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 FOR *AMICUS CURIAE* ASSOCIATION OF AMERICAN LAW SCHOOLS IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS*[1]

Founded in 1900 to improve the legal profession through legal education, the Association of American Law Schools (AALS) is a non-profit association of 176 public and private law schools.[2] The core values of the AALS shape the efforts of the Association as well as define the obligations of its member schools. AALS Bylaw § 6-1. These values emphasize both excellent teaching (across a rigorous and dynamic curriculum) and scholarship, noting its relationship to the creation and dissemination of knowledge. The core values also embody other commitments, including diversity of viewpoints and of people. Member schools commit to support all of these objectives in an environment free of discrimination and rich in diversity among faculty, staff and students. The core values are framed by the idea that institutional autonomy should be honored whenever possible because wide latitude will encourage the development of strong and effective educational programs and learning communities. The core values combine to provide an environment where students

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[1] Pursuant to Rule 37.6, counsel for amicus states that no counsel for a party authored this brief in whole or in part, and that no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Petitioners and respondent have filed a letter of consent with the Clerk of the Court.

[2] The AALS is a voluntary association with requirements for membership widely regarded as indicators of a law school's quality. The Association does not serve an accreditation function.

have the opportunity to study law in an intellectually vibrant institution capable of preparing them for professional lives as lawyers instilled with a sense of justice and an obligation of public service. The AALS values and expects its member schools to value "selection of students based upon intellectual ability and personal potential for success in the study and practice of law, through a fair and non-discriminatory process designed to produce a diverse student body and a broadly representative legal profession." AALS Bylaw § 6-1.b.(v). Thus, among other things, the AALS requires that member schools "seek to have a faculty, staff, and student body which are diverse with respect to race, color, and sex." *Id.* § 6-3(c). Accordingly, the AALS filed an *amicus* brief in *Grutter v. Bollinger*, 539 U.S. 306 (2003), explaining why law schools should be permitted to take race into account in their admissions decisions. This Court relied on that brief, *see id.* at 332, to hold that diversity in legal education "is a compelling state interest that can justify the use of race" in law school admissions. *Id.* at 325. Consistent with the guidance provided by *Grutter*, most AALS member institutions consider race in their admissions processes.

Although this case concerns undergraduate admissions, the outcome may affect law schools, both by shaping the composition of their applicant pool and by constraining how they admit applicants from within that pool. First, law schools draw their students from more than 2,000 colleges and

universities across the United States,[3] many of them highly selective. Many of those undergraduate institutions now admit diverse classes, resulting in a diverse law school applicant pool. But if this Court announces a rule of law that substantially restricts the ability of colleges to enroll racially integrated student bodies, then law schools will no longer benefit from racially diverse applicant pools. Second, many law schools themselves take race into account in their admissions decisions. If the precedent set by this case forecloses consideration of race in higher education admissions, law schools will become less racially integrated.[4]

SUMMARY OF ARGUMENT

Although the University of Texas achieves some measure of racial diversity in its undergraduate student body through the nominally race-neutral means of a mechanical admissions formula, this Court should resist any temptation to announce a general rule foreclosing the use of race as one factor in a holistic admissions process. Such a rule would be counter-productive in many settings, especially law school admissions. In the law school context, a

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[3] A small number of students attend U.S. J.D. programs after receiving their prior education in other countries.

[4] Although the Equal Protection Clause binds only public institutions, this Court has long held that federal non-discrimination statutes such as Title VI of the Civil Rights Act of 1964 apply the same standards to all educational institutions that receive federal funds. *See Regents of Univ. of California v. Bakke*, 438 U.S. 265, 286-87 (1978). Thus, a decision here would affect all members of the AALS, public and private.

requirement of a mechanical admissions formula would be wildly impracticable, would not produce substantial racial diversity, and would undermine the ability of law schools to admit classes that are diverse along other dimensions.

Typical law school class sizes are more than an order of magnitude smaller than the class size of large public universities, and law schools draw their students from a wide range of undergraduate institutions. Guaranteeing admission to any percentage of the graduates of those institutions would result in vastly over-subscribed law school classes, even as it would exclude many better-qualified applicants.

To build excellent, diverse classes, law schools do not reduce any particular candidate to a number or a percentage. Instead, following this Court's guidance in *Grutter v. Bollinger*, 539 U.S. 306 (2003), law schools evaluate each applicant's record holistically, counting such academic factors as success in analytically demanding majors, intellectual curiosity and improvement over time, as well as such other factors as veteran status, work experience and hardships overcome. A mechanical admissions process would render such criteria irrelevant.

Moreover, a mechanical admissions process would undermine, rather than foster, racial diversity. The Texas Ten-Percent Plan produces some measure of racial diversity because it draws students from a secondary education system that exhibits a high degree of de facto segregation. The top ten percent of a virtually all-Latino school will be nearly all Latino. But with law schools drawing most of their applicants from integrated undergraduate

institutions, the use of a mechanical admissions procedure would lead to fewer minority admissions because of persistent racial gaps in test scores.

Given the role law schools play in training our national, state and local leaders, a requirement that institutions of higher education use nominally race-neutral application procedures would undermine the ability of law schools to build racially diverse classes and hamstring the ability of law schools to "cultivate a set of leaders with legitimacy in the eyes of the citizenry." *Grutter*, 539 U.S. at 332. Whatever the merits of the Texas Ten-Percent Plan in the context of a large public university, restricting law schools to using mechanical admissions standards would be devastating.

ARGUMENT

For the reasons expressed in the respondents' brief, the University of Texas's admissions plan is fully consistent with the Equal Protection Clause. The plan has permitted the University to achieve racially integrated classes through individualized consideration of each applicant rather than fixed quotas or racial balancing, and is therefore constitutional under this Court's precedent.

