

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 AMICI CURIAE
THE COLLEGE BOARD AND THE NATIONAL
SCHOOL BOARDS ASSOCIATION ET AL.
IN SUPPORT OF RESPONDENTS**

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INTEREST OF *AMICI CURIAE*¹

Amici represent elementary, secondary, and postsecondary education organizations committed to the success of all students, upon which their futures in the workplace and as citizens will be shaped. With a recognition of the vital role of diversity in the lives of students, these organizations address the goals to which they and their members aspire, and their reliance on long-standing principles of this Court that have informed their diversity-related efforts to foster success for the benefit of all students.

Founded in 1900, the **College Board** is a mission-driven not-for-profit organization that connects students to college success and opportunity. Today, its membership includes more than 6,000 of the world's leading educational institutions dedicated to promoting excellence and equity in education. Each year, the College Board helps more than seven million students prepare for a successful transition to college through programs and services in college readiness and college success — including the SAT® and the Advanced Placement Program®. The organization also serves the education community through research and advocacy on behalf of students, educators, and schools.

¹ No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae* or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

The **National School Boards Association** ("NSBA") is a nonprofit organization representing state associations of school boards, and the Board of Education of the U.S. Virgin Islands. Through its member state associations, NSBA represents over 90,000 school board members who govern approximately 13,800 local school districts serving nearly 50 million public school students. NSBA regularly represents its members' interests before Congress and federal and state courts and has participated as *amicus curiae* in many school diversity cases.

The College Board and NSBA are joined in this brief by eleven organizations whose members include educational leaders, schools, colleges, universities, and other institutions dedicated to improving education in America: **American Association of College Registrars and Admissions Officers, American Association of Colleges for Teacher Education, American Association of School Administrators, Association of Teacher Educators, Council of Chief State School Officers, Horace Mann League, National Association for College Admission Counseling, National Association of Independent Schools, National Association of Secondary School Principals, Public Education Network, and Texas Association of School Boards Legal Assistance Fund.**

SUMMARY OF THE ARGUMENT

The ability of America's educators to help students achieve excellence by providing the kinds of opportunities and experiences students will need as they prepare for careers and citizenship in the 21st Century is dependent upon many factors, including the diversity among peers with whom they interact. From the elementary to the postsecondary context, where the establishment of a sufficiently diverse learning environment is often essential to educational success, race and ethnicity still matter.

The American workplace is diverse and global, and becomes more so each year. Success is dependent upon an individual's ability to engage with diversity of all kinds, be it diversity of ideas or cultures or diversity of race and ethnicity. Indeed, the nation's future depends on ensuring that pathways exist that exhibit such diversity, with education settings being among the most critical. Accounting for the reality of the current and evolving American workforce necessarily includes providing the learning experiences that will facilitate student success in a diverse world, which in turn necessitates considerations of achieving diversity within educational institutions—including, but not limited to, racial and ethnic diversity.

Decisions regarding who to admit to postsecondary institutions have historically been judged to be among the cornerstones of academic freedom,

meriting deference in the establishment of mission-oriented goals and objectives that are both grounded in evidence and central to institutional success. It is therefore essential that this Court preserve the ability of higher education admissions officers to render mission-informed holistic judgments based upon the background qualities, characteristics, and experiences of applicants—consistent with the current, rigorous federal nondiscrimination standards and framework that have guided such efforts for decades.

Academic judgments inherent in higher education admissions involve considerations of numerous factors regarding student applicants, which, in combination, are essential in the formation of classes in which students will expand their horizons, have their world views sharpened and challenged by exposure to other viewpoints and experiences, and prepare for productive and engaging lives. Race and ethnicity often constitute a small but vital part of that overall mix of factors. To eliminate or materially alter the current legal framework that preserves the foundation for holistic judgments informed by these factors (that may or may not include race and ethnicity) would undermine the investment that thousands of institutions have made in defining themselves and aligning policies and practices to concrete inquiries derived from this Court's teachings. Under current law, educators continue to adhere to a workable legal framework that has guided diversity efforts for decades—as a foundation for achieving success for students, as well as for the institutions these students attend and the

society in which they will enter as productive workers and engaged citizens.

ARGUMENT

I. THIS COURT SHOULD AFFIRM THAT 21ST CENTURY EDUCATION GOALS ALIGNED WITH EFFORTS TO ADVANCE ECONOMIC SUCCESS AND PROMOTE THE CONTINUED VITALITY OF OUR DEMOCRACY ARE FURTHERED BY DIVERSITY.

