: An Application of the Theory of Relative Deprivation to Career Decisions of College Men*, 72 *Am. J. Socio.* 17 (1966). Writing outside the affirmative action context, Davis found that college grades were more strongly correlated with the decision to enter a high-prestige career than was the selectivity of the institution. In some cases at least, the added self-confidence one enjoys as a result of being the big frog in the small frog pond appeared to outweigh whatever advantages an elite education in a larger, more glamorous frog pond can offer. Davis therefore offered the following advice: “Counselors and parents might well consider the drawbacks as well as the advantages of sending a boy to a ‘fine’ college, if, when doing so, it is fairly certain he will end up in the bottom ranks of his graduating class.” *Id.* at 30-31. As a result of race-preferential admissions policies, two generations of under-represented minority students have now disproportionately had the experience of being the small frog in a highly competitive pond.

fail to attain their goal of a science or engineering degree are disproportionately students whose entering academic credentials put them in the bottom of their college class. Not all stereotypes about science and engineering students are accurate. But the notion that they tend to be highly-credentialed and hardworking is largely on target.

What some do find surprising is this: Three impressive empirical studies have now demonstrated that *part of the effect is relative*. An aspiring science or engineering major who attends a school where her entering academic credentials put her in the middle or the top of her class is more likely to persevere and ultimately succeed than an otherwise identical student attending a more elite school where those same credentials place her in the bottom of the class. Put differently, an aspiring science or engineering major increases her chance of success not just if her entering credentials are high, but also if those credentials compare favorably with her classmates'. See Rogers Elliott, A. Christopher Strenta, Russell Adair, Michael Matier & Jannah Scott, *The Role of Ethnicity in Choosing and Leaving Science in Highly Selective Institutions*, 37 Res. Higher Ed. 681 (1996) ("*Elliott*"); Frederick Smyth & John McArdle, *Ethnic and Gender Differences in Science Graduation at Selective Colleges with Implications for Admission Policy and College Choice*, 45 Res. Higher Ed. 353 (2004) ("*Smyth-McArdle*"); Richard Sander & Roger Bolus, *Do Credentials Gaps in College Reduce the Number of Minority Science Graduates?*, Working Paper (Draft July 2009) available at <http://www.seaphe.org/pdf/sciencemismatch.pdf> ("*Sander-Bolus*").

Part of the reason may be that science and engineering are ruthlessly cumulative. A student who has difficulty with the calculus textbook's first chapter is apt to have difficulty with later chapters and subsequent courses. Since switching majors is easy, the attrition rate is very high.

In the first of these studies—the article by Dartmouth psychologist Rogers Elliott and his co-authors—the single most important cause for minority attrition from science at the eleven selective institutions they studied was the “*relatively* low preparation of black aspirants to science in these schools.” *Elliott* at 700. The authors were careful to put the emphasis on “relatively.” It wasn't just entering credentials demonstrating highly developed ability at science that mattered, but comparatively high credentials. A student who attended a school at which his Math SAT score was in the top third of his class was more likely to follow through with an ambition to earn a degree in science or engineering than was a student with the same score who attended a school at which his score was in the bottom third.

According to *Elliott*, a student with an SAT Math score of 580 “who wants to be in science will be three or four times more likely to persist at [the two least competitive schools of the eleven prestigious schools studied] ... than at [the two most competitive schools]...” *Id.* at 702.⁸

⁸ Numerous studies have found that there is no problem with minority students' initial interest in science and engineering, which tends to exceed whites'. *E.g.*, Alexander Astin & Helen Astin, *Undergraduate Science Education: The Impact of Different College Environments on the Educational Pipeline in*

The extraordinary record of Historically Black Colleges and Universities was a second source of evidence cited in *Elliott*. With only 20% of total black enrollment, these schools were producing 40% of the black students graduating with natural science degrees, according to the National Science Foundation. Those same students were frequently going on to earn Ph.D.s from non-HBCUs. The National Science Foundation reported, for example, that 36% of the blacks who earned an engineering doctorate between 1986 and 1988 received their undergraduate degree from an HBCU. *Id.* at 700. See also Elizabeth Culotta, *Black Colleges Cultivate Scientists*, 258 *Science* 1216 (Nov. 13, 1992) (“*Culotta*”).