While this case involves the use of race in undergraduate admissions decisions, law schools also have important and distinctive interests in enrolling racially integrated classes. Because no race-neutral method exists for achieving racial diversity in law schools while fulfilling law schools' other important goals, it is critical that law schools continue to be able to consider race as one factor within their holistic admissions processes.

I. Law Schools Now Use Holistic Admissions Processes Consistent With This Court's Precedent To Enroll Outstanding Incoming Classes.

In *Grutter v. Bollinger*, 539 U.S. 306 (2003), *Gratz v. Bollinger*, 539 U.S. 244 (2003), and *Parents Involved in Community Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007), this Court set clear guidelines for how educational institutions may permissibly consider race in making enrollment decisions. Law schools, like other institutions of higher education, have tailored their admissions processes accordingly. In reliance on the Court's precedent, law schools use their educational judgment in constructing the best possible class. To do so, they employ holistic admissions processes where an applicant's race is one among many factors considered in evaluating how candidates will contribute to the law school and to the legal profession.

A. Law Schools Use Holistic Admissions Processes To Enroll Highly Qualified And Racially Integrated Classes Whose Members Have A Broad Range Of Talents, Perspectives, And Interests.

To understand how race is taken into account in law school admissions, one must understand the admissions process more generally. American law schools vary with respect to nearly all aspects of their academic programs, including student admissions. Nonetheless, their admissions procedures share important features. Guided in part by this Court's rulings, law schools select their incoming classes by considering many aspects of candidates' applications

in order to shape the best possible class. Rather than filling their classes solely in reliance on undergraduate GPAs and LSAT scores, law schools draw on a wealth of information about candidates' prior academic and work experience, their backgrounds, their professional goals, and their personal qualities. Schools use this information to determine whether a student is prepared for law school, will contribute to his or her classmates' education, and will succeed in the legal profession. In selecting candidates, law schools are not providing rewards to individual students for their past academic performance; rather, they are making educational judgments about how different applicants will interact with each other and contribute to the distinctive environment of the particular school and to the profession beyond. They recognize that the most promising class is not homogenous, but is diverse in many ways. Almost all law schools take an applicant's race into account in the context of this broader commitment to enrolling a diverse class.

1. The admissions process normally begins by determining whether an applicant has the ability to succeed at the particular law school. Even in evaluating a candidate's academic promise, law schools use a process that looks beyond a candidate's undergraduate GPA, class rank, and test scores.

To be sure, law schools do look at those measures. An applicant's class rank and undergraduate GPA provide evidence of capacity for legal study and enable law schools to compare students who attended the same institution. Standardized test scores are also relevant. They

provide some evidence of a candidate's capacity to perform law school work, while also allowing comparison of students across different institutions. There are some students for whom GPA, class rank, and LSAT scores are largely determinative: their performance may be so impressive that, absent some disqualifying factor in their file, a school admits them on that basis alone, or their performance may place them so low in a school's applicant pool that no further review is warranted. A school may also care about its median GPA and LSAT score because they affect the school's placement in some ranking systems. But a median is not the same as a mean. Because most students' scores will not affect a school's median, schools have flexibility to use their educational judgment both in selecting individual applicants and in crafting a class.

Most schools have concluded that, standing alone, GPA and test scores alone are too crude a measure of the intellectual capacities they seek. Law schools therefore consider numerous other factors to gauge many candidates' academic abilities.[5]

Law schools consider applicants' undergraduate major and, where relevant, their graduate training. Some fields of study are especially likely to provide students with skills necessary to succeed in law school. For example, fields that require analytic or persuasive writing provide a good foundation for law school. And studying important aspects of American

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[5] *See How Law Schools Determine Whom to Admit*, Law Sch. Admissions Council, http://www.lsac.org/jd/apply/whom-to-admit.asp. (All websites in brief last visited June 6, 2012.)

history, government, or economic life may also provide useful background. Some disciplines may be relevant to a particular area of legal study. For example, students who receive a science or engineering degree may be especially well qualified to pursue careers in intellectual property. Conversely, students who chose less demanding majors both may be ill prepared academically for law school and may be indicating a disinclination towards hard work.

Law schools additionally evaluate the individual classes that applicants have taken. A student who completes more than the number of classes required to graduate may demonstrate a healthy intellectual appetite. In evaluating an applicant's course-selection choices, context is critical. A transcript with a broad range of courses may indicate an intellectually curious mind, or a dilettante who flits from introductory class to introductory class. And a student who focuses only on a particular area of study may be indicating intellectual passion, or narrow-mindedness and risk aversion. Only a careful consideration of the transcript in light of other admissions materials will enable law schools to determine whether a student will excel or founder.

The trajectory of a candidate's performance may also be relevant. A candidate whose grades improved considerably over the course of her college career has indicated a capacity for intellectual growth and perseverance. That applicant may therefore be more impressive than a candidate who showed no academic improvement – even if the latter candidate's cumulative GPA is somewhat higher. And excellence

in graduate study may compensate for a less impressive undergraduate record.

Finally, law schools look at the quality of applicants' undergraduate institutions. A college that offers a rigorous education will better prepare its students for the analytic challenges of law school. Moreover, a student who performs well at a college that attracts many high-achieving peers has demonstrated exceptional academic merit. And some schools instill their graduates with particular qualities relevant to legal education. For example, a graduate of West Point brings a perspective that may not be shared even by other applicants with military experience. Similarly, students who attended colleges with distinctive educational missions may have unique approaches to their legal studies – whether they attended Berea College, with its requirement that students perform manual labor; or Deep Springs College, with its intense ranching experience; or Wellesley College, which remains all-female; or any of the wide range of religiously-affiliated institutions. Because students who have received rigorous undergraduate educations are better prepared for law school, law schools have a vital interest in the admissions decisions of selective undergraduate institutions. If those institutions are not open to a wide variety of students, then law schools will face a constricted pool of applicants.

