

No. 11-345

*In The Supreme Court of the
United States*

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS, ET AL.

Respondents.

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

**BRIEF AMICI CURIAE FOR RICHARD
SANDER AND STUART TAYLOR, JR.
IN SUPPORT OF NEITHER PARTY**

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INTEREST OF THE *AMICI CURIAE*¹

The past decade has witnessed a profusion of careful research on the subject of racial preferences, much of it stimulated by this Court's decisions in *Grutter v. Bollinger*, 549 U.S. 306 (2003), and *Gratz v. Bollinger*, 549 U.S. 244 (2003). *Amici curiae* have written this brief to bring to the Court's attention the portions of this research that seem most relevant to the issues under consideration in *Fisher v. University of Texas, et al.*

Richard Sander is an economist and law professor at UCLA, and a leading scholar in the field of affirmative action. Stuart Taylor, Jr. is a lawyer and journalist who has written many articles and a book on various civil rights issues and episodes. They have been collaborating on a book about the social science research on, and policy dilemmas involving, racial preferences in higher education admissions.

Amici suggest a rule sought by neither party: narrow tailoring should require each state school that seeks to use racial preferences to make them no larger than its socioeconomic preferences and to disclose their size, operation and a timetable for phasing them out by 2028.

¹ No counsel for a party wrote this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than the *amici curiae* made a monetary contribution to this brief's preparation or submission. Pursuant to Rule 37, letters of consent from the parties have been filed with the Clerk of the Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

Many of the issues involved in judicial oversight of racial affirmative action in university admissions turn on empirical questions that can be better understood through social science research. This brief identifies important findings in recent research that suggest that the Court's decision in *Grutter*, and indeed affirmative action practices in general, are not having their intended effects.

ARGUMENT

I. **Social Science Research Has Undermined The Central Assumption Underlying All Racial Preference Programs In Higher Education Admissions: That They Are Good For The Intended Beneficiaries**

Affirmative action is an intensely controversial policy, and the social science work done in this field is far from immune to politics. But a growing volume of very careful research, some of it completely un rebutted by dissenting work, suggests that racial preferences in higher education often undermine minority achievement.

This Court's decisions make clear that racial preferences in higher education are tolerated under constitutional law — to the extent that they are tolerated — only on the assumption that they are benefits conferred upon relatively powerless minorities.² If preferences turn out to have mostly harmful

² This has always been implicit and often explicit in the Court's opinions. *E.g.*, *Grutter* 539 U.S. 306, 313-14, 316, 341 (2003); *id.* at 332-33 (admissions policy helps preferred groups achieve "[e]ffective participation . . . in the civic life of our Nation" and

effects — or even if the effects are often harmful and on balance ambiguous — then the fundamental legal premise for permitting this type of racial classification is gone.

Admissions preferences are often described by universities as essentially tie-breaking exercises or as efforts to create a “level playing field.” If this were true it would be hard to imagine any harmful effect on the intended beneficiaries. But in fact the racial preferences used by the University of Texas, and those used by most flagship state universities, elite colleges, and graduate professional schools are very large indeed.³ Those African-Americans (hereinafter “blacks”) and Hispanics who are admitted due to preferences typically enter with markedly less academic preparation (as measured by test scores and high school/college records) than nearly all of their Caucasian (hereinafter “white”) and Asian classmates.

For example, among freshmen entering the University of Texas at Austin in 2009 who were admitted outside the top-ten-percent system, the mean SAT score (on a scale of 2400) of Asians was a staggering 467 points above (and the mean score of whites was 390 points above) the mean black score. In percentile terms, these Asians scored at the 93rd percentile of 2009 SAT takers nationwide, whites at

acquire "the training and education necessary to succeed in America"); *Regents of University of California v. Bakke*, 438 U.S. 265, 325 (1978) (joint opinion of Brennan, White, Marshall and Blackmun, JJ).

³ T.J. Espenshade, C.Y. Chung, and J.L. Walling, *Admission Preferences for Minority Students, Athletes, and Legacies at Elite Universities*, 85 SOCIAL SCIENCE QUARTERLY 1422 (2004); Richard Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367 (2004).

the 89th percentile, Hispanics at the 80th percentile, and blacks at the 52nd percentile.⁴

For decades, it was unclear whether very large preferences generally benefited the preferred students (through the positive peer effects of very able classmates and influential networks) or, on balance, harmed them by subjecting them to academic “mismatch” (because teachers would aim instruction at the median student, and those with weaker preparation would fall behind and learn less).⁵ A growing array of evidence suggests that mismatch effects predominate.

⁴ The mean SAT scores were 1991 for Asians, 1914 for whites, 1794 for Hispanics, 1524 for blacks. The mean GPA's were 3.07, 3.04, 2.83, and 2.57. Univ. of Tex. Off. of Admissions, Implement. and Results of Tex. Aut. Admissions Law, (HB 588) at Univ. of Texas, Sec. 1: Demographic Analysis of Entering Freshmen, Fall 2010, at 14 (hereafter "Demographic Analysis") <http://www.utexas.edu/student/admissions/research/HB588-Report13.pdf>. Data on distribution of 2009 SAT takers is from College Board, SAT Percentile Ranks for Males, Females, and Total Group http://professionals.collegeboard.com/profdownload/sat_percentile_ranks_composite_cr_m_w.pdf

⁵ See Esther Duflo, Pascaline Dupas, and Michael Kremer, *Peer Effects, Teaching Incentives, and the Impact of Tracking: Evidence from a Randomized Evaluation in Kenya*, 101 AMERICAN ECONOMIC REVIEW 1739 (2011) for an outstanding overview of the learning tradeoffs between separating -- and placing in a single classroom -- students with very different levels of academic preparation.

A. Studies Of Preferred Minorities' Low Grades, Abandonment Of Initial Aspirations By Shunning Hard Courses, Low Graduation Rates, And Bar Exam Failure Rates Show Academic "Mismatch" To Be A Costly Side-Effect Of Racial Preferences

1. It is now generally conceded that large admissions preferences — regardless of whether these are based on race, “legacy” considerations, or other factors — cause students to receive lower grades. The median black receiving a large admissions preference to an elite law school, for example, ends up with grades that put her at the 6th percentile of the white grade distribution — an effect that is almost entirely due to the preference itself.⁶ (Data made available to researchers *after* the *Grutter* decision revealed that 60% of blacks admitted to the University of Michigan Law School had GPAs in the bottom tenth of their class.)⁷ Low grades interconnect with other preference-related problems, as discussed below.