This Court has consistently recognized that in educational settings, the benefits of diversity are compelling. Throughout the education spectrum, this Court has recognized the relationship of diversity (including racial and ethnic diversity) to enhanced teaching and learning, as well as its role in preparing students for productive lives in the workforce and in society.² In the postsecondary

² See *Grutter v. Bollinger*, 539 U.S. 306, 330-31 (2003) (recognizing the compelling interest associated with the educational benefits of diversity, including those of improved teaching and learning, preparation for the workforce in a global economy, and more—with emphasis on developing skills that enhance communication and that mitigate stereotypes); *Gratz v. Bollinger*, 539 U.S. 244, 268 (2003); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (PICS)*, 551 U.S. 701, 797-98 (2007) (Kennedy, J., concurring in part and concurring in the judgment) ("A compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue. Likewise, a district may consider it a compelling interest to achieve a diverse student population."); *id.* at 865 (Breyer, J., dissenting) (agreeing, on behalf of four Members of the Court, that "avoiding racial

context, in particular, the benefits associated with diversity include improved teaching and learning through which critical and complex thinking and problem solving abilities are enhanced;³ in addition, such diversity advances the development of skills associated with communication, collaboration, and teamwork—which, in turn, promote creativity and innovation.⁴ In the elementary and secondary setting, as well, diversity not only contributes to the achievement of students, it also contributes positively to the development of citizenship traits, transmission of cultural norms, and growth of interpersonal and social skills that students will need to be productive and thriving citizens of a democratic nation. In this setting, diversity plays "an important role in transmitting society's culture and values to its young, as well as giving them the appropriate knowledge and skills for leading productive and fulfilling adult lives."⁵

isolation' and 'achiev[ing] a diverse student population' [are] compelling interests").

³ See generally ANTHONY LISING ANTONIO ET AL., EFFECTS OF RACIAL DIVERSITY ON COMPLEX THINKING IN COLLEGE STUDENTS (2003), available at <http://www.stanford.edu/~aantonio/psychsci.pdf>; T.K. BIKSON & S. A. LAW, RAND REPORT ON GLOBAL PREPAREDNESS AND HUMAN RESOURCES: COLLEGE AND CORPORATE PERSPECTIVES 15-19 (1994); see also Patricia Gurin et al., *Diversity and Higher Education: Theory and Impact on Educational Outcomes*, 72 HARVARD EDUC. REV. 330, 330-36 (2002).

⁴ See Neal Lane, *Increasing Diversity in Engineering Workforce*, 29 THE BRIDGE, No. 2, 15-19 (Summer 1999); Charlan J. Nemeth, *Differential Contributions of Majority and Minority Influence*, 93 PSYCH. REV. 23, 23-32 (1986).

⁵ Jomills Henry Braddock II, *Looking Back: The Effects of Court-Ordered Desegregation*, in FROM THE COURTROOM TO THE

These educational interests today are, if anything, more clearly compelling than in decades past.⁶ Long identified as essential to the missions of many postsecondary institutions and school districts in the United States, diversity has emerged as central to our nation's overarching goals associated with educational excellence and the preparation of individuals to contribute meaningfully to our rapidly changing global workforce and to the communities in which they will live.

Indeed, a growing consensus regarding "[m]ust [h]ave' skills," ELENA SILVA, EDUC. SECTOR, MEASURING SKILLS FOR THE 21ST CENTURY 2 (2008), reflects that students must know and be able to "master core academic content; *think critically and solve complex problems; work collaboratively; communicate effectively*; and be self-directed and able to incorporate feedback." ALLIANCE FOR EXCELLENT EDUC., A TIME FOR DEEPER LEARNING:

CLASSROOM: THE SHIFTING LANDSCAPE OF SCHOOL DESEGREGATION 3, 7 (Claire E. Smrekar & Ellen B. Goldring eds., 2009). Studies have shown that "children exposed to racially diverse peers in the classroom exhibit reduced adherence to racial stereotypes and reduced racial prejudice, and they are more willing to engage in voluntary interactions with peers of a different race." *Id* at 11.

⁶ See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 (1978) (opinion of Powell, J.) (citations omitted) (maintaining that "it is not too much to say that the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples" and that "our tradition and experience lend support to the view that the contribution of diversity is substantial"); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (similar); *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in result).

