No. 11-345

In the

Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, et al.,

Respondents.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, CENTER FOR EQUAL OPPORTUNITY, AMERICAN CIVIL RIGHTS INSTITUTE, NATIONAL ASSOCIATION OF SCHOLARS, AND PROJECT 21 IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the University of Texas at Austin's race-based admissions policy violates the Equal Protection Clause of the Fourteenth Amendment.

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IDENTITY AND INTEREST OF AMICI CURIAE

Pacific Legal Foundation, the Center for Equal Opportunity, the American Civil Rights Institute, National Association of Scholars, and Project 21 respectfully submit this brief amicus curiae in support of the Petitioner Abigail Fisher.[1]

For nearly 40 years, Pacific Legal Foundation (PLF) has litigated in support of the rights of individuals to be free of racial discrimination. PLF participated as amicus curiae in nearly every major Supreme Court case involving racial classifications in the past three decades, including *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); and *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

The Center for Equal Opportunity (CEO) is a nonprofit research, education, and public advocacy organization. CEO devotes significant time and resources to studying racial, ethnic, and gender discrimination by the federal government, the states,

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of 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, its members, or its counsel made a monetary contribution to its preparation or submission.

and private entities, and educating Americans about the prevalence of such discrimination. CEO publicly advocates for the cessation of racial, ethnic, and gender discrimination by the federal government, the several states, and private entities. CEO has participated as amicus curiae in numerous cases relevant to the analysis of this case. *See Ricci v. DeStefano*, 129 S. Ct. 2658 (2009); *Parents Involved*, 551 U.S. 701; *Grutter*, 539 U.S. 306.

The American Civil Rights Institute (ACRI) is a nonprofit research and educational organization. ACRI monitors and researches laws that ban government's use of race, sex, or ethnicity in public contracting, public education, or public employment. ACRI devotes significant time and resources to the study of racial, ethnic, and gender discrimination by the federal government, the several states, and private entities. ACRI has participated as amicus curiae in numerous cases relevant to the analysis of this case. *See Ricci*, 129 S. Ct. 2658; *Parents Involved*, 551 U.S. 701; *Grutter*, 539 U.S. 306. CEO, ACRI, and PLF participated in this case in the court below. *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213 (5th Cir. 2011).

The National Association of Scholars (NAS) is an independent membership association of academics working to foster intellectual freedom and to sustain the tradition of reasoned scholarship and civil debate in America's colleges and universities. NAS supports intellectual integrity in the curriculum, in the classroom, and across the campus. NAS is dedicated to the principle of individual merit and opposes race, sex, and other group preferences. As a group comprised of professors, graduate students, administrators, and trustees, NAS is intimately familiar with the issues

relevant to the analysis of this case. NAS, CEO, ACRI, and PLF participated in this case in the court below. *Fisher v. Univ. of Texas at Austin*, 631 F.3d 213.

Project 21 is an initiative of The National Center for Public Policy Research to promote the views of African-Americans whose entrepreneurial spirit, dedication to family, and commitment to individual responsibility has not traditionally been echoed by the nation's civil rights establishment. Project 21 participants seek to make America a better place for African-Americans, and all Americans, to live and work. Project 21 has participated as amicus curiae in this Court numerous times. *See Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (2009); *Bartlett v. Strickland*, 556 U.S. 1 (2009); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008).

This case raises important issues of constitutional law. Amici consider this case to be of special significance in that it concerns the fundamental issue of whether racial diversity in undergraduate admissions at public universities may be deemed a compelling governmental interest sufficient to justify discriminatory policies based solely on the students' race. Amici believe that their public policy perspectives and litigation experience provide an additional viewpoint on the issues presented in this case, which will be of assistance to the Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

The University of Texas at Austin discriminated against Abigail Fisher in the admission process because of the color of her skin. *Fisher*, 631 F.3d

at 216-17. In the decision below, the Fifth Circuit held that because the University was following the reasoning of this Court in *Grutter*, 539 U.S. 306, the race-based admissions program did not violate the Equal Protection Clause. *Fisher*, 631 F.3d at 247.

The Equal Protection Clause mandates that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, cl. 1. This rule admits no exception for expert-endorsed discrimination. "[A]ll governmental action based on race—a group classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry." *Grutter*, 539 U.S. at 326 (citations omitted). The language of Title VI of the 1964 Civil Rights Act is even more explicit. *See* 42 U.S.C. § 1981.

After reciting the proper standard for judging race-based discrimination, *Grutter* held that government may employ racial classifications to secure "the educational benefits that flow from a diverse student body." *Grutter*, 539 U.S. at 328. The Court noted that its finding did not sanction "outright racial balancing," but was inextricably linked "to the educational *benefits* that diversity is designed to produce." *Id.* at 330 (emphasis added). Thus, the Court's compelling interest finding necessarily employs a cost/benefit analysis with respect to diversity's educational role.

In the abstract, any number of benefits can be attributed to a diverse student body. Greater diversity might teach tolerance, acceptance, and open-mindedness about other racial groups. It might lead to exposure to people with different ideas or experiences.

But no proffered benefit can justify the high costs of racial discrimination. Therein lies the error with the *Grutter* Court's compelling interest finding. Diversity cannot be viewed in a vacuum as an abstract good; constitutional scrutiny arises because of the means—racial classifications—that are being used to achieve the end—"the educational benefits that flow from a diverse student body."

Strict scrutiny of race-based classifications requires that the government show "that its purpose or interest is both constitutionally permissible and substantial." *In re Griffiths*, 413 U.S. 717, 721-22 (1973). Only one interest—remedying the effect of past, intentional discrimination—has ever repeatedly been found sufficiently compelling to allow classification based on race. *See Green v. Cnty. Sch. Bd. of New Kentucky*, 391 U.S. 430 (1968); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971). Unlike remedying past intentional discrimination, which has its roots in the historical evils of the slave trade, slavery, and Jim Crow, the benefits flowing from a diverse student body was an invention of politically interested social scientists. Previously, this Court had rejected such flimsy justifications. Segregation, the "role model theory," and "societal discrimination," were rejected by this Court as insufficiently compelling to justify racial discrimination. Put simply, until *Grutter*, this Court had never found a social science exception to the Equal Protection Clause. The social science foundation of *Grutter* was never sound, has grown shakier with contrary empirical findings, and crumbles in light of evidence that universities have thrived without racial preferences. This evidence became available when states across the country began prohibiting universities from differentiating students

on the basis of race. *See*, *e.g.*, Cal. Const. art. I, § 31; Mich. Const. art. I, § 26.