2. Dartmouth psychologist Rogers Elliott and several colleagues published a study in 1996 that found very high attrition rates from the sciences in

⁶ Sander, *supra* note 3, 57 Stan. L. Rev. at 425-36.

⁷ See Richard Sander, *Do Elite Schools Avoid the Mismatch Effect?*

http://www.elsblog.org/the_empirical_legal_studi/2006/09/do_elite_school.html (September 2006) (“In the 5-year [Michigan] Alumni dataset, the mean final (standardized) GPA of black respondents is -1.48; in the 15-year [Michigan] Alumni dataset, it’s the same. Interestingly, in the PDS dataset [another survey of Michigan graduates], the mean final GPA of black respondents is even lower, -1.75. These are very low figures – translated, they imply that over 60% of Michigan’s black students are in the bottom tenth of their classes.”)

four Ivy League schools for students admitted with large preferences.⁸ Students who had weaker academic preparation than their peers were particularly vulnerable in science and engineering classes, where grading is on a rigid curve, professors often teach at a challenging pace and material builds sequentially from one course to the next. Students with significantly weaker preparation than the median student can become overwhelmed, and consequently transfer to less rigorous majors at a high rate. This phenomenon came to be known as “science mismatch,” because similar students attending less elite colleges appeared to have higher persistence rates in science. The cumulative effect is that even though black entering freshmen have levels of interest and aspiration in science comparable to (or higher than) whites, they make up only a small proportion of those with degrees in science and engineering.⁹

This tendency for students admitted based on large preferences to transfer out of difficult majors at high rates was recently confirmed by a study at Duke University.¹⁰ A direct test of the “science mismatch” hypothesis, using data from the University of California, also found strong evidence of the effect.¹¹ In 2008, the United States Commission on

⁸ Rogers Elliott, A. Christopher Strenta, Russell Adair, Michael Matier and Jannah Scott, *The Role of Ethnicity in Choosing and Leaving Science in Highly Selective Institutions*, 37 RESEARCH IN HIGHER EDUCATION 681 (1996).

⁹ *Id.* at 681-82, 699-702.

¹⁰ Peter Arcidiacono, Esteban M. Acejo, and Ken Spenner, *What Happens After Enrollment? An Analysis of the Time Path of Racial Differences in GPA and Major Choice* (2011 working paper, available at <http://www.seaphe.org/working-papers/>)

¹¹ See Richard Sander and Roger Bolus, *Do Credential Gaps in College Reduce the Number of Minority Science Graduates?* (2009 working paper, available at <http://www.seaphe.org/working-papers/>).

Civil Rights held hearings on the problem, and issued a report that expressed great concern about the role of racial preferences in undermining minority graduation from science and engineering programs.¹² So far as we are aware, no scholar has shown any of these findings to be in error.¹³

3. In 2003, sociologists Stephen Cole and Elinor Barber (by then deceased) published *Increasing Faculty Diversity*,¹⁴ a study of the minority “pipeline” problem in academia. Drawing on questionnaires and other detailed data from 7,612 graduating seniors at 34 colleges, Cole and Barber found significant evidence that large racial preferences were hurting the minority pipeline to academia. Such students tended to get significantly lower grades and struggle academically, hurting their self-confidence. The idea of pursuing a doctorate to enter academia became less appealing, even among those who had started college with that ambition.¹⁵ Similar students at colleges with smaller or no racial preferences were far more likely to do well, develop self-confidence, and pursue their original goals.¹⁶

The Cole and Barber finding was striking in part because it was emphatically contrary to the

¹² United States Commission on Civil Rights, *Encouraging Minority Students to Pursue Science, Technology, Engineering and Math Careers*, Briefing Report, October 2010.

¹³ As we discuss below, the Duke study and its authors were subjected to intense criticism, including by Duke’s president, but, remarkably, none of the critics took issue with any of the study’s substantive findings. See, e.g., KC Johnson, Durham in Wonderland, March 23, 2012, <http://durhamwonderland.blogspot.com/search?q=arcidiacono>

¹⁴ Stephen Cole and Elinor Barber, *INCREASING FACULTY DIVERSITY: THE OCCUPATIONAL CHOICES OF HIGH-ACHIEVING MINORITY STUDENTS* (Harvard University Press 2003).

¹⁵ *Id.* at 116-21.

¹⁶ *Id.* at 208.

assumptions of the authors' funders and sponsors — Ivy League presidents and foundations that passionately supported racial preferences in admissions. Yet we are unaware of any comparable research that contradicts their conclusion.¹⁷

4. In 2005, one of the authors of this brief (Sander) published in the *Stanford Law Review* an analysis suggesting that large racial preferences seriously damaged the academic performance of black law students, contributing to lower graduation rates and much lower success rates on bar exams.¹⁸ The law school setting is uniquely appropriate for studying the mismatch effect, because — unlike in college and many graduate programs — there are more or less uniform tests taken by graduates to measure their legal learning. There are also huge racial disparities in outcomes: blacks entering law school are only half as likely as their white peers ever to become lawyers.¹⁹

Unlike the “science mismatch” and “academic mismatch” research discussed above, Sander’s “law school mismatch” research generated extensive public discussion, and many critiques have been published.²⁰ Although Sander’s data and calculations have been confirmed by replication,²¹ several of the

¹⁷ See *id.* at xi-xii; Robin Wilson, *The Unintended Consequences of Affirmative Action*, CHRONICLE OF HIGHER EDUCATION, Jan. 31, 2003 at 10.

¹⁸ Sander, *supra* note 3, 57 STAN. L. REV. at 440-48.

¹⁹ For a discussion of recent trends in black bar passage, see Richard Sander, *Are Black/White Disparities in Graduation and Passing the Bar Getting Worse, or Better?* http://www.elsblog.org/the_empirical_legal_studi/2006/09/sander_2_black.html

²⁰ <http://www2.law.ucla.edu/sander/Systemic/Critics.htm> catalogs a number of the critiques.

²¹ See, e.g., Ian Ayres and Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?* 57 STAN. L. REV.

critics have advanced alternate empirical models to test whether the mismatch effect is large enough to actually reduce the number of black lawyers produced each year. As economist Doug Williams has pointed out, almost none of these social science critiques have disputed the central contention of the law school mismatch hypothesis: that large preferences undermine learning in law school.²² Indeed, using some of the same models employed by critics, Williams has demonstrated that the basic finding – that large preferences substantially reduce the rate at which a given student will graduate and pass the bar on his first attempt, compared to his chances had he attended a less selective school — holds up robustly under a wide variety of tests.²³

Some of the critics have not themselves withstood scrutiny. For example, in 2007 law professor Katherine Barnes published a widely-discussed critique of Sander that turned out to be based on erroneous calculations. In her recently-published correction, Barnes found that, if eliminating racial preferences in law schools reduced the number of black matriculants by 21%, the number of blacks to graduate and pass the bar exam (including those passing after multiple attempts) would nonetheless remain the same.²⁴ This implies that the success rate

1807, 1808 n. 4 (2005); Richard Sander, *A Reply to Critics*, 57 STAN. L. REV. 1963, 1984-86 (2005).