Why have HBCUs been so successful? The Elliott team believed that unlike at mainstream institutions, African-American students at HBCUs are not grouped at the bottom of the class. Roughly half of black students will be in the top half of the class. Academic mismatch is not an issue at these colleges.

At least one HBCU faculty member—North Carolina Central University’s Dr. Walter Patillo, Jr.—reached the same conclusion four years before Elliott was published. He vented his frustrations in 1992: “The way we see it, the majority schools are wasting large numbers of good students. They have black students with admissions statistics [that are] very high, tops. But these students wind up

the Sciences 3-9, Table 3.5 (1993) available at <http://www.seaphe.org/pdf/astin.pdf>.

majoring in sociology or recreation or get wiped out altogether.” *Culotta* at 1218.

Eight years after *Elliott*, University of Virginia psychologists Frederick Smyth and John McArdle used a different methodology and database. But they reported findings consistent with *Elliott*’s conclusion that “race-sensitive admission, while increasing access to elite colleges, was inadvertently causing disproportionate loss of talented underrepresented minority students from science majors.” *Smyth-McArdle* at 373.

Smyth-McArdle developed a model that attempts to measure how many more minority students would have succeeded in their goal of a science or engineering degree if colleges had employed race-neutral admissions criteria. It states:

According to our model ..., if all the [Science-Mathematics-Engineering]-intending underrepresented minority students had enrolled in similarly functioning colleges where their high school grades and math test scores averaged at the institutional means among [Science-Mathematics-Engineering] intenders, 72 more of the women and 62 more of the men would be predicted to persist in [Science-Mathematics-Engineering] (45% and 35% increases, respectively).

Id.

Smyth and McArdle’s recommendation was clear: “Admission officials are advised to carefully consider the relative academic preparedness of science-interested students, and such students choosing among colleges are advised to compare their

academic qualifications to those of successful science students at each institution.” *Id.* at 353.

The latest contribution to this literature is from UCLA law professor Richard Sander and UCLA senior statistician Roger Bolus. Using data from the nine-campus University of California, they conclude, “Minority attrition in science is a very real problem, and the evidence in this paper suggests that ‘negative mismatch’ probably plays a role in it.” The multiple approaches to their data yielded consistent results: “[S]tudents with credentials more than one standard deviation below their science peers at college are about half as likely to end up with science bachelor degrees, compared with similar students attending schools where their credentials are much closer to, or above, the mean credentials of their peers.” *Sander-Bolus* at 23-24.

The Commissioner Amici are aware of no empirical research that challenges these findings. Nevertheless, as far as they are aware, the Commission’s recommendations that students be made aware of these risks have been ignored.⁹

⁹ Perhaps part of the reason that institutions have ignored these findings is that in the aftermath of *Grutter*, some federally-designated accrediting agencies and state regulators have ramped up their pressure on schools to diversify. See Brief of Amici Curiae California Association of Scholars and Center for Constitutional Jurisprudence in Support of Petitioner (filed October 19, 2011)(discussing accrediting agencies and other outside pressure groups that push colleges and universities into ever more racially discriminatory admissions policies). Even the most resolute faculties crumble in the face of threats to their accreditation and funding and hence fail to exercise their best academic judgment. The Commissioner Amici regard this as contrary to *Grutter*, which

The decision below bemoans the concentration of minorities in soft subjects. Its solution, however, is more preferential treatment, which will likely worsen the problem.

Most recently, Duke University economists Peter Arcidiacono and Esteban Aucejo and Duke sociologist Ken Spenner found evidence supporting the mismatch thesis when researching the major choices of undergraduates enrolling at Duke in fall 2001 and 2002.¹⁰ Peter Arcidiacono, Esteban Aucejo & Ken Spenner, *What Happens After Enrollment? An Analysis of the Time Path of Racial Differences in GPA and Major Choice* (June 2, 2011) available at http://public.econ.duke.edu/~psarcidi/grades_4.0.pdf “Arcidiacono”. As in *Elliott*, they found black undergraduates were much less likely to persist with an initial ambition of majoring in engineering, the natural sciences or economics than white students.

defers only to the *independent, academic* judgment of college faculties, not to policies that are products of non-academic factors. See, e.g., David Bernstein, *Affirmative Blackmail*, Wall St. J. (Feb. 11, 2006); Gail Heriot, *The ABA’s “Diversity” Diktat*, Wall St. J. (April 28, 2008). See also Susan Welch & John Gruhl, AFFIRMATIVE ACTION AND MINORITY ENROLLMENTS IN MEDICAL AND LAW SCHOOLS 80 (1998) (empirical study reporting that many schools admit being pressured by accreditors, state government and other groups to engage in race preferences).