2. Even after narrowing their applicant pools to include only academically qualified students, many schools still have many more applicants than available seats. In choosing among these students, law schools recognize that success in the law requires more than book smarts. Schools therefore use their

educational judgment to shape classes that are outstanding in more respects than past academic achievement. They look at a variety of non-academic factors that bear on the kind of lawyer an applicant will become.[6] Moreover, at every point law schools are concerned not only with the qualifications of individual applicants but also with the overall composition of their entering classes. They seek to enroll classes where a broad array of backgrounds, interests, and future plans are represented, so that students will enrich each other's legal education.

Law schools look for qualities that suggest that students will become outstanding future attorneys. Among other things, law schools look for evidence that a candidate has good judgment, potential for leadership, a commitment to public service, integrity, and passion. A candidate's prior work experience, her extracurricular activities, her personal statement, and her letters of recommendation may all indicate that she possesses these important qualities. Further, law schools with academic specialties may seek students with skills or interests in a particular area of law. For example, George Mason University School of Law offers a patent track in its JD program; Southwestern Law School in Los Angeles bills itself as "*the* place to study Entertainment Law"; the University of Houston Law Center has a distinctive focus on health law; and Vermont Law School claims the "largest and deepest environmental program of

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[6] *See Additional Admission Decision Factors*, Law Sch. Admissions Council, http://www.lsac.org/JD/Apply/additional-decision-factors.asp.

any law school."[7] How schools assess a student's potential for excellence in the profession may therefore vary from school to school.

Law schools also seek to represent a broad range of talents, perspectives, and interests within each class. They do so based on their judgment that students' educational experiences are improved in environments where each student "bring[s] to the classroom important and different perspectives." Association of American Law Schools, *Statement on Diversity, Equal Opportunity, and Affirmative Action* (1995). A student from the American West, for example, may bring a different approach to the study of water rights, property rights, or federalism than a student from the urban northeast. And a student who is herself a first generation American may have a different perspective on immigration issues than a student who is a Mayflower descendant. In attempting to enroll diverse classes, admissions officers consider many aspects of candidates' files – including their geographical and socioeconomic background, their extracurricular involvement, their prior professional experiences, and whether they have earned advanced degrees.

Among academically qualified applicants, no single factor is dispositive. Rigid quantitative values

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[7] *Patent Law Track*, George Mason Univ. Sch. of Law, http://www.law.gmu.edu/academics/tracks/patent_law; Sw. Law Sch., http://www.swlaw.edu/; *Health Law and Policy Institute*, Univ. of Hous. Law Ctr., http://www.law.uh.edu/healthlaw/; *Environmental Law Center*, Vt. Law Sch., http://www.vermontlaw.edu/academics/environmental_law_center.htm.

cannot capture the intellectual passion exhibited in a personal statement, or the wisdom attained through a prior career, or a history of adversity overcome. Moreover, law schools are concerned with constructing an excellent class rather than simply rewarding individual applicants for their past performance. Depending on the composition of the applicant pool, possessing a particular skill or background may make an applicant especially attractive one year to a degree unmatched in previous or subsequent years. And because each law school is unique, different schools will seek out different qualities in order to shape classes that will best contribute to the law school environment and the legal profession.

3. Within this multi-factored admissions process, as amicus explains in more detail in the next section of this brief, law schools consider race as one aspect of the diversity they aim to achieve. Law schools never make race dispositive of a candidate's admission, nor are quantitative weights attached to a candidate's race. Candidates, and not schools, choose whether and how to provide racially identifying information. When a candidate identifies herself as a racial minority, schools consider whether that fact – in conjunction with other information in her application such as her community service, her extracurricular activities, and her personal statement – may give her distinct perspectives that would deepen the school's classroom interactions or suggest her potential to creatively advance the law as a practicing attorney. As this Court acknowledged in *Grutter*, law schools seek "to assemble a student body that is not just racially diverse, but diverse along all

the qualities valued by the university." *Grutter*, 539 U.S. at 340. Race is but one factor evaluated by law schools in their attempt to assemble classes that are academically outstanding and diverse across many characteristics.

B. The Constitution Permits Law Schools To Engage In Race-Conscious Holistic Review.

In *Grutter v. Bollinger*, 539 U.S. 306 (2003), this Court affirmed the view expressed by Justice Powell in his controlling opinion in *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), that "student body diversity is a compelling state interest that can justify the use of race in university admissions." *Grutter*, 539 U.S. at 325. An admissions process will withstand constitutional scrutiny under *Grutter* so long as it is "flexible enough to ensure that each applicant is evaluated as an individual" and is not defined by his or her race. *Grutter*, 539 U.S. at 337. By contrast, the Court has made clear that a plan that assigns numerical weights to minority status and makes race "decisive" will fail constitutional scrutiny. *Gratz v. Bollinger*, 539 U.S. 244, 272 (2003) (citing *Bakke*, 438 U.S. at 317).