²² Doug Williams, *Does Affirmative Action Create Educational Mismatches in Law Schools?* (2009 working paper, available at <http://www.seaphe.org/working-papers/>).

²³ Doug Williams, *Do Racial Preferences Reduce Minority Learning in Law Schools?* (2011 working paper, available at <http://www.seaphe.org/working-papers/>). See also the extensive review of the law school mismatch debate in Sander, *Listening to the Debate on Reforming Law School Admissions Preferences*, 88 DENV. U.L. REV. 889, 933-952.

²⁴ Katherine Barnes, *Is Affirmative Action Responsible for the Achievement Gap Between Black and White Law Students?: A*

of black law students would rise sharply, with the number who never become lawyers falling by more than half.²⁵

5. The social science literature arguing that racial preferences do not hurt the intended beneficiaries has overwhelmingly focused on graduation rates from college. Some studies find that graduation rates are undermined by large preferences, and some find that they are not.²⁶ But the controversy may be more apparent than real. Graduation rates are under the control of college administrators, who can adjust policies or inflate grades to minimize academic “failures.” This is common at elite private colleges.²⁷ But a student can graduate and still be harmed by science mismatch, academic mismatch, lower grades, lower aspirations, less academic self-confidence and less promising career prospects.

Correction, A Lesson, and an Update, 105 NORTHWESTERN L. REV. 791 (2011).

²⁵ Doug Williams, Richard Sander, Marc Luppino, and Roger Bolus, *Revisiting Law School Mismatch: A Comment on Barnes (2007, 2011)*, 105 NORTHWESTERN L. REV. 813 (2011).

²⁶ Compare William G. Bowen and Derek Bok, *The Shape of the River* (Princeton University Press 1998) 59-70 with Linda Loury and David Garman, *College Selectivity and Earnings*, 13 JOURNAL OF LABOR ECONOMICS 289 (1995) and Audrey Light and Wayne Strayer, *Determinants of College Completion: School Quality or Student Ability?* 35 JOURNAL OF HUMAN RESOURCES 299 (2000).

²⁷ Stuart Rojstaczer and Christopher Healy, *Grading in American Colleges and Universities*, TEACHERS COLLEGE RECORD (March 2010).

B. Experience At The University Of California Provides A Uniquely Valuable Perspective On The Effects Of Racial Preferences

1. In 1996, California voters passed Proposition 209, which banned the use of racial preferences in state programs, including in university admissions. The University of California implemented this ban starting with freshmen matriculating in the fall of 1998. The aftermath is a uniquely valuable but understudied “real-world” experiment in what happens when racial preferences are eliminated.

The University in 1998 had eight undergraduate campuses (a ninth was added in 2005); all are considered excellent colleges, but they span a wide range of academic competitiveness. For example, the median SAT at UC Berkeley is a couple hundred points higher than the median SAT at the least “elite” of the eight campuses.²⁸ Proposition 209, by eliminating racial preferences, reduced the number of blacks and Hispanics admitted to UC’s most elite campuses. But most of those “displaced” students ended up at other UC campuses.²⁹

2. In the immediate aftermath of 209’s implementation, black enrollment fell by about half at the UC’s most elite campuses, rose at several less elite campuses, and fell systemwide (for all eight campuses) by almost 20%.³⁰ Strikingly, with the elite campuses not able to achieve their usual levels of minority enrollment through simple racial prefer-

²⁸ Kate Antonovics and Richard Sander, *Affirmative Action Bans and the Chilling Effect*, Table 4 (2011 working paper, available at <http://www.seaphe.org/working-papers/>).

²⁹ See *UC Application, Admissions, and Enrollment of California Resident Freshmen for Fall 1989 through 2010*, at http://www.ucop.edu/news/factsheets/flowfrc_10.pdf.

³⁰ *Id.*

ences, both Berkeley and UCLA launched significant efforts to improve K-12 education in their communities and to increase the number of strong minority candidates.³¹ Most UC schools also introduced socioeconomic preferences. Although much smaller than the racial preferences had been, these made Berkeley and UCLA by far the most socioeconomically diverse elite college campuses in the nation. They also added some racial diversity.³²

At present, by a wide range of metrics — including relative to state population share and changes in total UC enrollment — black and Hispanic enrollments at UC are higher than before Proposition 209.³³ UC black enrollment had returned to pre-209 levels by 2002 and averaged some 40% above pre-209 levels by 2007-1010.³⁴ The various post-209 changes in campus policies had even more positive effects on Hispanic enrollments. By 2000, Hispanic enrollment UC-wide had reached a new record, and by 2008 Hispanic enrollment UC-wide was double its pre-209 levels.³⁵

3. After Proposition 209 took effect, the academic performance and graduation rates of blacks and Hispanics rose -- just as mismatch theory would have predicted at any school where racial preferences became smaller. Because of the use of various surrogates for race, mismatch by no means disappeared within the University. But it declined, and

³¹ *New Directions for Outreach: Report of the University of California Outreach Task Force* (July 1997); Karl Pister, *UC Outreach: Systemwide Perspective and Strategic Plan* (September 1998).

³² Sander, *Class in American Legal Education*, 88 DENVER U.L. REV.631, 663-64 (2011).

³³ UC Applications, *supra* note 29.

³⁴ *Id.*

³⁵ *Id.*

209 thereby brought sharp improvements in black and Hispanic academic performance.

From 1992-94 to 1998-2005, black four-year graduation rates UC-wide improved by more than half and black six-year graduation rates improved by a fifth. Similar improvements occurred for Hispanics. Black and Hispanic GPAs also increased post-209, even though more minority students were sticking with less-generously-graded science and engineering studies.³⁶ Transfers of minority students who had started at community colleges and excelled there also increased sharply — once again, as predicted by mismatch theory.