Grutter further ignored the costs that arise when the state employs racially discriminatory practices to achieve a diverse student body. "If the need for the racial classifications . . . is unclear, . . . the costs are undeniable." *Parents Involved*, 551 U.S. at 745 (plurality op.). Those costs are discussed in this and other amicus briefs. Racial classifications destroy our very form of constitutional government by requiring governments to stereotype individuals, assuming they act in accordance with their race. So long as the "undeniable" costs outweigh the speculative benefits, the state simply cannot have a compelling interest in employing racial classifications.

Grutter is irredeemably flawed and should be overruled. Principles of *stare decisis* cannot save it. *Stare decisis* should give way when "such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." *Helvering v. Hallock*, 309 U.S. 106, 119 (1940). By deferring to the university, *Grutter* undermines decades of strict scrutiny review. Further, as noted in the court below, *Grutter* provides no guidance on how to apply strict scrutiny to university admissions policies. "[I]t is impossible to subject such uses of race to strict scrutiny. *Grutter* rewards admissions programs that remain opaque." *Fisher*, 631 F.3d at 253 (Garza, J., concurring specially). And because there are few if any reliance interests in continuing racially discriminatory admissions policies, *Grutter* can be overruled without causing students or university officials any legitimate harm.

Lastly, *Grutter* should be overruled because public universities across the country invoke it as an unqualified endorsement of race-based admissions standards. At a time when the changing demographics of America makes ethnic-sorting increasingly untenable, university officials strive to inject race into their decisionmaking. *Grutter* was not intended to be a blanket endorsement of racially discriminatory admissions policies, yet that is its legacy. In *Grutter*, the Court surmised that employing racial classifications would no longer be justified by 2028. 539 U.S. at 322. In fact, they are not justified now. The only way to stop rampant discrimination by the nation's public universities is to overrule *Grutter*.

ARGUMENT

I

A "COMPELLING INTEREST" MUST BE OF OVERWHELMING AND INDISPUTABLE GOVERNMENTAL IMPORTANCE

The Equal Protection Clause protects "persons, not groups." *Adarand*, 515 U.S. at 227. "It follows from that principle that all governmental action based on race—a group classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed." *Id.* The Fourteenth Amendment's intent is to ensure that all persons will be treated as individuals, not "simply as components of a racial . . . class," because "[r]ace-based assignments 'embody stereotypes that treat individuals as the product of their race, evaluating their thoughts

and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution.'" *Miller v. Johnson*, 515 U.S. 900, 911-12 (1995) (citation omitted).

For this reason, "racial classifications are simply too pernicious to permit" anything but the most needed justifications. *Gratz*, 539 U.S. at 270. Indeed, since the inception of strict scrutiny analysis for race-based classifications in *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (accepting national security as a compelling interest during wartime), this Court has found very few interests sufficiently compelling to justify state-sponsored racial discrimination. Notably, *Korematsu* is today ridiculed for its abhorrent result and its lackadaisical approach to strict scrutiny. *See Adarand*, 515 U.S. at 236. ("Any retreat from the most searching judicial inquiry can only increase the risk of another such error occurring in the future.") The *Adarand* Court's renunciation of *Korematsu*, reinforces the modern Court's reluctance to find a "compelling interest" based on mere speculation. *See* Brandon M. Carey, *Diversity in Higher Education: Diversity's Lack of a "Compelling" Nature, and How the Supreme Court Has Avoided Applying True Strict Scrutiny to Racial Classifications in College Admissions*, 30 Okla. City U. L. Rev. 329, 345 (2005).

In a number of school desegregation cases following *Brown*, this Court found racial classifications constitutional when employed to remedy past intentional discrimination. *Swann* is of particular importance because the Court distilled its reasoning behind the compelling interest of remediation:

> Our objective in dealing with the issues presented by these cases is to see that school

> authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race; it does not and cannot embrace all the problems of racial prejudice, even when those problems contribute to disproportionate racial concentrations in some schools.

402 U.S. at 23.

Before *Grutter*, this Court never approved a race classification that was not designed to remedy the effects of past intentional discrimination.[2] In *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274-277 (1986), this Court rejected racial classifications to further an interest "in providing minority role models for its minority students." This Court also rejected racial classifications to remedy the effects of societal discrimination. *See Croson*, 488 U.S. at 505 ("To accept Richmond's claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for 'remedial relief' for every disadvantaged group."). This Court also rejected Florida's interest in protecting the welfare of a child as sufficiently compelling to permit race-based discrimination. *See Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) ("[P]rivate biases and the possible injury they might inflict are [im]permissible

[2] *Bakke* cannot be said to endorse the position that the state has a compelling interest in "the educational benefits that flow from a diverse student body." *Grutter*, 539 U.S. at 328. While Justice Powell certainly wrote that "diversity is compelling," he was the only Justice to do so. *Bakke*, 438 U.S. at 315 (opinion of Powell, J.). Only two points commanded a majority of the Court: (1) Alan Bakke was entitled to admission; and (2) some amorphous consideration of race is allowable under the Constitution. *Id.* at 271-72.

considerations for removal of an infant child from the custody of its natural mother.").

"Simply because the [government] may seek a worthy goal does not mean they are free to discriminate on the basis of race to achieve it, or that their racial classifications should be subject to less exacting scrutiny." *Parents Involved*, 551 U.S. at 743 (plurality op.). A compelling interest must be of paramount government importance before it can be used as the basis to racially discriminate against individuals.

II

THE "BENEFITS THAT FLOW FROM A DIVERSE STUDENT BODY"ARE HIGHLY DUBIOUS

With *Grutter*, 539 U.S. at 328, this Court abandoned decades of equal protection jurisprudence by finding a compelling interest untethered to remedying the past effects of intentional discrimination: the interest in reaping "the educational benefits that flow from a diverse student body." This "benefits" analysis is flawed for two primary reasons. First, the nature of social science evidence in general—and the evidence relied upon in *Grutter* in particular—is an inherently poor rationale for infringing constitutionally protected rights. Second, students are thriving in states that have banned the use of racial preferences in education, undercutting the claim that preferences are sufficiently compelling to justify racial discrimination.