¹⁰ This study differs slightly from *Elliott* in grouping economics with engineering and the natural sciences as a major in which mismatch appears to best explain low minority persistence rates. Because of its subject matter, economics is often classified elsewhere as a social science. But it is a more quantitative discipline than many other social sciences. Arcidiacono notes that treating economics as a social science does not significantly alter the study’s results. Arcidiacono at 24 n. 31.

54% of black males switched out of these majors, whereas only 6% of white males did. Once again, blacks' weaker academic credentials relative to whites upon matriculation at Duke seemed to explain this disparity best. Courses in these fields were more difficult, associated with higher study times, and had lower grades than courses in other fields. As with the students studied in *Elliott*, lack of interest in these academic fields among African-Americans does not appear to explain lower rates of persistence. Indeed, before starting at Duke, more black students than whites indicated an initial interest in majoring in engineering, economics, or natural science. *Id.* at 16.

As *Arcidiacono* concluded: "Attempts to increase representation at elite universities through the use of affirmative action may come at a cost of perpetuating under-representation of blacks in the natural sciences and engineering. Namely, the difference in course difficulty and grading standards between the natural sciences, engineering, and economics and their humanities and social sciences counterparts naturally leads the least prepared students away from the sciences." *Id.* at 5.

Arcidiacono demonstrates that the common belief that affirmative action beneficiaries "catch up" after their freshman years with their better-credentialed fellow students is illusory. What happens instead is that many transfer to majors where the academic competition is less intense and where students are graded on a more lenient curve. *Id.* at 18.

Unlike *Elliott*, *Arcidiacono* also looked at patterns of major switching among a group of

disproportionately white and well-off Duke students who tend to have relatively low academic credentials: legacies, or students eligible to receive preferential treatment in admissions because they have a relative who attended Duke. *Arcidiacono* found that legacies also earned lower grades than white non-legacies at the end of their first year. The gap narrowed over time, but only because legacy students also shifted away from the natural sciences, engineering, and economics toward the humanities and social sciences. It is much harder to argue that bias, racism, lack of faculty role models who look like them, or other such explanations often advanced to explain racial disparities in science best explain legacies' collective drift toward humanities and social science majors. Rather, as *Arcidiacono* puts it, "These cross-race differences in switching patterns can be fully explained by differences in academic background." *Arcidiacono* at 4.

Sadly, some Duke students, alumni, and faculty members have misunderstood this point and instead taken *Arcidiacono* as a personal affront and an affront to minority students generally. Even more sadly, Duke University administrators have done nothing to correct those misunderstandings or to take the mismatch research in the area of science and engineering seriously. In an open letter to the campus responding to demands that the university condemn the study, Provost Peter Lange and other Duke administrators stated that they "understand how the conclusions of the research paper can be interpreted in ways that reinforce negative stereotypes," assured students that there are no easy fields of study at Duke (an apparent effort to respond to student-alumni demands that Duke declare all

majors equally rigorous), and took the position that, insofar as the mammoth problem identified in *Arcidiacono* exists, a few minor tweaks to Duke's student counseling and its science curriculum could take care of it or have already done so. *Duke Academic Leaders Respond to Concerns on Minorities in the Sciences*, Duke Chron. (January 18, 2012). Despite the inconvenient findings of the *Arcidiacono* study, business will remain as usual at Duke.

C. Race-Preferential Admissions Appear to Have the Effect of Discouraging Minority Students from Becoming College Professors.