All of this helps explain why by the time the early post-209 cohorts had worked their way through the UC system, the University of California was graduating dramatically more blacks and Hispanics than at any time in its history.³⁷

4. A common argument for engineering diversity through racial preferences is the perceived need for a “critical mass” of members of each minority group at each school — or even in every classroom. This notion helped spur complaints that Proposition 209 had “resegregated” the UC system. The ironic truth is that blacks were significantly more integrated across UC campuses after 209 than before.³⁸ Pre-209, Berkeley and UCLA had used very large racial preferences to compete aggressively with the less elite campuses for black freshmen; as a result, about half of all blacks enrolling at UC in the early 1990s went to the two elite campuses. After Proposi-

³⁶ Richard Sander, *An Analysis of the Effects of Proposition 209 Upon the University of California* (2011 working paper, available at <http://www.seaphe.org/working-papers/>).

³⁷ *Id.*

³⁸ *Id.*

tion 209, blacks became more evenly distributed across all eight campuses.³⁹

Research suggests a similar pattern nationally: Scholars have found that the use of large racial preferences by elite colleges has the effect of reducing diversity at second-tier schools.⁴⁰

5. Another important question about racial preferences is whether they help motivate minority high school students or, to the contrary, make it easier for them to coast into selective colleges. Careful research on 209's effect upon minority high school students is still underway, but one central fact supports the second hypothesis: The proportion of black California high school students whose academic performance put them in the top tenth of all students jumped by more a third in the first cohort affected by Proposition 209, and continued to rise in subsequent years.⁴¹ This suggests that strong black high school students may have increased their efforts to excel as UC preferences disappeared.

II. Research Suggests That *Grutter* And *Gratz* Were Empirically Flawed And Universities Have If Anything Increased Racial Balancing And Ignored This Court's Mandate To Phase Out Preferences by 2028

Gratz and *Grutter* expressed strong misgivings about racial preferences in admissions. The Court sought to ban particularly heavy-handed uses of race and to

³⁹ *Id.* The "index of dissimilarity" for blacks and non-blacks across UC campuses was 0.21 in 1996 and 0.18 in 2001. *Id.*

⁴⁰ Peter Arcidiacono, Shakeeb Khan, and Jacob Vigdor, *Representation versus Assimilation: How Do Preferences in College Admissions Affect Social Interactions?* 95 J. OF PUB. EC 1 (2011).

⁴¹ Sander, *supra* note 36.

set higher education on a course toward phasing out such preferences altogether. The available quantitative evidence suggests that these decisions have had the opposite of their intended effects.

A. *Grutter* Has Led to Larger and More Mechanical Preferences Because It Made An Empirical Error In Assuming That More ‘Holistic’ Preferences Would Do the Opposite

1. In determining that the University of Michigan Law School’s racial preferences were constitutional and the undergraduate College’s were not, the Court placed great importance on the fact that the Law School used a “highly individualized, holistic review of . . . all the ways an applicant might contribute to a diverse educational environment.” *Grutter*, 539 U.S. at 337. The Court said that the College’s “point” system, on the other hand, gave far more weight to the “mechanical, predetermined diversity ‘bonuses’ based on race or ethnicity,” *id.*, than to “the differing backgrounds, experiences, and characteristics” of students from non-preferred groups, *Gratz*, 539 U.S. at 273 (2003). The Court inferred that the Law School gave less weight to race and more to multiple other “diversity” factors.

2. Two major analyses after *Grutter* and *Gratz* by legal empiricists of diverse views and methodologies reached the same definitive conclusion: Contrary to the Court’s inference, the racial preferences used by the University of Michigan Law School before *Grutter* and *Gratz* were larger and more mechanical than those used by the College.⁴² Race was more

⁴² Ian Ayres and Sydney Foster, *Don’t Tell, Don’t Ask: Narrow Tailoring After Grutter and Gratz*, 85 TEX. L. REV. 517 (2007); Sander, *supra* note 3, 57 STAN. L. REV. at 400-410. Ayres strongly supports racial preferences; Sander is a skeptic.

often the deciding factor in an application at the Law School than at the College. And the Law School gave less weight to other diversity factors. “Holistic” admissions did not produce the outcomes that the Court said it desired; they simply made it harder for students, parents, and other non-experts to deduce how the Law School’s admissions system actually worked.⁴³

3. The data on practices since *Grutter* and *Gratz* confirms this point. For example, the University of Michigan undergraduate College had fully shifted, by the 2005-06 admissions year, to the kind of “holistic” system mandated by the Court. Analysis of the College’s admissions data shows that, in 2005-06, it gave substantially greater weight to race, more often making it the decisive factor in individual admissions decisions, than it had under the pre-*Gratz* point system.⁴⁴

The new system also pursued proportionate racial representation — the essence of racial balancing — by systematically preferring blacks over better-prepared Hispanics. The same is true at the University of Texas, whose data for enrolled freshmen admitted outside the Top-Ten-Percent system show very large preferences for blacks not only over whites and Asians but also over Hispanics. The mean Hispanic SAT score and high school GPA were 1794 and 2.83; the corresponding numbers for blacks were 1524 and 2.57. The data also show substantial preferences for whites as well as Hispanics and blacks over Asians, who could be seen as objects of systematic discrimination.⁴⁵

⁴³ See also *Gratz*, 349 U.S. at 305 (Ginsburg, J., dissenting), 297-98 (Souter, J., dissenting).

⁴⁴ Richard Sander, *Why Strict Scrutiny Requires Transparency: The Practical Effects of Bakke, Gratz, and Grutter*, in Kevin McGuire, ed., *NEW DIRECTIONS IN JUDICIAL POLITICS* (2012).

⁴⁵ See Demographic Analysis, *supra* note 4.

4. Admissions data from a sample of six state law schools (including the University of Michigan Law School) from 2002-03 and 2005-07 shows that, on average, their racial preferences became both larger and more mechanical after *Grutter* and *Gratz*.⁴⁶ There is no evidence that these schools give substantial weight to any other diversity factor than race -- and, as we discuss below, students admitted from all racial groups at such schools are overwhelmingly from relatively privileged backgrounds.⁴⁷ Analysis of a much larger sample of public law schools (over forty) shows that the patterns at the six law schools in the smaller sample are representative of national patterns.⁴⁸

B. Contrary To The Court's Expectation In *Grutter* That Racial Preferences Would Be Phased Out Over 25 Years, There Is Little Evidence After Nine Years That Respondent Or Any Other University Has Any Such Intent

In *Grutter*, Justice O'Connor held that "race-conscious admissions policies must be limited in time [and] must have a logical end-point," and specified that "[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary." 539 U.S. at 343. Over one-third of that period has elapsed. We are aware of no organized effort by higher education leadership to phase out preferences, or even to formulate a plan for doing so. To the contrary, the evidence cited above is illustrative of

⁴⁶ Sander, *supra* note 44.