A. There Should Be No Social Science Exception to the Equal Protection Clause

For decades, this Court rejected social scientists' rationales for separating, classifying, and discriminating against individuals on the basis of race. *Grutter*, however, relied heavily upon social science studies in substantiating its compelling interest finding. 539 U.S. at 330. The Court was wrong to do so. "Social scientists may debate how peoples' thoughts and behavior reflect their background, but the Constitution provides that the Government may not allocate benefits and burdens among individuals based on the assumption that race or ethnicity determines how they act or think." *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting).

"[W]hen racial segregation was challenged in the 1940s and 1950s, the improved-education argument was made by social science experts on behalf of the proponents of segregation." Roger Clegg, *Attacking "Diversity": A Review of Peter Wood's Diversity: The Invention of a Concept*, 31 J.C. & U.L. 417, 428 (2005). In *Davis v. Cnty. Sch. Bd.*, which was a companion case to *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954), the State of Virginia presented scores of testimony and social science research to demonstrate that "segregated education at the high school level is best for the individual students of both races." Clegg, *Attacking Diversity*, *supra*, at 428. Texas similarly defended segregation in *Sweatt v. Painter*, 339 U.S. 629 (1950), by citing studies by the U.S. government and the President of Harvard to argue that "there is ample evidence today to support the reasonableness of

the furnishing of equal facilities to white and Negro students in separate schools." Clegg, *Attacking Diversity*, *supra*, at 429.

These "studies" were by the leading social scientists of their day, and given the demonstrated flexibility of the discipline, the Court has viewed subsequent studies with skepticism. In *Wygant*, the Court was inundated with amicus briefs extolling the benefits of the "role model theory."[3] The same is true with *Croson*, where amicus briefs recited the necessity of racial preferences towards ending societal discrimination in public contracting.[4] Despite social science evidence purporting to demonstrate the utility of these race-based classifications, this Court consistently and properly rejected the idea that a compelling government interest could be manufactured through social science evidence. "There are few government functions that cannot be described as rooted in some interest that seems 'compelling,' and it will always be possible to find some social scientist who supports the notion that the consideration of race will

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[3] *See*, *e.g.*, Brief for Nat'l Educ. Ass'n, et al., as Amici Curiae Supporting Respondents, *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (No. 84-1340); Brief for Nat'l Bd., YWCA of the USA, et al., as Amici Curiae Supporting Respondents, *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (No. 84-1340).

[4] *See*, *e.g.*, Brief for the Md. Legislative Black Caucus as Amicus Curiae in Support of Appellant, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (No. 87-998); Brief for the Minority Bus. Enter. Legal Def. & Educ. Fund, Inc. & the La. Ass'n of Minority & Women Owned Businesses, Inc., as Amici Curiae in Support of Appellant, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (No. 87-998).

improve that function." Roger Clegg, *Race-Based Review*, National Review Online (Nov. 28, 2006).[5]

The diversity rationale adopted by the *Grutter* Court was created out of social science-backed whole cloth; it was dubious then, and has not withstood the test of time. In particular, the rationale and evidence underlying the educational benefits that flow from a diverse student body have been significantly undercut since the Court's decision. *See*, *e.g.*, Clegg, *Attacking Diversity*, *supra*, at 425-30 (collecting studies that the social science evidence purporting to tout diversity's educational benefits was and is seriously flawed); Roger Clegg, *The Educational Benefits of 'Diversity'*, National Review Online, Feb. 1, 2010 (describing new studies confirming that the evidence touting diversity is "marginal" and "uncertain");[6] John Rosenberg, *"Diversity" Research ~~Advances~~ ~~Progresses~~ Accumulates*, Discriminations, Feb. 6, 2010.[7]

B. The Benefits That Flow From a Diverse Student Body Can Be Accomplished Without Racial Discrimination

If the benefits that flow from a diverse student body can be achieved without resorting to racial discrimination, the asserted race-defined interest

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[5] *Available at* http://www.nationalreview.com/articles/219343/race-based-review/roger-clegg#.

[6] *Available at* http://www.nationalreview.com/phi-beta-cons/39876/educational-benefits-diversity?page=1.

[7] *Available at* http://www.discriminations.us/2010/02/"diversity"-research-advances-progresses-accumulates/.

cannot be compelling.[8] In 1996, California banned its public universities from considering race in admissions decisions. Cal. Const. art. I, § 31. Recognizing California's race-neutral admission policy, this Court in *Grutter* recommended that "[u]niversities in other States can and should draw on the most promising aspects of these race-neutral alternatives as they develop." 539 U.S. at 342. The results are in. Since California's ban on racial discrimination in admissions, its universities continue to thrive and racial diversity continues to increase on public university campuses.

The University of California (UC) system consists of nine undergraduate campuses.[9] The UC schools tracked the offers for admission by race and/or ethnicity from 1997 through 2011. These data show:

- University-wide, underrepresented minorities (defined as American Indian, African American, and Chicano/Latino students) constituted 19.6% of the students (7,385 total) to whom admission was offered

[8] This argument is similar to, but distinct from, a narrow tailoring analysis. A compelling interest is only required where the government has classified individuals according to their race. Thus, the *Grutter* Court necessarily held that the benefits that flow from a diverse student body was "compelling" in order to justify the law school's racial discrimination. But, if those benefits can be secured without resorting to discrimination, the interest can no longer be seen as compelling. In contrast, a narrow tailing inquiry accepts the compelling interest as given and analyzes whether the means chosen "work the least harm possible." *Bakke*, 438 U.S. at 308 (op. of Powell, J.).

[9] The new Merced campus, and campuses dedicated solely to graduate level courses, are not included in the data set forth in this brief, except as noted.

as freshmen in 1997.[10] By 2010, underrepresented minorities received 28.3% of the freshmen offers of admission (16,635 total), an increase of 9,250 offers of admission to underrepresented minority students. Meanwhile, offers of admission to white students declined from 42.6% in 1997 to 30.6% in 2010.[11]

- The percentage of offers of freshmen admission that were extended to underrepresented minorities was higher or the same in 2010 than 1997 on six of the eight UC campuses that had data for 1997

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[10] While Proposition 209 was passed in 1996, an injunction delayed its effective date until August of 1997. *See* Eva Paterson & Oren Sellstrom, *Equal Opportunity in a Post-Proposition 209 World*, 26 Hum. Rts. 9 (Summer 1999). The UC initially stopped considering race in its undergraduate admissions decisions pursuant to Regents Resolution SP-1, effective January 1, 1995. UC Irvine website, Office of Equal Opportunity & Diversity, *A Brief History of Affirmative Action*, *available at* http://www.eod.uci.edu/aa.html (last visited May 21, 2012).