The Nation's institutions of higher education have heeded this Court's guidance. In particular, law school admissions plans involve exactly the kind of "nuanced, individual evaluation" within which this Court permits race to be used "as a component." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 790 (2007) (Kennedy, J., concurring in part and concurring in the judgment). First, race is not determinative for any applicant. In contrast to the policies at issue in *Gratz* and *Parents*

Involved, race alone never determines whether a student will be granted or denied admission to a given school. No applicant can accurately say that he would or would not have been admitted "but for" his race. Instead, law schools "consider[] race as one modest factor among many others" in an individualized assessment of each applicant. *Grutter*, 539 U.S. at 392-93 (Kennedy, J., dissenting). For example, a black applicant with a solid but not exceptional academic record might not have been admitted had he not also served in leadership roles in community organizations. Similarly, had a rejected white applicant with superb test scores not written a fatuous personal statement, the result in his case would have been different. The difference between these two applicants was not their race alone; their applications were considered as a whole. The holistic process therefore "do[es] not lead to different treatment based on a classification that tells each student he or she is to be defined by race." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 789 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

Second, rather than evaluating race superficially, law schools consider how an applicant's race may "contribute to the life and diversity of the Law School." *Grutter*, 539 U.S. at 315. Because a student's race is never a proxy for his perspective, law schools focus "on each applicant as an individual, and not simply as a member of a particular racial group." *Parents Involved*, 551 U.S. at 722. Law schools consider many different aspects of candidates' applications in evaluating the outlooks and experiences they may bring to the law school. The

role of race in this evaluation is often difficult to isolate. For example, schools may be particularly interested in an applicant who has suffered discrimination as a result of her racial identity. This applicant's prospects are not improved solely on account of her race; rather, it is her race in the context of her experience overcoming racial hostility that makes her a strong candidate who may bring a distinctive perspective about antidiscrimination law to classroom and lunchroom discussions. Similarly, a law school may admit a student who writes a compelling essay describing how his distant Hawaiian heritage has influenced his intellectual development. While his race may play a role in his admission, it is his race in conjunction with his writing skill and his self-reflection that make him an outstanding applicant. Because all aspects of students' applications are considered – including the nuances of their racial identities – the holistic process employed by law schools is fully compliant with *Grutter*.

Finally, law schools eschew the rigid racial quotas of the kind objected to by the *Grutter* dissenters. The majority and dissenting opinions in *Grutter* agreed that racial balancing is an impermissible means of achieving classroom diversity. Law schools accordingly do not seek a fixed proportion of racial minorities in each class; rather, they admit minority applicants in different numbers each year depending on the size and makeup of the applicant pool. At Yale Law School, for example, African-American, Native-American, and Latino students made up 20.1% of the first-year class in 2006. In 2008 this number dipped to 11% – a 45%

drop – before rising the following year to 18%. Similarly, the percentage of African Americans, Native Americans, and Latinos in Stanford Law School's 1L class grew from 18.5% in 2007 to 24.5% in 2011 – an increase of roughly a third. At the University of Virginia Law School, the proportion of African Americans, Native Americans, and Latinos in the first-year class fell by nearly one-half between 2008 and 2009 – from 13.4% to 7.4% – before doubling again in 2011 to 14.5%.[8] And at the City University of New York Law School, the proportion of African-American, Native-American, and Latino students dipped from 21.1% in 2006 to 12.1% in 2008, and then increased nearly two-fold to 23.6% in 2011.

Such fluctuation is to be expected from a process in which race is only one among many factors considered. Indeed, in his dissent in *Grutter*, Justice Kennedy approvingly cited enrollment numbers from Amherst College that showed comparable racial variation – from a minimum of 5.6% to a maximum of 11.5% over a period of ten years. *Grutter*, 539 U.S. at 391 (Kennedy, J., dissenting). The variation in minority student enrollment from year to year thus refutes any suggestion that holistic review is racial balancing in disguise. These numbers undercut any "inference" that law schools "compromis[e] individual assessment" in favor of racial quotas. *Id.* at 390-91.

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[8] Enrollment data from every accredited law school from 2006 through 2012 is available at *Official Guide to ABA-Approved Law Schools Archives*, Law Sch. Admissions Council, http://lsac.org/LSACResources/Publications/official-guide-archives.asp.

II. Racially Diverse Law Schools Are Critical To American Democracy And To The Quality Of Legal Education.

Law schools are an indispensable gateway to careers in public life. Since the time of de Tocqueville, lawyers have held a uniquely influential position within the American political system. Alexis de Tocqueville, *Democracy in America*, Vol. I, ch. xvi (1st ed., 1835) (Vintage ed. 1945). As this Court recognized in *Grutter*, law schools are "the training ground for a large number of our Nation's leaders." 539 U.S. 306, 332 (2003). The legitimacy of governmental institutions and the quality of legal education depend on legal education remaining racially integrated. Racial diversity in law schools is therefore a "compelling state interest." *Grutter*, 539 U.S. 306 at 325.

1. Racial diversity is essential to preserving the legitimacy of American government. Our Nation's "historic commitment to creating an integrated society," *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 797 (2007) (Kennedy, J. concurring in part and concurring in the judgment), requires that we "cultivate a set of leaders with legitimacy in the eyes of the citizenry." *Grutter*, 539 U.S. at 332. Thus, "the path to leadership [must] be visibly open to talented and qualified individuals of every race and ethnicity." *Id.*

Law school is the only gateway to leadership in one branch of the government. All federal judges and nearly all state judges are law school graduates. And although a law degree is not a prerequisite to elective office, many elected officials are lawyers as well. Four of the last eight U.S. Presidents, including the

sitting Chief Executive, graduated from law school. A majority of U.S. senators are lawyers, as are 148 members of the U.S. House of Representatives. Cong. Research Serv., *Membership of the 112th Congress: A Profile* 2 n.8 (2011). Half of all state governors are lawyers, as, of course, are all state attorneys general. Lawyers are disproportionately represented in state legislatures and other state and local elected bodies as well. Law school is also the only path to the exercise of the state's coercive power by the Executive, through federal, state and local prosecutors. Indeed, many governmental lawyers also exercise tremendous power within the Executive branch in other contexts, such as administrative law judges and agency counsel.

All law schools – whether public or private and whether national, regional or local in the source of their student bodies or the placement of their graduates – contribute to the pool of lawyers visibly exercising power, whether in local communities, counties, states or the federal government. Lawyers from a wide range of law schools also serve as leaders of civic organizations.