⁴⁷ Sander, *supra* note 32.

⁴⁸ Sander, *supra* note 44.

the actual patterns since *Grutter*: Preferences have become larger and more pervasive.

The *Fisher* case illustrates a similar trend: In states that had developed successful efforts to shift to race-neutral admissions, post-*Grutter* initiatives in Texas have reintroduced preferences under rationales⁴⁹ at war with *Grutter*'s assertion that the Constitution forbids "[e]nshrining a permanent justification for racial preferences," 539 U.S. at 342. Powerful interest groups in states that have banned racial preferences in admissions, notably California, are constantly seeking to overturn or evade the bans.⁵⁰

The drift of policy is unmistakably toward using large racial preferences for many decades, or even centuries, in pursuit of proportional representation of every racial and ethnic group at every higher education institution. UT, for example, invoked state demographics in its proposal to restore racial preferences and deemed Asians "overrepresented" even though there are now fewer of them than Hispanics at UT. The University's apparent agenda is to use preferences to move toward racially proportionate representation of all four major racial groups – in other words, racial balancing. Pet. Brief 7. Universities will push to perpetuate large preferences until the racial gaps in test scores shrink dramatically --

⁴⁹ As Judge Garza pointed out in his special concurrence, "the University's reliance on race at the departmental and classroom levels will, in practice, allow for race-based preferences in seeming perpetuity." App. 87.

⁵⁰ See, e.g., Editorial, "We're sorry Californians voted for Prop 209. But the Legislature's attempt to undo it is wrong," *Los Angeles Times* (Oct. 6, 2011) at 18; Peter Wood, *A Veto for Racial Preferences*, *Chronicle of Higher Education*, Oct. 12, 2011, <http://chronicle.com/blogs/innovations/>.

and they have hardly shrunk at all since 1990.⁵¹ The racial gaps at the top of the SAT-score range, where elite colleges find most of their students, are especially dramatic.⁵² Numerous studies show that on average blacks do not catch up with their white classmates during college or graduate school. They tend to fall farther behind.⁵³

C. *Grutter's* Confidence That Higher Education Institutions Are Entitled To A Uniquely High Level Of Deference In Their Use Of Race Is Misplaced

1. This Court's opinions in *Bakke* and *Grutter* have extended a unique level of deference to universities, reflecting a belief that each of them deserves some latitude to determine its own need to balance racial diversity with other factors in shaping its

⁵¹ The most authoritative assessment of national trends in academic preparation is the Congressionally authorized National Assessment of Educational Progress ("NAEP"). The most recent NAEP report, on levels of academic preparation for a variety of demographic groups, analyzes data through 2008. The report shows that although black-white performance gaps narrowed substantially from 1971 until the late 1980s, the gaps widened in the years around 1990, and have been essentially unchanged since then. The same is true of the Hispanic-white gaps. NAEP 2008 TRENDS IN ACADEMIC PROGRESS, National Center for Education Statistics (2009).

⁵² "In 1999, . . . [w]hite students were 9.8 times as likely as their black peers to score 750 or better on the verbals, and 13.1 times as likely to do that well in math." Abigail and Stephan Thernstrom, *Secrecy and Dishonesty: The Supreme Court, Racial Preferences, and Higher Education*, CONSTITUTIONAL COMMENTARY 209, 227.

⁵³ E.g., Thernstrom, *id.*, at 227-32; Sander, *supra* note 3, at 435-36; Bowen & Bok, *supra* note 26, at 77.

academic mission. Several facts, however, suggest that universities are severely constrained in their ability to weigh the costs and benefits of racial preferences in an independent and candid way.

2. Accreditation agencies have become very aggressive in imposing national racial diversity standards upon individual institutions. The most well-known example, by no means unique,⁵⁴ is the George Mason Law School, which was forced to reinstitute large racial preferences to avoid losing accreditation from the ABA.⁵⁵ (In the wake of *Grutter*, the ABA adopted even more aggressive racial diversity standards that apply even to law schools in states that have banned the use of race in admissions.)⁵⁶

3. For schools that operate in “national” markets for their students, the “cascade effect” of racial preferences severely constrains the individual autonomy of schools. This is because, in these markets, the competition for minority students with preferences and financial aid packages tends to “bid up” the size of racial preferences. Thus, even moderately elite schools that, in a race-blind world, would enroll substantial numbers of blacks and Hispanics, find that the minorities they could admit on a race-blind basis are being lured by large preferences and race-

⁵⁴ The University of Colorado Medical School has in recent years tripled minority enrollment, to 33% of its student body, in response to pressure from its accrediting agency. See Margaret Jackson, “University of Colorado Medical School Heals Diversity Gap,” DENVER POST, April 21, 2012.

⁵⁵Robert Zelnick, Accreditation and Affirmative Action, at <http://www.seaphe.org/working-papers/>

⁵⁶ See Standard 212, 2011-2 Standards and Rules of Procedures for Approval of Law Schools, American Bar Association.

based financial aid packages to more elite schools. The moderately-elite schools thus feel constrained to maintain large racial preferences of their own no matter the resulting harms. This pattern then exerts the same pressure on institutions further down the selectivity hierarchy. By unintentionally fostering this state of affairs, this Court's decisions have ironically helped put enormous pressure on selective schools to engage in the very racial balancing that the Court has declared unconstitutional whether the schools would freely choose to do so or not.⁵⁷

4. The political climate on many university campuses makes careful deliberation on and candor in discussing these subjects a very rare thing. Consider: (a) The University of Texas promised, with reflexive alacrity, to restore race as an admissions factor within hours after *Grutter* was issued, Pet. Brief 5. (b) Despite the issuance of two thoughtful reports from the United States Commission on Civil Rights Commission about the problem of academic mismatch (in 2008 and 2010), there has been *no* response from the university community to either report. (b) As noted earlier, no university or academic association has, so far as we are aware, undertaken any efforts to plan for a phaseout of racial preferences by 2028. (c) The recent ostracism by Duke's President and many others of a group of Duke's own social scientists -- for their sensitively

⁵⁷ Stanley Rothman, Seymour Martin Lipset, and Neil Nevitte, "Does Enrollment Diversity Improve University Education?" INT'L J. OF PUB. OPINION RESEARCH, Vol. 15, No. 1 (2003) report that the level of diversity at a university has a strong negative correlation with administrators' assessments of student academic preparation and their satisfaction with educational quality.

presented and completely unrefuted analyses of the science mismatch problem at Duke -- illustrates a pervasive hostility among university officials nationwide toward careful or candid discussion of evidence concerning the effects of large racial preferences on academic performance.⁵⁸

5. The pervasive secrecy in which universities cloak their preferential admissions programs⁵⁹ makes it impossible for courts to monitor compliance with this Court's commands that universities eschew racial balancing and seriously pursue race-neutral alternatives.