In 2003, Drs. Stephen Cole and Elinor Barber published *Increasing Faculty Diversity: The Occupational Choices of High-Achieving Minority Students*—a project funded in part by the Mellon Foundation, an institution that is generally considered a strong supporter of affirmative action. The authors' mission was to determine why more minority members are not attracted to academic careers. Their conclusions, reached after extensively questioning 7,612 high-achieving undergraduates at 34 colleges and universities, pointed to mismatch as the culprit:

The best-prepared African Americans, those with the highest SAT scores, are most likely to attend elite schools Because of affirmative action, these African Americans ... are admitted to schools where, on average, white students' scores are substantially higher, exceeding those of African Americans by about 200 points or more. Not surprisingly, in this kind of competitive

situation, African Americans get relatively low grades. It is a fact that in virtually all selective schools ... where racial preferences in admission is practiced, the majority of African American students end up in the lower quarter of their class.

...

African American students at the elite schools ... get lower grades than students with similar levels of academic preparation (as measured by SAT scores) than African American students at the nonelite schools Lower grades lead to lower levels of academic self-confidence, which in turn influence the extent to which African American students will persist with a freshman interest in academia as a career. African American students at elite schools are significantly less likely to persist with an interest in academia than are their counterparts at nonelite schools.

Stephen Cole and Elinor Barber, INCREASING FACULTY DIVERSITY: THE OCCUPATIONAL CHOICES OF HIGH-ACHIEVING MINORITY STUDENTS 124, 212 (2003)(citations omitted). *See also Arcidiacono* at 19, chart 10 (showing substantial gaps in GPAs at Duke between African American and white students among the humanities and social sciences as well as the natural sciences).

Soon after publication, the *Chronicle of Higher Education* reported that the Mellon Foundation was “trying to distance itself” from the book’s findings. Unlike similar projects with Mellon funding, this one

did not receive a publicity push from the foundation. Dr. Cole told the *Chronicle* that there was “no chance” that he would receive money again from Mellon. “And I don’t care,” he said. “I was trained at a time before social science became so politicized.” “I believe that social science should be objective and value-free, and you should design a study to answer a question and whatever the answer is, that’s what it is.” Robin Wilson, *The Unintended Consequences of Affirmative Action*, *The Chron. of Higher Educ.* 10 (Jan. 31, 2003).

D. Race-Preferential Admissions Appear to Have the Effect of Decreasing the Number of Minority Law Students Who Graduate and Pass the Bar.

UCLA law professor Richard Sander published his attempt to gauge academic mismatch in law schools in 2003. He found that when elite law schools lower their academic standards in order to admit a more racially diverse class, the ultimate result is a gap in academic credentials between minority and non-minority law students at law schools generally. Up and down the law school hierarchy, the average black student has an academic index that is more than two standard deviations below that of his average white classmate. Only HBCUs are immune to this effect. Richard Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 *Stan. L. Rev.* 367, 416 (2004) (“Sander”).¹¹

¹¹ Large credential gaps also were found in *Gratz v. Bollinger*, 539 U.S. 244 (2003), where the University of Michigan’s undergraduate college added 20 points to the academic index of all African-American applicants for admission—the equivalent of an entire letter grade in the applicant’s high school GPA. *See*

This affects student performance. Sander's research demonstrated that in elite law schools, 51.6% of African-American law students had first-year GPAs in the bottom 10% of their class as opposed to only 5.6% of white students. Nearly identical performance gaps existed at law schools at all levels. At mid-range public schools, the median African-American student's first-year grades corresponded to the 5th percentile among white students. For mid-range private schools, the corresponding percentile was 8th, and for lower-range private schools it was 7th. With disappointingly few exceptions, African-American students were grouped towards the bottom of their class. Moreover, the performance gap widened as students continued through law school. *Sander* at 427-36.¹²

The Commissioner Amici are not aware of anyone who disputes these figures. Even Sander's most passionate critics—and there are some—have to concede that the relative performance of African-American law students is very discouraging. *See, e.g., Ian Ayres & Richard Brooks, Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 *Stan. L.*

also Althea Nagai, *Racial and Ethnic Preferences in Undergraduate Admission at the University of Michigan*, Center for Equal Opportunity (October 17, 2006), available at <http://www.ceousa.org/content/blogcategory/78/100>(finding that the University of Michigan actually increased the average preference level for African Americans after *Gratz*).