[11] Univ. of Cal., Office of the President, *California Freshman Admissions for Fall 2008* (UC 2008 Admissions), Table 4, *available at* http://www.ucop.edu/news/factsheets/fall2008adm. html (last visited May 21, 2012); Univ. of Cal., Office of the President, *California Freshman Admissions for Fall 2010* (UC 2010 Admissions), Table 3, *available at* http://www.ucop.edu/ news/factsheets/fall2010adm.html (last visited May 21, 2012); Univ. of Cal., Office of the President, *New California Freshman Admits Fall 1997, 1998, 1999, and 2000*, Table A, *available at* http://www.ucop. edu/ucophome/commserv/preadm_a0400.pdf (last visited May 21, 2012). Preliminary data for 2011 show that these trends have continued (for 2011, underrepresented minorities received 30.8% of the freshman offers of admission, while offers to white students fell to 30.6% of offers), but, for reliability, this brief uses the finalized 2010 data. Univ. of Cal., Office of the President, *California Freshman Admissions for Fall 2011* (UC 2011 Admissions), Table 3, *available at* http://www.ucop.edu/news/fact sheets/fall2011adm.html (last visited May 21, 2012).

through 2010.[12] Preliminary data for 2011 shows the same result for seven of the eight campuses.[13]

Since 1997, minorities continue to seek and be offered admission to the University of California in greater numbers without resorting to racial preferences. California has thus enjoyed the educational benefits that flow from a diverse student body without resorting to racial discrimination.

III

THE COSTS ATTENDANT TO RACIAL CLASSIFICATIONS OUTWEIGH ANY "BENEFITS THAT FLOW FROM A DIVERSE STUDENT BODY"

The speculative benefits of a diverse student body must be weighed against the inherent, undeniable, and well-known costs. "If the need for the racial classifications . . . is unclear, . . . the costs are undeniable." *Parents Involved*, 551 U.S. at 745 (plurality op.). The harm caused by government policies that prefer some individuals over others based on race is well known by this Court.[14] Government racial classifications tear at the very fabric of our society, dehumanize us as individuals, and significantly hamper the very students they are designed to protect.

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[12] UC 2008 Admissions, Table 4 and UC 2010 Admissions, Table 3.

[13] UC 2011 Admissions, Table 3.

[14] This brief focuses only a few of the well-known costs of governmental race-based preferences and discrimination. For a more exhaustive list *see* Clegg, *Attacking Diversity*, *supra*, at 435-36.

A. Government Racial Classifications Are Destructive of Democratic Society

"Racial classifications of any sort pose the risk of lasting harm to our society." *Shaw v. Reno*, 509 U.S. 630, 657 (1993). "The equal protection principle," that was "purchased at the price of immeasurable human suffering," reflects "our Nation's understanding that such classifications ultimately have a destructive impact on the individual and society." *Adarand*, 515 U.S. at 240 (1995) (Thomas, J., concurring). Discrimination based on race is "illegal, immoral, unconstitutional, inherently wrong, and destructive of a democratic society." *Croson*, 488 U.S. at 521.

These costs are especially high in an increasingly multi-cultural and multi-ethnic society.[15] A state's "[p]referment by race . . . can be the most divisive of all policies." *Grutter*, 539 U.S. 306, 388 (2003) (Kennedy, J., dissenting). Such a policy "contain[s] within it the potential to destroy confidence in the Constitution and the idea of equality," *id.*, and "escalat[es] racial hostility and conflict." *Metro Broad.*, 497 U.S. at 603 (O'Connor, J., dissenting). Wherever governments

[15] In the past ten years the number of Americans who identify as belonging to "two or more races" has increased 32.0%. Further, growth in the number of individuals self-identifying as Hispanic, Asian, American Indian, Black, or Native Hawaiian has far outpaced that of individuals who self-identify as "white alone." *See* United States Census 2010, 2010 Census Data, *available at* http://2010.census.gov/2010census/data/ (last visited May 21, 2012). Indeed, there are now more "minority" than "nonminority" babies born each day in the United States today. Carol Morello & Ted Mellnik, *Census: Minority Babies Are Now a Majority in the United States*, Washington Post, *available at* http://www.washingtonpost.com/local/census-minority-babies-are-now-majority-in-united-states/2012/05/16/gIQA1WY8UU_story.html (last visited May 22, 2012).

implement policies that prefer one race over another, the destructive effects of such a policy in every society that adopts it is not a matter of speculation or prediction.

> [E]ven a broad-brush look at what affirmative action programs have actually done in various countries reveals a failure to achieve their goals may be the least of the problems created by these programs. Poisonous intergroup relations and real dangers to the fabric of society have also been produced by affirmative action.

Thomas Sowell, *Affirmative Action Around the World: An Empirical Study* 22 (2004).

The only way to justify the destructive consequences of a governmental policy of racial preferences is to declare that "any amount of social redress, however small, is worth any amount of costs and dangers, however large." *Id.* at 198. This Court should reject that premise.

B. Government Racial Classifications Dehumanize Us as Individuals

The intent of the Fourteenth Amendment is to ensure that all persons will be treated as individuals, not "as simply components of a racial . . . class." *Miller*, 515 U.S. at 911 (internal quotation marks omitted, citation omitted). "Government cannot make us equal; it can only recognize, respect, and protect us as equal before the law." *Adarand*, 515 U.S. at 240 (Thomas, J., concurring). Moreover, "[r]ace-based assignments 'embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to

a criterion barred to the Government by history and the Constitution.'" *Miller*, 515 U.S. at 912 (citation omitted).

Most public universities classify students according to broad racial categories of "African-American" or "Hispanic" or "Asian," *see Fisher*, 645 F. Supp. 2d at 593-99, thereby defining individuals within these groups as the embodiment of their group identities. But nothing intrinsic in these categories assures a commonality of experience. *See* Peter Wood, *Diversity: The Invention of a Concept* 25 (2003) ("The term 'Hispanic' clearly doesn't describe common social background; it doesn't designate a common language; and it doesn't, for that matter, describe gross physical appearance."). The same can be said of the term "Asian" which, to name a few examples, includes individuals of Japanese, Vietnamese, Indian, or Chinese descent.