⁵⁸ On the events at Duke, see K.C. Johnson, *supra* note 13. In his annual address to Duke faculty, President Broadhead attacked three eminent social scientists on the faculty simply for documenting, in a careful and thoughtful analysis, the problem of science mismatch at Duke. Broadhead said the professors “appeared to disparage the choice of majors by Duke undergraduates . . . *A further insult was that the paper had been included in an amicus brief submitted by opponents of affirmative action urging the Supreme Court to hear [Fisher]*” (emphasis added). On the general problem of honest discussion of affirmative action in higher education, see Bill Moyers, transcript of interview of psychologist Jonathan Haight, Feb. 3, 2012, <http://billmoyers.com/segment/jonathan-haidt-explains-our-contentious-culture/> (Haight says: “I think the New Left, the commitment that was made in the '60s, was toward victim groups. So it was civil rights, women's rights, gay rights. . . . [T]he sacralization of victim groups had to happen to bring the Left together to fight what was a truly altruistic and heroic battle. And they won, . . . But . . . [o]nce you've sacralized something, you become blind to evidence.”)

⁵⁹ To the best of our knowledge, no university in the United States has ever voluntarily made public the size of its racial preferences or how they are administered.

D. The Court's Acceptance Of Diversity As A Compelling Interest In Educational Settings Puts Universities Under Great Pressure To Disregard The Costs Of Racial Preferences

1. Past Court decisions on affirmative action at universities have relied heavily on the belief that racial diversity confers enough educational benefit to constitute a compelling interest justifying the use of race in admissions. With this blessing, a veritable industry of “diversity advocates” has arisen, generating an enormous volume of “research” that purports to demonstrate a wide variety of educational, performance, and institutional benefits flowing from diversity. In fact, the conclusions one can reasonably draw about diversity benefits are both limited and nuanced.⁶⁰

For example, a good deal of research focuses on the very plausible idea that increased student racial diversity on a campus fosters more interracial contact and a better understanding of how race affects one's viewpoints. However, very little of this work considers how the size of racial preferences used in achieving schools' desired racial head counts affects these interactions. One very careful study that does consider this issue finds, in comparing cross-racial interactions on many different college campuses, that the very large racial preferences used by many elite schools *reduce* cross-racial social interaction; that is, whites and blacks are less likely

⁶⁰ Although this Court will undoubtedly receive many amicus briefs citing research on educational benefits of diversity, many of the scholars involved in this research have been candid in acknowledging its limitations. See, e.g., the commentary by the distinguished *Chronicle of Higher Education* reporter Peter Schmidt, *America's Universities are Living A Diversity Lie*, WALL STREET JOURNAL, June 28, 2008.

to become friends when they arrive on campus with dramatically different levels of academic preparation.⁶¹ Indeed, science mismatch, discussed above, has been shown to cause a decline in social interaction among blacks and whites between their freshman and senior years.⁶² In other words, the educational benefits of diversity are undermined when diversity is achieved through large preferences.

2. An overpowering inference from this research is the inherently inescapable idea that large racial preferences -- and the resulting large disparities in academic performance -- feed negative stereotypes about academic ability among whites and minorities alike. An environment that produces gross performance disparities that closely correlate with race will foster negative racial stereotypes. Perhaps the most striking failing of the “diversity school” of scholars is its studious avoidance of this issue in examining the effects of affirmative action.

3. A few researchers have examined the effects of large preferences on the *self*-perception of recipients. These scholars have found that once on campus, such students tend to develop negative perceptions about their own academic competence, which in turn affect academic performance.⁶³

⁶¹ Arcidiacono et al, *supra* note 40.

⁶² Research in progress by Arcidiacono and his colleagues has found that freshman white students at Duke have similar rates of friendship with black and Asian students, but that by senior year, white-black friendships have declined and white-Asian friendships have increased. The academic distance between blacks and whites (and the absence of such a distance between Asians and whites), and the attrition of blacks from the sciences and economics, all contribute to this shift.

⁶³ See Brown, Charnsangavej et al, *Putting the “Affirm” Into Affirmative Action: Preferential Selection and Academic Performance*, 79 J. OF PERSONALITY AND SOCIAL PSYCHOLOGY 736 (2000); Cole and Barber, *supra* note 14, at 116-21; Fischer and

4. These findings fit well with the often-misunderstood phenomenon of “stereotype threat.” In a famous but usually misreported experiment conducted in the mid-1990s, Claude Steele and Joshua Aronson found that black Stanford students performed worse on a difficult cognitive test when they were “primed” with some reminder of a racial stereotype – in particular, that blacks tend to perform worse than whites on such tests.⁶⁴ When the stereotype priming (or “threat”) was absent, blacks performed the same on Steele's cognitive tests as whites with the same SAT scores. The implication of this finding is not (as is often claimed) that the racial test-score gap on the SAT is due to stereotype threat. Indeed, it refutes that claim. Steele's finding of no racial gaps in the more natural test setting (without artificially “priming” test-takers) strongly suggests that stereotype threat is essentially absent from standardized test administrations like the SAT I. A second logical inference from Steele's experiment is that environments which reinforce in minority minds the idea that their race is an academic handicap will tend to undermine the academic performance of those students.

5. This understanding of stereotype-threat research helps explain why real-world tests (as opposed to experiments) usually do not show much evidence of stereotype threat.⁶⁵ To the extent this phenomenon does occur, however, it argues strongly

Massey, *The Effects of Affirmative Action in Higher Education*, 36 SOCIAL SCIENCE RESEARCH 531 (2007).

⁶⁴ Steele and Aronson, Stereotype Threat and the Intellectual Test Performance of African Americans, 69 J. OF PERSONALITY AND SOCIAL PSYCHOLOGY 797 (1995).