¹² The “low black performance is not the result of test anxiety (the gap is similar or greater in legal writing classes) or some special difficulty that blacks in general have with law school.” *Sander* at 427.

Rev. 1807, 1807 (2005) (“Richard Sander’s study of affirmative action at U.S. law schools highlights a real and serious problem: the average black law student’s grades are startlingly low.”).

Only slightly more controversial is Sander’s finding that all this was almost entirely the result of affirmative action. When African-American and white law students with similar entering credentials competed against each other, they performed very close to the same. *Sander* at 428. Race-based admissions were creating the illusion that African-American law students are somehow destined to do poorly. The real problem is less daunting. There are fewer African-American students than anyone would prefer with the entering credentials necessary for admission on a color-blind basis to the most elite law schools. But there are many more who would do well at mid-tier schools—if they were only attending those schools.

Sander demonstrated that law students at the bottom of their class were worse off than students with the same credentials who attend less competitive law schools. It did so by noting two important effects of race-based admissions policies. First, African-American students attending law schools failed or dropped out at much higher rates than white students (19.3% vs. 8.2%). *Sander* at 437. Overwhelmingly, this phenomenon was associated with poor performance and not financial hardship, which mattered only very slightly. *Id.* at 439. Since many of these students who left law school would likely have performed better at a less competitive law school, they appear to have been, in a very real sense, victims of affirmative action.

Second, among African Americans who graduated and took the bar, the proportion who passed on their first attempt was not just lower than that for whites, it was lower even when one controls for academic index (LSAT and college GPA). For example, 71% of African Americans with a 400-460 index failed the bar on their first effort, while only 52% of whites did. Similarly, 26% of African Americans with an index between 640 and 700 failed their first time, while only 13% of whites did. *Id.* at 446.

Ultimately, only 45% of African Americans who entered law school passed the bar on their first attempt as opposed to over 78% of whites. Even after multiple attempts, only 57% of African Americans succeeded. The gap was thus never closed. *Id.* at 454.

Something was clearly wrong. When African-American and white law students with similar credentials competed against each other at the same school, they earned about the same grades. And when African-American and white students with the same grades from the same tier school took the bar examination, they passed at the same rate. Yet African-American students as a group had dramatically lower bar passage rates than white students with similar credentials.

As Sander pointed out, the most plausible explanation is that on the whole they were not attending the same law schools. The black and Hispanic students were more likely to be attending an elite school that spends little time on subjects covered on the bar exam and delves instead into more abstract and esoteric legal issues. *Id.* at 449.

Affirmative action beneficiaries were struggling while their similarly-credentialed white and Asian peers were learning at a more appropriate pace at less elite schools.

Sander estimated that if law schools were to use race-neutral admissions policies, fewer African-American law students would be admitted to law schools. But since those who were admitted would be attending schools where they had a substantial likelihood of doing well, fewer would fail or drop out. In the end, more would pass the bar on their first try (1859 vs. 1567) and more would eventually pass the bar (2150 vs. 1981) than under current admissions practices. *Id.* at 473.

In response to this research, the Commission urged grant-making agencies to fund research into this issue and requested state bar associations to “cooperate with this research.”¹³ Unfortunately, something closer to the opposite has happened. When Dr. Sander and his ideologically-diverse team of investigators attempted to obtain the data necessary to verify his initial findings, they were met with strong resistance from affirmative-action partisans and have had to institute litigation to obtain public data. *See Sander v. State Bar of California*, Civil Action A128647 (Cal. App. June 10, 2011), *rev. granted* (August 25, 2011) (holding that defendant’s records are subject to disclosure under the common-law presumption of access to public documents).

¹³ U.S. Comm’n on Civil Rights, *Affirmative Action in American Law Schools* 143 (2007).

E. *Shape of the River's* Conclusion that Affirmative Action Benefits Minority Students Is Flawed; If Anything, that Book's Data More Closely Support the Opposite Conclusion.