Diversity is therefore critical for *all* law schools because they all can serve as a pathway to the exercise of state power and to public office. For example, the U.S. Court of Appeals judges and the Senators and Congressmen who hold law degrees attended 120 different law schools. Many local and regional law schools serve as pipelines into key positions in local prosecutors' offices and state governments.

At the same time, a small group of law schools produces a remarkable share of Congress and the

federal judiciary. The most selective law schools include private schools such as the University of Chicago, Columbia, Cornell, Duke, Harvard, Georgetown, Northwestern, NYU, Penn, Stanford, and Yale, and public schools such as Berkeley, UCLA, and the Universities of Georgia, Michigan, North Carolina, Texas, and Virginia. These law schools alone account for 22 of the 100 senators and 44 of 436 members of the House of Representatives (including the nonvoting delegate from the District of Columbia). All nine members of this Court attended highly selective law schools, and 144 judges serving on the United States Courts of Appeals received an LL.B. or J.D. degree from one of this relative handful of law schools.[9]

Racially homogenous public bodies cannot maintain their legitimacy in an increasingly heterogeneous society. Members of the public – and members of minority groups in particular – will lose faith in organs of government that conspicuously fail to reflect our Nation's racial diversity. Just as all-white or all-Anglo juries lacked legitimacy in the eyes

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[9] Data about lawyers in Congress were taken from the American Bar Association, Governmental Affairs Office, http://www.americanbar.org/publications/governmental_affairs_periodicals.html. Data about the educational history of Court of Appeals judges were compiled from each court or judge's website.

While the most selective members of the AALS accept only a small fraction of their applicants, and a majority of AALS members accept fewer than half their applicants, even the least selective members turn away roughly a third of the individuals who apply.

of many Americans, *Batson v. Kentucky*, 476 U.S. 79, 87-88 (1986); *see also Powers v. Ohio*, 499 U.S. 400, 412-13 (1991), so too a nearly all-white or all-Anglo judiciary would lack legitimacy in contemporary society. And when the institutions charged with creating or executing the law are racially homogenous, "the rule of law is weakened as the people see and come to distrust their exclusion from the mechanisms of justice." Am. Bar Ass'n, *Diversity in the Legal Profession: The Next Steps* 9 (2010).

2. All lawyers, not just those exercising public power, operate in a multi-racial society and confront issues with racial implications. Lawyers frequently have to deal with clients, opposing counsel, judges, and government officials of different races and backgrounds. Working effectively across racial lines is critical to excelling as a lawyer in contemporary society. Legal education "better prepares students for an increasingly diverse workforce and society" if it occurs in racially integrated classrooms. *Grutter*, 539 U.S. 306 at 330 (quotation marks omitted).

Many law school courses are expressly concerned with questions of racial justice: constitutional law, employment discrimination and voting rights are just a few examples. Other courses, such as criminal procedure, immigration law and poverty law, are permeated with concerns about race. And racial issues arise even in classes where race is not a primary concern. For example, while much of property law is concerned with concepts like the rule against perpetuities and springing executory trusts, discussions of zoning or restrictive covenants can put race in the foreground.

Law school classrooms give students practice in discussing sometimes-charged issues with people of other races, backgrounds, and perspectives, as they will be called upon to do throughout their lives as lawyers. For many students of all races, college or law school represents their first opportunity to interact in substantive settings with members of other races. In a 1999 study on race relations within law schools, 50% of white law students reported having very little or no interracial contact while growing up. Gary Orfield & Dean Whitla, *Diversity and Legal Education: Student Experiences in Leading Law Schools* 11 (1999). Furthermore, black and Hispanic students are more isolated in their primary schooling today than at any time in the past forty years; two out of every five attend a school with 90% or more minorities. Gary Orfield, *Reviving the Goal of an Integrated Society: A 21st Century Challenge* 12 (2009). Law school, with its intensive focus on discussion and debate of controversial issues, therefore represents one of the first opportunities for many students of all races to engage substantively with members of other races. If this Court were to impose new restrictions limiting schools' ability to admit racial minorities, then law schools would not only fail to produce leaders that reflect society's diversity, they would also fail to prepare graduates to interact with the diverse society in which they will practice.

3. In addition to benefitting law students professionally, diverse student bodies also confer important pedagogical benefits. Law school prepares students for legal practice by exposing them to "the interplay of ideas and the exchange of views with

which the law is concerned." *Sweatt v. Painter*, 339 U.S. 629, 634 (1950). In such environments, students learn best by interacting with peers who have different views, backgrounds and life experiences. Educational pluralism encourages students to confront their assumptions and preconceptions. Nancy E. Dowd et al., *Diversity Matters: Race, Gender, and Ethnicity in Legal Education*, 15 U. FLA. J.L. & PUB. POL'Y 11 (2003). It also helps to foster critical thinking, as students become better problem-solvers when they bring different perspectives to bear on an issue. *See* P.L. McLeod, et al., *Ethnic Diversity and Creativity in Small Groups*, 27 SMALL GROUP RESEARCH 248 (1996). Because law school classes are usually discussion-based, much of what students take out of their classes will depend on the contributions of their peers. "[C]lassroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds." *Grutter*, 539 U.S. at 330 (quotation marks omitted). Thus, non-homogenous environments will considerably improve students' classroom experiences and their learning. It will make students into better lawyers.

Law schools therefore seek to secure diversity across a broad spectrum of characteristics. Admissions officers attempt to enroll students who represent a wide array of socio-economic backgrounds, geographical regions, moral convictions, and professional experiences. A student with considerable work experience, for example, can offer a perspective not replicable by a student who enrolled in law school directly after college. Having made hiring and firing decisions may have given the

small-business-owner-turned-law-student a distinct perspective on how motive should be shown in employment discrimination cases. And a student who grew up poor may offer insight about the benefits and failings of American welfare policy that an affluent student cannot.