⁶⁵ See, for example, Cullen, Hardison, and Sackett, Using SAT-Grade and Ability-Job Performance Relationships to Test Predictions Derived from Stereotype Threat Theory, 89 J. APPLIED PSYCHOLOGY 220 (2004).

against the use of large racial preferences. At a school with such preferences, black students will tend to have low grades and, importantly, will be aware that academic performance at the school strongly correlates with race. (This will of course not be true at a school that does not use racial preferences.) Every testing situation will tend to prime negative stereotypes about test performance. Thus, while stereotype threat does not explain the test score gap or other measured racial differences in academic preparation in elementary and secondary school, it may well help to explain why blacks (and, to a lesser extent, Hispanics) often underperform their academic credentials at colleges and universities that use large racial preferences.⁶⁶

⁶⁶ The many studies showing that blacks "underperform" their SAT and LSAT scores by getting substantially *lower* grades in college and law school than whites with the same scores, *see, e.g.*, Thomas J. Espenshade and Alexandria Walton Radford, *NO LONGER SEPARATE, NOT YET EQUAL* 238-39, 249 (Princeton University Press 2009), are sometimes cited as conclusive disproof of stereotype threat theory. We suggest that these tend to show that stereotype threat is absent at most high schools and settings where students take college entrance exams, but may well be activated on college campuses that rely on large racial preferences.

III. Key Assumptions Accepted By The Court Below Are Doubtful: Evidence Suggests That Large Racial Preferences Add Little Classroom Diversity And Do Not Make the University More Attractive To Minority Candidates

A. Self-Segregation Into “Soft” Courses Limits Classroom Diversity

1. As noted above, a pervasive characteristic of large admissions preferences is that the recipients are at a competitive disadvantage in courses. Many of them consequently seek out courses and majors where they will suffer least — academically and personally — from their relatively weaker preparation. Over time, this means that students admitted with large preferences tend to concentrate in the “softest” majors and courses.⁶⁷

This process of self-segregation directly undercuts a central premise of UT’s reintroduction of racial preferences in 2004. Officials justified the new preferences primarily on the ground that too many courses at the University lacked meaningful “diversity,” meaning a significant presence of blacks and Hispanics. App. 23a, 156a-157a.⁶⁸ But admitting students with large racial preferences is not an effective strategy for diversifying classrooms. The larger the preference, the more ill-prepared students will self-segregate into soft majors and courses. UT’s policy will at best produce a high ratio of racial engineering to classroom diversity — the opposite of “narrow tailoring.”

⁶⁷ Arcidiacono *et al.*, *supra* note 10.

⁶⁸ "App." references the Fifth Circuit opinion reported at 631 F.3d 213, reproduced in the appendix to the Petition for Certiorari.

2. Such self-segregation into soft courses will result from any system of admissions preferences that create large disparities in academic preparation within the student body. Most relevant here, the Texas Top Ten Percent plan, whatever its merits in advancing diversity, created a student body with very wide disparities in academic preparation, largely (though not entirely) along racial lines. This may well explain the fact that, according to the University of Texas, classroom diversity decreased between 1996 and 2002 even though minority enrollment increased. App. 86a.

B. Experience After Racial Preferences Were Banned At The University Of California Shows A “Warming” Effect On Minority Applications And Enrollments

1. Respondents have advanced the familiar argument that racial preferences are vital to persuade racial minorities that they are “welcome” on a college campus, and that reducing preferences would have what some call a “chilling effect” on minorities’ interest. And the court below suggested that minorities were discouraged from attending UT after it implemented *Hopwood*. But the best available evidence suggests that this is a myth, and that, on the contrary, bans on racial preferences seem to produce a “warming effect,” making the affected institutions more desirable — not less — to prospective black and Hispanic students.

2. An authoritative analysis by two leading labor economists, David Card and Alan Krueger, found that the propensity of highly-qualified blacks to apply to Berkeley, UCLA, and the University of Texas at Austin did not meaningfully change after

those schools implemented bans on racial preferences.⁶⁹

3. Strikingly, labor economist Kate Antonovics and Richard Sander (a coauthor of this brief) found that black and Hispanic students admitted to the UC system after the race-preference ban were substantially more likely to accept the offer and enroll, compared to similarly qualified students before Prop 209.⁷⁰ This “warming effect” for blacks and Hispanics at UC Berkeley was approximately 15%. Although we do not know why this happened, the available evidence is consistent with the hypothesis that these students believed their diplomas would be more valuable without the taint of being presumed an “affirmative action admit.”

4. This reinforces all of the findings discussed in Part I of this brief. While race-based advocacy groups overwhelmingly express support for racial preferences, the warming effect evidence suggests that individually, many blacks and Hispanics strongly prefer to avoid settings where they may be stigmatized by a racial preference. Indeed, a careful survey of a national random sample of sixteen hundred students at 140 American colleges and universities found that 71% of minority students (and 85% of all students) specifically rejected the use of racial or ethnic “preferences” in admissions; 62% of minority

⁶⁹ David Card and Alan B. Krueger, *Would the Elimination of Affirmative Action Affect Highly Qualified Minority Applicants? Evidence from California and Texas*, 58 *INDUSTRIAL & LABOR RELATIONS REVIEW* 416 (2005). Card & Krueger examined “highly-qualified” blacks because their admission chances would be minimally affected by the ban, which reduced the chances of most other blacks; students are less likely to apply when their admission chances are low.

⁷⁰ Kate Antonovics and Richard Sander, *Affirmative Action Bans and the Chilling Effect* (2011 working paper, available at <http://www.seaphe.org/working-papers/>).

students (and three-fourths of all students, and a majority of faculty members) opposed “relaxing academic standards” to increase minority representation.⁷¹

IV. The Lack Of Socioeconomic Diversity At Elite Schools Refutes The Notion That Large Racial Preferences Can Qualify As Narrowly Tailored

1. An outpouring of research since *Grutter* and *Gratz* has documented the shocking lack of socioeconomic diversity in the upper reaches of higher education. Whether we measure “socioeconomic status” (hereafter “SES”) by the incomes, education, or occupations of a student’s parents (or some combination), highly selective colleges draw three-quarters of their students from the top quartile of the SES spectrum, and half from the top tenth.⁷² A young person from the bottom quartile of the SES distribution is less than one-hundredth as likely to attend a “top ten” law school as a young person from the top tenth of the SES distribution.⁷³ As these numbers imply, racial preferences contribute little socioeconomic diversity to most schools that use them, because most of those receiving these preferences are from elite backgrounds.⁷⁴

2. This intense underrepresentation is partly due to the lower average academic achievement of low-SES students. But when one controls for aca-

⁷¹ Rothman *et al.*, *supra* note 57.