Race-preferential admissions supporters sometimes assert that, despite the likelihood of poor grades, minority students are better off accepting a preference from a prestigious school. When an effort is made to support this argument, the citation is inevitably to *Shape of the River*. In that book, the authors calculate that the mean earnings of black men with SAT scores of less than 1000 who attend a Tier-1 school (e.g. Princeton) are higher than their counterparts at a Tier-2 (e.g. Vanderbilt) or Tier-3 school (e.g. Pennsylvania State). On this basis, they conclude:

Black students admitted to the most selective of [the schools we studied] did not pay a penalty in life ... for having attended such competitive institutions. On the contrary, the black ... matriculants with academic credentials that were modest by the standards of these schools appear to have been well-advised to go to the most selective schools in which they were admitted.

Shape of the River at 144. If that was what the authors intended to show, however, their methodology was seriously flawed.

For example, they took account only of SAT scores and not of other academic credentials—like high school rank. One cannot assume that a student with a combined SAT score of 1200 at Princeton is

the equivalent of a student with the same score at Pennsylvania State. There is an excellent chance that the first student has a substantially better high school GPA or other distinctions in his favor. That is why he is at Princeton, not Pennsylvania State. Comparing students with the same SAT scores and finding that the student at the more elite school has higher post-graduation earnings, even though he appears to be mismatched at the more elite school, is a false comparison. It is overwhelmingly likely that the student attending the more elite school has a more elite high school record too.¹⁴

Given that and other methodological flaws, one would have to expect the data to come out as it did.¹⁵ But even given these flaws, evidence of mismatch comes peeking out coyly from behind the charts. Their own figures show that black men with SAT scores between 1000 and 1099 earn more if they avoid Tier-1 schools. Similarly, black women with SAT scores between 1100 and 1199 earned more if they stayed away from Tier-1.

Meanwhile, buried in Appendices D.5.4 and D.5.5 is a more sophisticated analysis that is barely

¹⁴ This is not the kind of error that former Ivy League presidents should make. Much of their schools' publicity is built around the theme that they routinely reject applicants with perfect SATs who do not otherwise measure up to their standards. See Sam Dillon, *A Great Year for Ivy League Schools, But Not So Good For Applicants to Them*, The New York Times, April 4, 2007.

¹⁵ The study compares students within broad bands of SAT scores, rather than students with identical SAT scores. Since Tier-1 schools will tend to have more students towards the top of each band and Tier-3 schools have more towards the bottom, the comparison is biased against mismatch.

mentioned in the text. It attempts to tease out how various factors influence the subsequent earnings of blacks who attended one of the 28 colleges or universities. Included among the factors considered are several pre-college considerations: the student's family's socio-economic status, SAT scores, and whether the student was in the top 10% of his high school class. Also included are several factors from his college experience: the selectivity of his college or university; his major; whether his grades put him in the top, middle or bottom third of the class; and whether he went on to earn an advanced degree. Each such factor's effect was measured.

The authors purport to show that attending a Tier-1 school rather than a Tier-3 school on average contributes to the income of both black men and women. They appear oblivious, however, to the bombshell contained in the figures just a few rows down: *College grades generally contribute more.* Again and again through the different permutations of their analysis, their own figures show it.

Imagine two black males with identical SAT scores; both were in the top 10% of their high school class and both come from middle-class families. Only their colleges are different. The authors convincingly demonstrate that if the two have the same college major and similar grades, the one who attended a Tier-1 school will earn about \$17,365 more than the one who attended a Tier-3 school.

But what if they don't have similar grades? The authors also show that if one student is in the top third of his college class and the other is in the bottom third of his, the former will earn an average of \$34,089 more. By the authors' own calculations,

therefore it is better to be a black male at Pennsylvania State in the top third of the class than in the bottom third at Princeton. The increased earnings he gets from high grades are worth almost twice the increased earnings from attending a Tier-1 school. And the boost in earnings he would get for majoring in natural science rather than the humanities would be \$49,537.

If one's class rank and major were unrelated to the selectivity level of one's college, then it would be perfectly sensible for the authors to celebrate the finding that, on average, black males get an earnings boost from attending a Tier-1 school over a Tier-3 school. But they are not unrelated. For students who would not have been admitted but for racial preferences, the chances of earning grades in the top third of the class are exceedingly remote.