Racial diversity can enrich a law school classroom as well. It remains inescapably true that members of racial minorities often possess experiences and perspectives not shared by their white peers. "Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters." *Grutter*, 539 U.S. at 333. Although the effect of racial diversity may be subtle in any given classroom, it cannot be doubted that a single-race (or nearly single-race) community, like a single-gender community, "is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables." *Ballard v. United States*, 329 U.S. 187, 193-94 (1946).

Token minority representation will not produce the kind of learning environment that fosters an excellent legal education. Diversity among minority students is itself important. Without it, minority students will face the burden of serving as standard-bearers for their race. True racial diversity will improve the classroom experience not because minorities "express some characteristic minority viewpoint," but because diversity will "diminish[] the force of such stereotypes" by demonstrating that all students, even students of the same race, have

differing outlooks and experiences. *Grutter*, 539 U.S. at 333 (quotation marks omitted). Students will also learn from the fact that their discussions across racial lines expose commonalities, even at times where they are least expected.

III. Texas's Top Ten Percent Plan And Similar Mechanistic Processes Will Not Work For Law Schools.

A holistic admissions process is the only way for most law schools – and indeed, most educational institutions – to achieve racial diversity and meet their pedagogical objectives. The University of Texas's top ten percent admissions plan – or any class rank-based admissions plan – cannot work at the law school level, or for most undergraduate institutions either. While an admissions plan that relies solely on students' class rank may achieve a semblance of racial diversity at some large public undergraduate universities, this success could not be replicated for law schools. Rather, law schools that admitted students based solely on class rank would fail to achieve racial integration and would sacrifice along the way many of the interests holistic admissions processes serve.

Furthermore, a top ten percent plan cannot be rendered suitable for law schools through the addition of other easily quantifiable factors such as GPAs and test scores. The adoption of an entirely mechanistic admissions process – and the rejection of holistic review – would undercut law schools' considered judgment about how to produce excellent lawyers.

A. The Texas Ten Percent Plan Would Be Impossible For Law Schools To Administer, And Any Other Mechanical Admissions Plan Would Sacrifice Important Pedagogical Values.

The Texas ten percent plan originated as a political response to the Fifth Circuit's decision in *Hopwood v. Texas*, forbidding the University of Texas from engaging in any race-conscious affirmative action. 78 F.3d 932 (5th Cir. 1996). "[A] large, if not primary, purpose" of the Texas legislature's requirement that Texas state universities accept Texas high school seniors in the top ten percent of their class was to increase the number of minority students at those schools. *Fisher v. University of Texas*, 631 F.3d 213, 224 (5th Cir. 2011). While this plan – in conjunction with a holistic review process for some class seats – achieves some level of racial integration for the University of Texas, the same would not be true for law schools.

1. It would be logistically impossible for law schools to use a top ten percent plan as the University of Texas does for undergraduate admissions. The largest entering law school classes in the country have fewer than 600 students, and many law schools, including state universities, enroll far smaller cohorts. To fill these classes, law schools draw their applicants from a nationwide pool of more than 2000 degree-granting undergraduate institutions. For example, at the University of Texas Law School, where state law mandates that 65% of

students be Texas residents, 143 undergraduate institutions are represented in a class of approximately 400 students.[10] In 2011, the University of Montana School of Law's incoming class of 84 students represented 50 undergraduate colleges and universities.[11] Therefore, unlike large state undergraduate programs in Texas, California, and Florida, no law school enrolls a class large enough to guarantee admission even to the top student graduating from each undergraduate university that might send it an applicant.[12]

Of course, a top ten percent plan would be even more impracticable. The U.S. Department of Education estimated that more than 1.7 million bachelor's degrees will be awarded in 2012.[13] If the University of Texas School of Law employed a ten percent plan it would be required to guarantee admission to approximately 172,000 candidates, including students whose undergraduate course of study has left them completely ill-suited for law

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[10] *UT Law Admissions: Quick Facts*, Univ. of Texas L. Sch., http://www.utexas.edu/law/admissions/jd/quickfacts.php.

[11] *Admissions*, Univ. of Montana Sch. of L., http://www2.umt.edu/law/admissions/default.htm.

[12] For example, Yale Law School normally accepts around 250 applicants every year to fill a class of approximately 200 students. If it were to automatically admit any valedictorian who applied, it would have to increase its class size dramatically, and would have to reject many of the students it now accepts.

[13] National Center for Education Statistics, *Table 279: Degrees Conferred By Degree-Granting Institutions*, http://nces.ed.gov/programs/digest/d10/tables/dt10_279.asp.

school. Even a top one percent plan would guarantee admission to 17,200 candidates. Naturally, not all students at the top of their class would choose to attend law school. However, even with the vast majority of qualifying applicants opting out, law schools would still be faced with inestimably large entering classes.

2. Besides being logistically impossible, any plan that automatically admits students based on class rank, or any other unidimensional quantitative measure, would undermine the academic quality of law school classes. These measures capture only one aspect of an applicant's academic promise and do virtually nothing to capture the remaining abilities an applicant might have. For example, it is only by considering class rank in conjunction with undergraduate institution, major, and transcript that law schools are able to determine which students are most academically prepared for the rigor of law school classes. Variations in the academic strength of different colleges and universities mean that class rank cannot serve as a consistent measure of relative academic achievement. Further, differences within courses of study, even at the same institution, can make class rank a poor proxy for academic achievement. Kevin Rask, *Attrition in STEM Fields at a Liberal Arts College: The Importance of Grades and Pre-Collegiate Preferences*, 29 ECONOMICS OF EDUCATION REVIEW 892 (2010) (showing a gap of up to .58 points in GPA between majors at a single college). A student at College X with a 3.3 GPA who majored in chemistry, for example, may have a far lower class rank than the accounting major with a 3.8, but the chemist may actually be a far more

promising law student. Finally, rote examination of class rank, GPA, or test scores fails to capture positive grade trajectory, a willingness to take challenging classes, and breadth and depth in class selection – all indicators relied on by law school admissions officers when making educational judgments about which applicants to accept and reject.