⁷² Anthony Carnevale and Stephen Rose, *Socioeconomic Status, Race/Ethnicity, and Selective College Admissions*, in Richard Kahlenberg, editor, *AMERICA’S UNTAPPED RESOURCE: LOW-INCOME STUDENTS IN HIGHER EDUCATION* (2004).

⁷³ Sander, *supra* note 32.

⁷⁴ *Id.*

demic preparation, low-SES students are *80% less likely* than high-SES students to attend college after high school. Using the same controls, blacks are *30% more likely* than whites to attend college (at elite colleges, of course, these imbalances are much greater).⁷⁵ This captures in a telling way the imbalance in current preference policies. To put the same point differently, universities could significantly increase socioeconomic diversity with much less use of preferences than are currently used in pursuit of a predominantly racial diversity.

3. Low-and-moderate-SES students can confer as much or more intellectual and viewpoint “diversity” benefit upon universities, the available research and real-world observation suggest, as the mostly high-SES racial minorities currently favored by preferential admissions. By recruiting and giving admissions preferences to such low-and-moderate-SES students, universities could also increase social mobility in, and the legitimacy of, American institutions at least as much (given current imbalances noted above) as current racial preference programs.⁷⁶ Such a policy could also increase racial diversity (if not as much as racial preferences) because disproportionate numbers of low-and-moderate-SES students are black and Hispanic. So socioeconomic preferences could confer net diversity benefits equal to or greater than racial preferences without the costs of feeding stereotypes, spurring resentment,

⁷⁵ Richard Sander, *Listening to the Debate on Reforming Law School Admissions Preferences*, 89 DENV. L. REV. 881 (2011).

⁷⁶ *Id.* We submit that the following from *Grutter*, 539 U.S. at 332, is equally true of low-and-moderate SES students: "All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training [for future leaders]."

and straining fundamental equal protection principles.

4. The principle that racial classifications must be a last resort⁷⁷ and the availability of a rich, untapped supply of low-and-moderate-SES students who could enhance diversity while also raising academic standards, point to the same conclusions, as stated below.

V. The Court Should Require Each State School That Seeks To Use Racial Preferences To Make Them No Larger Than Its Socioeconomic Preferences And To Disclose Their Size, Operation, And Effects And A Timetable For Phasing Them Out By 2028

1. Our purpose in this brief has been to bring to the Court's attention important bodies of research on the actual operation and effects of racial preference programs in higher education. The overall picture this research paints is a grim one:

--A widespread academic culture that, despite internal misgivings, feels constrained to embrace very large racial preferences;

--"Diversity" strategies that do not use race as part of an individualized consideration of individual circumstances, but rather rely almost exclusively on race at the expense of other forms of diversity – especially socioeconomic diversity;

⁷⁷ *E.g.*, *Parents Involved in Cmty Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 735 (2007); *id.*, at 789-90 (Kennedy, J., concurring in part and concurring in the judgment) ("individual racial classifications employed in this manner may be considered legitimate only if they are a last resort to achieve a compelling interest"); *Grutter*, 539 U.S. at 339; *Id.*, at 387-95 (Kennedy, J., dissenting).

--A determination among university administrators to minimize public awareness of the actual workings of large racial preferences, which in turn leads them to ignore or deny the large academic harms produced by those preferences.

2. This Court's prior opinions have in many ways made a bad situation worse. Nominally, *Bakke*, *Gratz* and *Grutter* all sought to tightly constrain the use of race in admissions, but did so in ways that aggravated underlying problems. *Bakke* banned quotas, but by allowing universities to place an indeterminate "weight" on race in the pursuit of diversity, simply changed the name of practices that continued on essentially as before. By upholding the larger, more race-focused preferences used by the University of Michigan Law School, while striking down the smaller, measurable preferences used by Michigan's undergraduate program, *Grutter* and *Gratz* signaled (whether intentionally or not) that enormous racial preferences were permissible so long as they were draped in an opaque cloak of "holistic" consideration. *Grutter* failed so thoroughly to ground critical ideas such as "strict scrutiny," "racial balancing," and "narrow tailoring," that Judge Garza gave up trying to set limits on what struck him as clearly improper practices by the University of Texas.

3. Perhaps the single most important step forward the Court can take is to mandate that any state university which wishes to take the race of students into account must do so in a way that makes both the university's current and planned use of racial preferences in admissions and the academic consequences thereof transparent both to applicants and (with careful privacy protections) to the public.

First, each school that wants to use racial preferences should provide each admitted student with information on the academic records of past enrollees with comparable entering credentials. For

example, a student admitted to the University of Texas with a given SAT score and high school GPA should receive the University's best estimate of the past graduation rates of comparable students, their college GPAs, and their rates of attrition from intended majors. Graduate programs, such as those in law and medicine, should also provide the best available estimate based on entering credentials of each applicant's chances of passing requisite licensing exams. Schools should be encouraged but not required to provide data on post-graduate employment as well.

Second, these data should be made publicly available in a form aggregated enough to protect individual privacy, but detailed enough so that interested observers can discern and report on the weight given in admissions to the various criteria on which decisions are based and estimate the likely success rates of students with particular credentials.

Third, experience suggests strongly that only mandatory public disclosure of each school's timetable for phasing out racial preferences by 2028 will lead schools to take that *Grutter* deadline seriously.

4. This type of transparency is very similar to that recommended by the United States Commission on Civil Rights when it issued a detailed report on the problem of "law school mismatch" in 2007.⁷⁸ Without transparency, strict scrutiny becomes a contradiction in terms and preferences a trap for the unwary.

5. Narrow tailoring would also be advanced by requiring universities that wish to take race into

⁷⁸ United States Commission on Civil Rights, AFFIRMATIVE ACTION IN AMERICAN LAW SCHOOLS, Briefing Report, April 2007.

account to demonstrate (through disclosure) that the weight assigned to race in admissions decisions does not exceed the weight given to socioeconomic factors. As discussed in Part IV, socioeconomic imbalances in college access and on elite campuses far exceed racial imbalances, and greater SES diversity can be achieved with much smaller preferences, and thus less risk to students, than is the norm with current racial preferences. Thus constraining the use of race in admissions makes it far more likely that racial preferences are not mechanically manipulated to achieve balancing goals, but instead really are part of a multi-faceted process of assessing an individual's contribution to a diverse campus community.

6. In short, the Court can make “narrow tailoring” meaningful, and foster a far healthier diversity on university campuses, by mandating transparency and barring the use of racial preferences that exceed a school's socioeconomic preferences.

CONCLUSION

For the foregoing reasons, the judgment of the Fifth Circuit should be reversed.

Respectfully submitted,

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