The only question is whether a black student who attends a Tier-1 school and winds up in the bottom third of the class would have likely been in the top third of a Tier-3 school. And the answer to that question, at least in many cases, is yes. Consider, for example, a black male with SAT scores of 1300 who just missed being in the top 10% of his high school class. If he attends Pennsylvania State, his SAT scores will put him exactly at the 75th percentile in the entering class of 2011. That would give him an excellent shot at earning grades in the top third and/or graduating with a natural science degree. If he enrolls at Princeton instead, his SAT scores would put him ninety points *below* the 25th

percentile for that school, making it much more likely his grades will be in the bottom third.¹⁶

Shape of the River was cited by this Court in *Grutter* as supporting the argument for race-preferential admissions policies. *Grutter*, 539 U.S. at 333. Its actual data supports their opposition.

F. The Academic Literature on “Stereotype Threat” Does Not Justify Race-Preferential Admissions Policies.

News reports indicate that some of Respondents’ supporters may file an amicus brief arguing that the experimental psychology literature on “stereotype threat” justifies race-preferential admissions.¹⁷ This literature began with an experiment in which a group of African-American students at Stanford and control group of Stanford students were told that a certain difficult exam could evaluate their verbal ability. The African-American students did less well on the exam than the control students *with the same SAT Verbal score*. On the other hand, when similar groups of Stanford students were told that the purpose of the same exam was “to better understand the ‘psychological factors involved in solving verbal problems,” the

¹⁶ See US News College Rankings (2011) available at <http://colleges.usnews.rankingsandreviews.com/best-colleges/rankings/national-universities>(reporting the 25th and 75th percentile SAT score for various schools, including Pennsylvania State and Princeton).

¹⁷ See Brooke Donald, *Affirmative Action is Needed to Get the Best Candidates*, *Psychologist Says*, Phys.Org (April 27, 2012) available at <http://phys.org/news/2012-04-affirmative-action-candidates-psychologist.html>.

African-American students performed almost identically to the controls with the same verbal SAT scores (though part of the reason was that the control students who were told the second test was non-diagnostic did less well). See Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 *J. Person. & Soc. Psych.* 797 (1995). Steele and Aronson dubbed this phenomenon “stereotype threat” and have attempted to explain it this way:

[W]henver African American students perform an explicitly scholastic or intellectual task, they face the threat of confirming or being judged by a negative societal stereotype—a suspicion—about their group’s intellectual ability and competence. . . . And the self-threat it causes—through a variety of mechanisms—may interfere with the intellectual functioning of these students, particularly during standardized tests.

Id. at 797. Note that contrary to some early misinterpretations of this experiment, these authors did not find that African-American students performed just as well as non-black students on the less threatening test. Differences in academic credentials were controlled for. See Paul R. Sackett, et al., *On Interpreting Stereotype Threat as Accounting for African American—White Differences on Cognitive Tests*, 59 *Am. Psych.* 7 (Jan. 2004) (documenting these widespread misinterpretations).

Since that initial experiment, a number of similar experiments have produced similar results.

The settings have varied. Some of these experiments have focused on women and girls, some involved African Americans and Latinos. Turkish residents of Germany and others have also been examined for stereotype threat. There is, however, a concern that the seeming similarity of results is an artifact of publication bias—i.e. that experiments that arguably show stereotype threat get published while those that do not are not. See Jelte M. Wicherts & Cor de Haan, *A Meta-Analysis of the Effects of Stereotype Threat on the Cognitive Test Performance of African Americans* (University of Amsterdam Scholarly Paper) (2011)(manuscript under review)(expressing serious concerns over the publication bias issue).

Until recently, not many who have examined this literature have thought stereotype threat to be an argument for race-preferential admissions. Indeed, one important question is whether race-preferential admissions are in substantial part the *cause* of “stereotype threat” rather than its *solution*. The effect noted by Steele & Aronson has been found to exist from a very early age for African-American children (thus casting some doubt on the theory that “stereotype threat” causes it). But it has also been noted that the effect is greater at highly competitive universities like Stanford than it is at earlier stages in education and that it does not appear to be a factor at Historically Black Colleges and Universities. See Gregory M. Walton & Geoffrey L. Cohen, *A Question of Belonging: Race, Social Fit, and Achievement*, 92 *J. Person. & Soc. Psych.* 82 (2007); Arlana Dodson-Sims, *Examining Stereotype Threat, Academic Self Concept, and College Class Status Among African Americans at Historically Black Universities and Predominantly White*

Universities, (2005) (University of North Carolina at Charlotte dissertation) available at <http://gradworks.umi.com/31/62/3162076.html>.