3. Academic excellence is not the only quality that a class rank plan or similar mechanical reliance on purely academic factors would sacrifice. Law schools also seek to over-represent certain types of students in their entering classes, such as individuals with advanced academic degrees, a strong commitment to public service or military experience. Under mechanical plans, law schools would no longer be able to accept these students unless they happen to satisfy a formula that ignores these qualities. Indeed, because mechanical admissions plans rely on academic metrics to the exclusion of other relevant admissions factors, such plans would prevent law schools from admitting whole categories of students who may be strong candidates despite having somewhat less impressive academic records.

Financially Disadvantaged and First Generation College Students: Mechanical admissions plans handicap financially disadvantaged and first-generation college students. Students who can afford to attend college only by working part-time or putting in extra hours to keep athletic or ROTC scholarships may struggle to match the GPAs of wealthier college students without these time commitments. Furthermore, students without a family history of college often struggle in the first few years; plans

that focus on class rank or GPA would make it far harder to overcome this early adversity, regardless of success the student afterwards achieved. *See* Ernest T. Pascarella et al., *First-Generation College Students: Additional Evidence on College Experiences and Outcomes*, 75 JOURNAL OF HIGHER EDUCATION 249 (2004). Because mechanical admissions plans ignore these factors, law school classrooms could lose the insight these students bring.

Military Veterans: Many law schools value military experience for a number of reasons. First, military experience can signal traits important for success in law schools and as lawyers: professionalism, discipline and character. Additionally, veterans, particularly those who have served in combat zones, may bring a unique perspective to the classroom when discussing legal issues such as detainee rights or the rule of law in Afghanistan or Iraq.[14] Finally, many law schools now recognize the importance of providing legal resources to veterans. For example, a number of law schools, including John Marshall Law School, Yale Law School and Widener Law School have established veterans law clinics.[15] These projects may have special relevance to veteran law students.

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[14] *See* Tim Hsia, *An Ex-Soldier Writes*, N.Y. Times At War Blog (Jan. 10, 2011), http://atwar.blogs.nytimes.com /2011/01/10/an-ex-soldier-writes/ (discussing his experience as a veteran 1L).

[15] *Veterans Legal Support Center*, John Marshall Law School, http://www.jmls.edu/veterans/; *Veterans Legal Services Clinic*, Yale Law School, http://www.law.yale.edu/academics/

However, despite being equally qualified, some military veterans may be disadvantaged by a strict mechanistic admissions process. The grading at service academies is strict and includes physical fitness and leadership. Enlisted military men and women often balance obtaining undergraduate degrees with jobs and families. Furthermore, many military members study for or take the LSAT while deployed, often to combat zones. These distractions and difficulties mean that numbers may under-represent a veteran's academic potential, and the process itself ignores the unique perspective and experience that veterans can bring to a law school. Currently, law schools consider applications in light of the applicants' circumstances; adoption of a strict mechanistic process may cripple law schools' ability to accept veterans.

Late Bloomers: Strict class rank or GPA comparisons exclude students who mature or grow into their academic potential later than average. Some students simply have learning styles that do not enable them to show their full potential in undergraduate classes. For example, students who learn experientially rather than theoretically may be disadvantaged in some majors, such as math or economics. *See* Alice Y. Kolb & David A. Kolb, *Learning Styles and Learning Spaces: Enhancing Experiential Learning in Higher Education*, 4 ACADEMY OF MANAGEMENT LEARNING & ED. 193, 196-97 (2005). Other students are not emotionally

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veteranslegalservicesclinic.htm; *Veterans Law Clinic*, Widener Law School, http://law.widener.edu/vetclinic/.

mature during their college years, which may affect their college performance. But both of these groups may have post-graduate experience indicating that they will make excellent law students and lawyers.

A class rank or GPA metric will fail to capture these candidates' abilities. In contrast to a holistic system, a mechanical admissions plan would prevent law schools from admitting students whose lower GPA or class rank are offset by the wisdom and experience they acquired in the real world. Because people with many learning styles can make good lawyers, and law schools benefit from a mix of learning styles in the classroom, admissions officers should be able to consider these students.

Prodigies: It is not just late bloomers who would be excluded by mechanical admissions plans. These plans tend to overlook applicants with extraordinary abilities and achievements but comparatively less college success. For example, looking strictly to class rank could dramatically diminish the number of Olympic medalists, award-winning novelists and dorm room entrepreneurs that law schools can enroll. These achievements might be relevant to assessing a student's application in two ways. First, some deficiencies on a transcript may be excusable if the applicant was pursuing her other talent at the time. Second, some achievements show hard work, dedication or other qualities relevant to a law school classroom and to performance in the profession. For example, a student who built his own business may have shown initiative, imagination and persistence, and might also have experiences that would enrich a classroom discussion of venture capital.

Academically Adventurous Students: Mechanical admissions plans punish students who have taken intellectual risks, for example, by enrolling in demanding classes or classes outside their areas of expertise. The practice of law values understanding or experience in multiple fields and the ability to engage and struggle with difficult material. However, learning these skills often comes at the cost of lower grades in unfamiliar fields. Mechanical admissions plans do not reward students for this engagement – indeed, they punish students for it.