The diversity movement perpetuates group-based stereotypes, weakening one of the greatest achievements of the Civil Rights Movement—laying bare the perniciousness of stereotyping. *See* Wood, *supra*, at 43. This group-right diversity concept contravenes the very premise of the Constitution:

> Diversity raised to the level of counterconstitutional principle promises to free people from the pseudo-liberty of individualism and to restore to them the primacy of their group identities . . . . Real equality according to [diversity proponents], consists of parity among groups, and to achieve it, social goods must be measured out in ethnic quotas, purveyed by group

> preferences, or otherwise filtered according to the will of social factions.

Id. at 14. "Once we allocate political rights by group identity, the assignment of group identity becomes the crucial determinant of everything else for the individual." *Id.* at 43. Such a result cannot be countenanced under the United States Constitution designed to thwart precisely the dangers now promoted as goals. Racial preferences stigmatize recipient groups by implying that the recipients are inferior and need special protection, thus generating the "politics of racial hostility." *Id.* at 173-74. "'Because that perception . . . can only exacerbate rather than reduce racial prejudice, it will delay the time when race will become [ ] truly irrelevant.'" *Adarand*, 515 U.S. at 229 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 545 (1980) (Stevens, J., dissenting)).

C. Racial Preferences in College Admissions Cause Serious Harm to the Very Students the Preferences Are Intended to Benefit

Several studies reveal that racial preferences in college admissions result in an "academic mismatch" that leads to lower grades and higher drop-out rates among minority students. *See*, *e.g.*, Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 Stan. L. Rev. 367 (2004) (describing academic mismatch at law schools); Rogers Elliott, et al., *The Role of Ethnicity in Choosing and Leaving Science in Highly Selective Institutions, Research in Higher Education*, Vol. 37, No. 6 (1996) (mismatch at elite colleges and universities). Academic mismatch begins when elite universities lower their academic standards to admit a more racially diverse student

population. Schools one or two academic tiers below must do likewise, since the minority students who might have attended those lower ranking universities based on their own academic record are instead attending the elite colleges. The result is a significant gap in academic credentials between minority and nonminority students at all levels.

Scholars identified the academic mismatch phenomenon even before race-conscious admission policies became entrenched at leading universities:

> If Harvard or Yale, for example, admit minority students with test scores 100 to 150 points below that normally required for a nonminority student to get admitted, the total number of minority students to get a legal education is not increased thereby. The minority students given such preference would meet the normal admissions standards at Illinois, Rutgers or Texas. . . . Thus, each law school, by its preferential admission, simply takes minority students away from other schools whose admissions standards are further down the scale . . . . In sum, the policy of preferential admission has a pervasive shifting effect, causing large numbers of minority students to attend law schools whose normal admission standards they do not meet, instead of attending other law schools whose normal standard they do meet.

Clyde W. Summers, *Preferential Admissions: An Unreal Solution to a Real Problem*, 2 U. Tol. L. Rev. 377, 384 (1970). Later research confirms this phenomenon.

Even supporters of racial preferences have had to acknowledge that students who attend schools where their academic credentials are substantially below those of their fellow students will tend to perform poorly. "College grades [for students admitted based on race] present a . . . sobering picture." William G. Bowen & Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* 72 (1998). "The grades earned by African-American students . . . often reflect their struggles to succeed academically in highly competitive academic settings." *Id.* For example, in 1990, the average grade point average of African-American freshmen at the University of Texas was 1.97, compared to 2.45 for nonminority freshmen, whose average SAT scores were over 100 points higher. Charles J. Sykes, *The Hollow Men: Politics and Corruption in Higher Education* 47 (1990).

These struggles tend to result in shifting majors as African-American and Hispanic students find the coursework too difficult or advanced given their skill level. *See* Elliot, et al., *supra*; Stephen Cole & Elinor Barber, *Increasing Faculty Diversity: The Occupational Choices of High-Achieving Minority Students* 124, 212 (2003) ("African American students at elite schools are significantly less likely to persist with an interest in academia than are their counterparts at nonelite schools."). The lower an African American student's academic credentials are relative to the average student at his undergraduate college or university, the lower his grades are likely to be and the less likely he is to graduate. Linda Datcher Loury & David Garman, *College Selectivity and Earnings*, 13 J. Lab. Econ. 289, 301, 303 (1995); Audrey Light & Wayne Strayer, *Determinants of*

College Completion: School Quality or Student Ability?, 35 J. Hum. Resources 299, 301 (2000).

This leads to African-American students failing or dropping out of school at much higher rates than white students (19.3% vs. 8.2%). Sander, *supra*, 437 n.1, tbl.5.5. The high drop-out rate was associated with poor performance, and not financial hardship. *Id.* at 439, tbl.5.6. In 1987, almost a quarter of African American students at M.I.T. failed to graduate. Arthur Hu, *Minorities Need More Support*, The Tech (M.I.T.), Mar. 7, 1987, at 8. Although the average math SAT scores of the African American students were in the top 10% nationwide, they were in the bottom 10% at M.I.T. *Id.* A 1988 study showed that African American students at the University of California at Berkeley had a 70% drop-out rate, despite average SAT scores well above the national average. John H. Bunzel, *Affirmative Action Admissions: How it 'Works' at Berkeley*, Pub. Interest, Fall 1988, at 124-25. The problem was that the average SAT scores of nonminority students at Berkeley were several hundred points higher. *Id.* These effects are replicated in lower tier schools as well: In 1997, the University of Colorado graduated only 37% of African-American students compared to 72% of nonminority students. Robert Lerner & Althea K. Nagai, *Racial Preferences in Colorado Higher Education*, Prepared for the Center for Equal Opportunity 34-36 (1997).[16]

Minority law school students who graduate still fail to pass the bar more often than white students. *Id.* at 454 (only 45% of African Americans law school

[16] *Available at* http://www.eric.ed.gov/PDFS/ED418193.pdf.

graduates passed the bar on their first attempt as compared to over 78% of whites). That is, law school students who struggle academically because of mismatch will most likely not achieve subject matter mastery, and will suffer lower pass rates on the bar, and increased problems in the job market. Sander, *supra*, at 370. The poor performance by minority students at universities and law schools is not the result of students' race, but is "simply a function of disparate entering credentials, which in turn is primarily a function of the schools' use of heavy racial preferences." Sander, *supra*, at 429.