It seems unlikely that systematically putting bright African-American college students at schools at which their academic credentials are all but certain to put them at a severe academic disadvantage will do anything but aggravate anxieties over stereotyping. Indeed, if the Commission Amici did not know better, they would suspect that race-preferential admissions policies were a diabolical plot designed to increase minority student anxiety.

Nevertheless, some scholars now argue that race-preferential admissions can be justified as a response to stereotype threat. See Gregory M. Walton, Steven J. Spencer & Sam Erman, *Affirmative Meritocracy*, __ Soc. Issues & Pol'y Rev. __ (2012)(forthcoming). They argue that they have evidence that stereotype threat kicks in early and masks African Americans' true academic aptitude, such as by depressing their SAT scores even before they enter college, and that African Americans actually outperform non-blacks with the same academic credentials in non-threatening situations. See Christine R. Logel, Gregory M. Walton, Steven J. Spencer, Jennifer Peach & Zanna P. Mark, *Unleashing Latent Ability: Implications of Stereotype Threat for College Admissions*, __ Educ. Psychologist __ (2012)(forthcoming).

There are many things wrong with this argument. For one, the level of preferential treatment that is currently typical at highly competitive schools is greater than the effect that

these scholars purport to have detected, even assuming their analysis is otherwise correct. For another, their findings depend on a meta-analysis of a motley body of stereotype threat literature that includes many kinds of “stereotyped” groups other than racial minorities in this country, in many kinds of settings, with many kinds of methodological problems and a significant publication bias. Their meta-analysis excludes the seminal study by Steele & Aronson, which conspicuously did not find that African-American students outperform non-black counterparts with the same SAT Verbal score when they are told the test they were taking was non-diagnostic.

Walton *et al.* take the view that if only higher education could become less threatening by refraining from conducting tests designed to measure individual students’ aptitude or achievement, African-American beneficiaries of preferences would slightly outperform other students whose academic credentials (like theirs) are below the institution’s norm. But it is naïve to believe that colleges could drop their reliance on grades and other performance indicators without profoundly altering the incentive of students of all races and ethnicities to apply themselves to their studies. The Commissioner Amici continue to believe that the best way to create environments where minority students can learn and flourish is through race-neutral admissions policies. Students of all races and ethnicities learn best where they have a fighting chance to excel. That is what the mismatch literature is finding, and that literature is based not on experiments, but only actual student experience.

The irony is that Walton *et al.* are themselves engaged in stereotyping. None of the stereotype threat literature claims that all or almost all African Americans are affected by anxiety over stereotype threat. Yet all African Americans would benefit from preferential admissions. The Commissioner Amici do not believe that negative stereotypes are less harmful when they come from scholars who mean well.

CONCLUSION

Almost two generations ago, Justice Mosk opposed deviating from the usual strict prohibition on race discrimination for the sake of a “dubious expediency.” 18 Cal. 3d at 62. The expediency has turned out to be dubious indeed. Taken together, the evidence is quite devastating.

Nevertheless, race-based admissions policies have become entrenched. Evidence of their failure is ignored and covered up. Rather than pull back, advocates argue for the policies’ expansion. In an interview with Columbia University president Lee Bollinger, Attorney General Eric Holder recently stated, “The question is not when does [affirmative action] end, but when does it begin . . . When do people of color truly get the benefits to which they are entitled?” Yasmin Gagne, *Holder Talks Financial Crime, Affirmative Action at Low*, Colum. Spectator (Feb. 24, 2012).

Holder’s comments are sobering. The federal government’s top lawyer urges the nation to double down on affirmative action—all in the face of evidence that race-preferential admissions policies have gone badly awry for its supposed beneficiaries.

At some point, it becomes necessary for the courts as guardian of individual rights to act to end this dubious deviation from the prohibition on race discrimination. The Commissioner Amici request that the Court invalidate the University of Texas's expansive race-preferential admissions policy.

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