Plans that focus exclusively on class rank or GPA create perverse incentives for applicants. They discourage students from attending competitive undergraduate institutions and from taking difficult classes or majors. *See Gratz*, 539 U.S. at 304 n.10 (Ginsburg, J., dissenting). Students might hesitate to take classes outside of their comfort zone, and might avoid extracurricular involvements that risk deflecting time and energy away from studying. College students would only be harmed by passionate extracurricular interests; students might avoid taking on responsibilities or leadership positions, particularly if these positions could harm their grades.

B. Mechanical Admissions Plans Would Reduce Racial Diversity In Law Schools.

Not only would mechanical admissions plans at the law school level diminish the quality of legal education and the lawyers it produces, but they would actually reduce racial diversity.

Whatever racial diversity the Texas ten percent plan produces comes from a distinctive and

unfortunate characteristic of primary and secondary education in Texas. Texas high schools exhibit high degrees of de facto racial segregation. Marta Tienda & Sunny Xinchun Niu, *Capitalizing on Segregation, Pretending Neutrality: College Admissions and the Texas Top 10% Law*, 8 AM. LAW ECON. REV. 312 (2006); *see also Fisher v. University of Texas*, 631 F.3d 213, 240-41 (2011). The ten percent plan produces diversity at the university level because the top ten percent of students from an all-Latino high school will all be Latino. By contrast, the vast majority of universities and colleges from which law schools draw their students are integrated. It would be impossible to assure racial diversity among the group of top graduates from these schools. Therefore, even if it were feasible to accept law school applicants based on class rank, adopting such a plan would do little to promote racial diversity in law schools.

And although they would be counterproductive with respect to preserving racially integrated legal education, adoption of such plans in the hopes that they will produce racial diversity without race being expressly taken into account would not even serve the value of color-blindness. Government policies that are ostensibly race neutral but "unexplainable on grounds other than race" must undergo the same scrutiny as explicitly race-conscious policies. *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977); *see also Shaw v. Reno*, 509 U.S. 630, 643-44 (1993). A "top x percent" plan adopted for the purpose of enrolling more minority students is no less race-conscious than the holistic admission plans that law schools use today – only less effective.

IV. A Race-Blind Holistic Admissions Process Is Not A Realistic Alternative To The Existing Form Of Holistic Review.

If law schools are to achieve racial diversity, a race-blind holistic admission process is not a reasonable alternative to the current system. Such a process would not produce racially integrated classes; further, a holistic process is inherently race-conscious.

1. Large racial disparities in quantitative selection criteria make it impossible for a race-blind process to produce an integrated class. It remains an unfortunate fact that there are substantial gaps between the LSAT scores and GPAs of African-American and Latino students and those of their peers. *See* Sarah E. Redfield, *Diversity Realized: Putting the Walk With the Talk for Diversity in the Legal Profession* 49 (2009).

These disparities are often the product of differences in family wealth, differential access to educational opportunities or "stereotype threat."[16] As a result, they often do not accurately capture a candidate's potential to become an excellent lawyer. An admissions process that forbids any consideration

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[16] *See* Wayne J. Camara & Amy Elizabeth Schmidt, *Group Differences in Standardized Testing and Social Stratification*, College Board Report No. 99-5 (1999), *available at* http://professionals.collegeboard.com/profdownload/pdf/rr9905_3916.pdf; Joshua Aronson et al., *The Effects of Stereotype Threat on the Standardized Test Performance of College Students*, *in* Readings About the Social Animal 400, 402-403, 411 (Elliot Aronson ed., 2004).

of race will be unable to accurately assess a minority candidate's qualifications.

At many law schools, the pool of academically qualified applicants is larger than the size of the incoming class. Racial differences in GPAs and test scores mean that this pool may be disproportionately non-minority. If a school cannot take race into account at all, its admitted class will tend to reflect the racial composition of this non-diverse pool. Therefore, to achieve racial integration, law schools must be able to oversample for minority students within the pool of qualified applicants, just as law schools admit more than a proportionate number of veterans and students with advanced degrees, for example, in order to produce a class with significant enrollments of these students.

2. In addition to failing to produce racial diversity, a race-blind holistic admissions process would be unadministrable. A holistic admissions process by its very nature conveys racial information to law school decision-makers. Many factors in the admissions decision are therefore inextricably intertwined with race. For example, a student may write an essay about his desire to attend law school due to his history confronting racial discrimination. Another student may draw on the leadership experience he gained as the president of his college's Latino Students Association, in a discussion of his career goals. A student may discuss her experience growing up in an immigrant household, or her capacities to build upon her native language skills, or reflect upon the lessons she gleaned from her cultural heritage. Law schools cannot meaningfully evaluate this information as part of a holistic admissions

process while ignoring that it is related to the applicant's race. As this Court has recognized in the electoral redistricting context, the most that can be realistically achieved is that race will not "predominate[]" in government decision-making. *See Miller v. Johnson*, 515 U.S. 900, 916 (1995); *see also Shaw v. Reno*, 509 U.S. 630, 646 (1993). And, as with redistricting cases – where race is one consideration along with "age, economic status, religious and political persuasion, and a variety of other demographic factors," *Shaw v. Reno,* 509 U.S. 630, 646 (1993) – the use of race as one factor among many in law school admissions is constitutionally permissible.

If the nuanced use of race that law schools currently employ in compliance with this Court's precedents – from *Bakke* through *Grutter* to *Parents Involved* – is held impermissible, the only true alternative would be to strip away every indication of race from candidates' applications. But stripping applications of all evidence of extracurricular activities, geography, recommendations, essays, background, passions, and community service is anathema to a holistic process and to the goal of producing excellent lawyers who can function effectively in our society.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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August 13, 2012