Racial preferences in college admissions impose significant costs on minority students. No matter where academic mismatch occurs, lower grades lead to lower levels of academic self-confidence, which in turn increases the likelihood that minority students will lose interest in continuing their education and drop out. Generations of minority students who would have succeeded without race-based admission policies are saddled with far greater risks of failure because of academic mismatching. Eliminating racial preferences in student admissions will eradicate academic mismatch and restore confidence and success to students of all races.

IV

GRUTTER SHOULD BE OVERRULED

Amici urge this Court to overrule *Grutter*. Amici do not make the suggestion lightly, as *stare decisis* is "of fundamental importance to the rule of law." *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) (citations omitted). Yet, this Court has demonstrated its willingness to overrule prior decisions

"where the necessity and propriety of doing so has been established." *Id.* at 172; *see also Adarand*, 515 U.S. at 232-33 (1995) (opinion of O'Connor, J.) (collecting instances in which the Court overruled erroneous decisions). The necessity and propriety of overruling *Grutter* are clear.

So long as universities are allowed to weigh race, there will an irresistible tendency to do so mechanically and with an eye toward achieving a predetermined racial mix. If such discrimination is banned, schools will instead consider an applicant's life circumstances and perspectives on an individual basis, which is what "individualized consideration" should mean anyway. There is no real reason, then, to uphold *Grutter*—and overwhelming practical reasons to overturn it.

A. Principles of *Stare Decisis* Do Not Support Preservation of the Highly Flawed *Grutter* Decision

Where a conflict exists between prior precedent and the Constitution's text, justices are bound to uphold the Constitution. *See South Carolina v. Gathers*, 490 U.S. 805, 825 (1989) (Scalia, J., dissenting) ("I would think it a violation of my oath to adhere to what I consider a plainly unjustified intrusion upon the democratic process in order that the Court might save face."), *overruled by Payne v. Tennessee*, 501 U.S. 808 (1991). This Court's primary obligation is to interpret the text of the Constitution. *See Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 177 (1803). Although courts should generally be reluctant to overrule their prior decisions, the principle of *stare decisis* is not an inexorable command. *See Patterson*,

491 U.S. at 172 (*stare decisis* "[is] not a mechanical formula of adherence to the latest decision").

The key principles that should guide the Court are that no state "shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, cl. 1. Because there are no textual exceptions, and racial distinctions are "odious to a free people," racial classifications are always subject to strict scrutiny. *Adarand*, 515 U.S. at 214; *see also Rice v. Cayetano*, 528 U.S. 495, 517 (2000); *Parents Involved*, 551 U.S. at 745-46.

Grutter departs from the text of the Constitution and the requirement that all race-based classifications must undergo the strictest constitutional scrutiny to survive. The guiding principle of *Grutter*—"not every decision influenced by race is equally objectionable," 539 U.S. at 327—stands in stark contrast to *Rice* (decided three years earlier), which held that "[o]ne of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities." *Rice*, 528 U.S. at 517. The *Grutter* Court erred by creating a compelling interest only after deferring to the Law School's "academic freedom," thus imbuing the strictness of the scrutiny with relativity based on contextual factors. *Grutter*, 539 U.S. at 328; *see also* Paul Brest, *Some Comments on Grutter v. Bollinger*, 51 Drake L. Rev. 683, 690-91 (2003).

Grutter's unprecedented deference to the University was, and remains, a sharp departure from strict scrutiny. *See Grutter*, 539 U.S. at 350 (Thomas, J., concurring in part, dissenting in part) ("[T]he Constitution [does not] countenance the unprecedented

deference the Court gives to the Law School, an approach inconsistent with the very concept of "strict scrutiny"); *id.* at 394 (Kennedy, J., dissenting) ("[D]eference is antithetical to strict scrutiny, not consistent with it"). Moreover, First Amendment free speech considerations of academic freedom have nothing to do with racial classifications, which are not speech and might result in the violation of someone's equal protection rights. Lackland H. Bloom, Jr., *Grutter and Gratz: A Critical Analysis*, 41 Hous. L. Rev. 459, 469, 479 (2004).

Deferring to the University's interest in diversity also undercuts strict scrutiny because the University's interest "is too theoretical and abstract. It cannot be proved or disproved." *See Fisher*, 631 F.3d at 255 (Garza, J., concurring specially). Meanwhile, in other contexts, the government actor must prove the existence of the past intentional discrimination it is attempting to remedy through its race-conscious policy. *See*, *e.g.*, *Croson*, 488 U.S. at 499, 500, 505, 507, 509 (government must show "identified discrimination" with specificity); *Bakke*, 438 U.S. at 307 ("judicial, legislative, or administrative findings of constitutional or statutory violations" must be made); *Wygant*, 476 U.S. at 276 (warning that "[i]n the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future").

Because race-based classifications must always be subject to nondeferential strict scrutiny, this Court previously overturned decisions that mistakenly applied less demanding review. *See Adarand*, 515 U.S. at 222, 233-34, *overruling Metro Broad.*, 497 U.S. 547 ("*Metro Broadcasting* itself departed from our prior

cases—and did so quite recently. By refusing to follow *Metro Broadcasting*, then, we do not depart from the fabric of the law; we restore it.").

In *Patterson*, another case involving *stare decisis* in the context of race-based classifications, the Court identified three factors as particularly relevant to the *stare decisis* analysis: subsequent developments in the law; whether the challenged precedent is a "positive detriment to coherence and consistency in the law"; and whether the precedent is "inconsistent with the sense of justice." 491 U.S. at 173-74. Each of these factors favors overruling *Grutter*.

Subsequent developments in the law reveal *Grutter*'s aberrant analysis, as this Court has since applied nondeferential strict scrutiny and rejected the use of race-based classifications. *See*, *e.g.*, *Johnson v. California*, 543 U.S. 499 (2005); *Parents Involved*, 551 U.S. 701. In *Parents Involved*, this Court held that a race-based school assignment policy violated the Equal Protection Clause. 551 U.S. at 711. Indeed, a plurality of the Court recognized the perilous similarity between race-based classifications in the name of "diversity," and those that were found unconstitutional for the rejected goal of "racial balancing." *Id.* at 732 ("The principle that racial balancing is not permitted is one of substance, not semantics. Racial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity.'") (plurality op.) (citation omitted).

Further, in the wake of *Grutter*, states around the country have continued to flatly prohibit the type of racial classifications that *Grutter* sanctioned. To date, California, Louisiana, Washington, Michigan, Arizona, Nebraska, Florida, and New Hampshire all prohibit

racial classifications in university admissions. *See* Cal. Const. art. I, § 31; *La. Associated Gen. Contractors, Inc. v. Louisiana*, 669 So. 2d 1185 (La. 1996) (interpreting Louisiana Constitution as banning all racial classifications); Wash. Rev. Code Ann. § 49.60.400; Ariz. Const. art. II, § 36; Neb. Const. art. I, § 30; Fla. Exec. Order No. 99-281; N.H. Rev. Stat. Ann. § 187-A:16-a. A constitutional ban on racial classifications in university admissions will be on the Oklahoma ballot this year.[17]

The second *Patterson* factor is whether the challenged precedent "may be a positive detriment to coherence and consistency in the law." 491 U.S. at 173 (citations omitted). *Grutter*, which is logically incoherent and gives courts little to no guidance on how to interpret race-based admissions policies, fails this factor.

In the court below, Judge Garza related how *Grutter* is logically incoherent:

> But it is not clear, to me at least, how using race in the holistic scoring system approved in *Grutter* is constitutionally distinct from the point-based system rejected in *Gratz*. If two applicants, one a preferred minority and one nonminority, with application packets identical in all respects save race would be assigned the same score under a holistic scoring system, but one gets a higher score when race is factored in, how is that different from the mechanical group-based boost prohibited in *Gratz*? Although one system

[17] *Available at* https://www.sos.ok.gov/documents/questions/759.pdf?6,6 (last visited May 21, 2012).

> quantifies the preference and the other does not, the result is the same: a determinative benefit based on race.

Fisher, 631 F.3d at 252 (Garza, J., concurring specially). The result of this *Grutter*/*Gratz* incoherency is that "*Grutter* eliminated any chance for courts to critically evaluate whether race is, in fact, the defining feature of an admissions packet." *Id.* at 252 (Garza, J., concurring specially).

Grutter also fails to provide any consistency in the law. "[B]y using metaphors, like 'critical mass,' and indefinite terms that lack conceptual or analytical precision, but rather sound in abject subjectivity, to dress up constitutional standards, *Grutter* fails to provide any predictive value to courts and university administrators tasked with applying these standards consistently." *Fisher*, 631 F.3d at 258 (Garza, J., concurring specially). Because *Grutter* is "unworkable in practice," resulting in "mischievous consequences to litigants and courts alike," *Swift & Co., Inc. v. Wickham*, 382 U.S. 111, 116 (1965), the case should be overruled.

The last *Patterson* factor is whether the challenged precedent, having been "tested by experience," proves to be "inconsistent with the sense of justice or with the social welfare" and, in particular, "with our society's deep commitment to the eradication of discrimination based on a person's race or the color of his or her skin." 491 U.S. at 174 (citations omitted). *Grutter* fails any test that turns on "the sense of justice" or "the eradication of discrimination." As Ms. Fisher's experience in this case exemplifies, and as our Nation's history demonstrates, there is no justice in race discrimination; and *Grutter* has fostered, not

eradicated, race discrimination in higher education. As noted below, public universities, in the remaining states that permit race-based classifications, are using *Grutter* as a framework to classify and burden their students according to their race.

Finally, overturning *Grutter* would not raise the same reliance concerns that were present in *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992). "The inquiry into reliance counts the cost of a rule's repudiation as it would fall on those who have relied reasonably on the rule's continued application." *Id.* at 855. The nature of race-based preferences simply doesn't create significant reliance interests. No government institution is required to institute race-based preferences, and states are moving to prohibit the continued use of race-based classifications. Even *Grutter* itself recognized that "all race-conscious admissions programs have a termination point." 539 U.S. at 342.

Under the Court's *stare decisis* principles, the flawed *Grutter* decision should be overruled. The sooner the aberrational *Grutter* decision is explicitly rooted out of the law, the better the purposes of *stare decisis*—stability, coherence, and predictability—will be served.

B. Universities and Colleges Throughout the Country View *Grutter* as an Unqualified Endorsement of Race-Based Admissions Standards

Too many public universities across this country assume that *Grutter* always permits the use of race. They read *Grutter* not as a narrowly tailored exception to the general prohibition of racially motived

decisionmaking, but as a blueprint for creating a student body with their preferred racial composition.[18] Amicus Center for Equal Opportunity has produced many studies examining the admission practices of dozens of institutions of higher education. Each study has resulted in the same conclusion—public universities are using race to favor preferred minorities and turn away applicants for admission of disfavored races.

CEO's studies assess the degree of racial and ethnic admission preferences in admissions by using a statistical model that predicts the probability of admission at a university for members of different ethnic and racial groups, holding other qualifications constant. A multiple logistic regression equation, and its corresponding odds ratio, allowed CEO's statisticians to present admissions data in terms of the relative odds of members of Group A being admitted as compared with members of Group B, while controlling for other important variables like test scores, grades, and residency status.

The following chart shows the admissions practices at the University of Wisconsin Law School for the 2005 and 2006 applicant pools, where blacks and

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[18] The extent of racial preferences is generally conceded even by those who advocate in favor of them. *See*, *e.g.*, Bowen & Bok, *supra*, at 26-27 ("[A]lmost all academically selective institutions [share] a commitment to enrolling a diverse student population—and, as one way of achieving this objective, to paying attention to race in the admissions process."); Thomas J. Espenshade & Alexandria Walton Radford, *A New Manhattan Project*, Inside Higher Ed., Nov. 12, 2009, *available at* http://www.insidehighered.com/views/2009/11/12/radford.

Hispanics were strongly preferred to whites.[19] The odds ratio measures the magnitude of the preference given relative to the baseline group (in these studies, whites). An odds ratio equal to or greater than 3.0 to 1 reflects a strong association; an odds ratio less than 3.0 to 1, but greater than 1.5 to 1, reflects a moderate association; an odds ratio of 1.5 or less to 1 indicates a weak association. A very strong association might be taken to be the rough equivalent of the relative odds of smokers versus nonsmokers dying from lung cancer, which one-well known study calculated as 14 to 1. Nagai, *University of Wisconsin Law School*, *supra*, at 13-14.

University of Wisconsin Law School

Univ. of WI - Law	Odds Ratio[20]
Black over White	61.4 to 1
Hispanic over White	14.2 to 1

The law school numbers, however, are not nearly as extreme as those found in the 2007-2008 University of Wisconsin-Madison undergraduate admissions—the

[19] Althea K. Nagai, *Racial and Ethnic Preferences in Admission at the University of Wisconsin Law School*, Center for Equal Opportunity, at 12-13, *available at* http://www.ceousa.org/component/option,com_docman/task,doc_view/gid,275/ (last visited May 21, 2012).

[20] The odds ratio here, and in all subsequent tables, is arrived at after controlling for both academic (LSAT/SAT, GPA, class rank) and nonacademic factors (year of admission, gender, residency, etc.).

most severe discrimination CEO has ever found, either before or after *Grutter*.[21]

University of Wisconsin-Madison

Univ. of WI-Madison	Odds Ratio (with SAT)	Odds Ratio (with ACT)
Black over White	576 to 1	1330 to 1
Hispanic over White	504 to 1	1494 to 1
Asian over White	1 to 1	1 to 1

Blacks and Hispanics were preferred at ratios of between 500 and 1500 to 1 over both Asian and white students. Other reports confirm that it is increasingly the case that Asians are discriminated against in addition to, and sometimes even more than, whites. *See* Russell K. Nieli, *How Diversity Punishes Asians, Poor Whites and Lots of Others*, Minding The Campus, July 12, 2010.[22]

CEO's studies, all post-*Grutter*, also found that the law schools at the University of Nebraska, Arizona State University, and the University of Arizona have granted very strong preferences for preferred minorities (blacks and Hispanics), and comparatively small (but still significant) preferences for non-preferred minorities (Asians).

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[21] Althea K. Nagai, *Racial and Ethnic Preferences in Undergraduate Admissions at the University of Wisconsin-Madison*, Center for Equal Opportunity, at 16, *available at* http://www.ceousa.org/attachments/article/546/U.Wisc.undergrad.pdf (last visited May 21, 2012).

[22] *Available at* http://www.mindingthecampus.com/originals/2010/07/how_diversity_punishes_asians.html.

University of Nebraska College of Law
(2006 and 2007 applicant pools)[23]

Univ. of NE - Law	Odds Ratio
Black over White	442 to 1
Hispanic over White	90 to 1
Asian over White	6 to 1

Arizona State University College of Law
(2006 and 2007 applicant pools)[24]

ASU - Law	Odds Ratio
Black over White	1,115 to 1
Hispanic over White	85 to 1
Asian over White	2 to 1

[23] Althea K. Nagai, *Racial and Ethnic Preferences in Admission at the University of Nebraska College of Law*, Center for Equal Opportunity, at 15, *available at* http://www.ceousa.org/content/view/628/100/ (last visited May 21, 2012).

[24] Althea K. Nagai, *Racial and Ethnic Admission Preferences at Arizona State University College of Law*, Center for Equal Opportunity, at 15, *available at* http://www.ceousa.org/content/view/623/119/ (last visited May 21, 2012).

University of Arizona College of Law
(2006 and 2007 applicant pools)[25]

Univ. of Ariz. - Law	Odds Ratio
Black over White	250 to 1
Hispanic over White	18 to 1
Asian over White	3 to 1

Undergraduate admissions at universities in Ohio also recently demonstrated strong preferences for certain preferred minorities.

Ohio State University and Miami University

Miami University	Odds Ratio (with SAT)	Odds Ratio (with ACT)
Black over White	8.0 to 1	10.2 to 1
Hispanic over White	2.2 to 1	2.2 to 1
Asian over White	2.1 to 1	1.6 to 1
OH State University	Odds Ratio (with SAT)	Odds Ratio (with ACT)
Black over White	3.3 to 1	7.9 to 1
Hispanic over White	4.3 to 1	6.5 to 1
Asian over White	1.5 to 1	2.1 to 1

[25] Althea K. Nagai, *Racial and Ethnic Preferences in Admission at the University of Arizona College of Law*, Center for Equal Opportunity, at 15, *available at* http://www.ceousa.org/affirmative-action/affirmative-action-news/education/577-racial-and-ethnic-preferences-at-arizona-college-of-law (last visited May 23, 2012).

Even at the University of Michigan itself, severe undergraduate, law, and medical school admission preferences prevailed after *Grutter*.[26]

These odds ratios indicate the extent of racial and ethnic preferences at the different schools. Because the statistical analysis holds all factors constant except for race, the ratios demonstrate the strength of preferences given to preferred minority students over white students. The schools grant very strong preferences to blacks, and generally to Hispanics as well. In other words, blacks and Hispanics are preferred minorities who are given significant admission preferences *solely because of their race*, while Asians are nonpreferred minorities who fare no better than similarly situated white applicants. Admission preferences are pervasive among institutions of higher education.

CONCLUSION

Our nation is increasingly multiethnic and multiracial, and individual Americans are more and more likely to be multiethnic and multiracial. In such a nation, it is dangerous to allow the inevitably divisive

[26] *See*, *e.g.*, Althea K. Nagai, *Racial and Ethnic Preferences in Undergraduate Admission at the University of Michigan*, Center for Equal Opportunity, *available at* http://www.ceousa.org/content/view/521/100/ (last visited May 21, 2012); Althea K. Nagai, *Racial and Ethnic Admission Preferences at the University of Michigan Medical School*, Center for Equal Opportunity, *available at* http://www.ceousa.org/content/view/523/100/ (last visited May 21, 2012); Althea K. Nagai, *Racial and Ethnic Admission Preferences at the University of Michigan Law School*, Center for Equal Opportunity, *available at* http://www.ceousa.org/content/view/522/100/ (last visited May 21, 2012).

racial and ethnic discrimination by public institutions to become wider and more entrenched. For the foregoing reasons, Amici respectfully request that thisCourt overrule *Grutter*, 539 U.S. 306, and reverse the decision below.

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