PREPARING STUDENTS FOR A CHANGING WORLD 2 (2011) (emphasis added). These expectations, along with the emerging consensus state standards that are defining what students should know and be able to do as they graduate from high school, are fully aligned with the aims of postsecondary education.⁷

⁷ Support for more demanding and relevant educational standards has led 45 states and the District of Columbia to adopt the "Common Core State Standards," which establish evidence-based English/language arts and mathematics standards aligned to college and work expectations. *See About the Standards*, COMMON CORE STATE STANDARDS INITIATIVE, <http://www.corestandards.org/about-the-standards> (last visited July 30, 2012). Adoption of the Common Core signifies recognition among the vast majority of states that "the competition for jobs is now an international one [and]... that we needed a new body of standards that truly prepared kids for the 21st century and to compete in an international environment," *David Coleman*, YOUTUBE (Oct. 26, 2011), <http://www.youtube.com/watch?v=EBjIC-g5Psk>; and that the goals of "teaching students to think critically, giving them the skills they will need in college and careers, and preparing them to succeed in a global economy" is essential. Gene Wilhoit, *States Raise the Bar with Standards Implementation*, EDUC. WK., <http://www.edweek.org/ew/articles/2012/06/22/36wilhoit.h31.html> (last visited July 29, 2012); *see also* LINDA DARLING-HAMMOND & FRANK ADAMSON, STANFORD CTR. FOR OPPORTUNITY IN POLICY EDUC., *BEYOND BASIC SKILLS: THE ROLE OF PERFORMANCE ASSESSMENT IN ACHIEVING 21ST CENTURY STANDARDS OF LEARNING 1* (2010) ("Genuine readiness for college and 21st century careers, as well as participation in today's democratic society, requires...much more than 'bubbling in' on a test. Students need to be able to find, evaluate, synthesize, and use knowledge in new contexts, frame and solve non-routine problems, and produce research findings and solutions. It also requires students to acquire well-developed thinking, program solving, design, and communication skills."); P'SHIP FOR 21ST CENTURY SKILLS, 21ST CENTURY SKILLS, EDUCATION, AND COMPETITIVENESS 6 (2008).

Indeed, the vital interest in equipping tomorrow's workforce and citizens with the experiences and skills they will need to succeed is manifested in higher education's obligation to the students it educates *and* to the society that it serves. *See* WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* 280-86 (1998). Thus, to meet the challenges of the day, educators throughout the secondary and postsecondary spectrum have embraced a commitment to ensuring that America's students are globally competitive, just as they remain focused on the corresponding core interests that have defined education's mission for generations.

To fulfill these aims effectively, the continuing importance of considerations of race and ethnicity—including within the institutions that are charged with preparing students for life as productive workers and contributing citizens—remains central. *See Grutter v. Bollinger*, 539 U.S. 306, 330-31 (2003) (finding that benefits associated with higher education's diversity goals are "substantial," "important," "laudable," "real," and "pivotal").⁸ These national interests are widely reflected within a varied array of postsecondary institutions in their

⁸ Indeed, this Court has recognized that goals of diversity and academic excellence are complementary, not competing goals. *See Grutter*, 539 U.S. at 331 (concluding that "our country's...most selective institutions must remain both diverse *and* selective"); *id.* at 339 (stating that narrow tailoring does not "require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups").

articulation of institution-specific core principles, many of which have been developed in the context of this Court's longstanding guidance. In a 2003 survey, almost three-quarters of colleges and universities indicated that they included a commitment to diversity in their institutional mission statements, with over two-thirds of responding institutions reporting an express commitment to racial and ethnic diversity as part of that commitment. *See* NAT'L ASSOC. FOR COLL. ADMISSION COUNSELING, DIVERSITY AND COLLEGE ADMISSION IN 2003: A SURVEY REPORT x (2003).⁹

⁹ *See also* GRETCHEN W. RIGOL, COLL. BD., ADMISSIONS DECISION-MAKING MODELS: HOW U.S. INSTITUTIONS OF HIGHER EDUCATION SELECT UNDERGRADUATE STUDENTS app. A (2003) [hereinafter RIGOL, ADMISSIONS MODELS] (listing illustrative institutional policy statements regarding admissions policies and enrollment goals reflecting institutional commitments to, e.g., enrolling a "diverse student body, full of talented and interesting individuals"; achieving a "rich learning environment ...with students whose life experiences and world views differ significantly from their own"; and enrolling students "who bring a diversity of talents, skills, viewpoints, and experiences to the University"). A decade later, that landscape has not changed. Illustrative mission-based statements included in Appendix B to this brief reflect a common focus on student diversity as integral to institutional missions and success. *See also infra* Part III.

As these forward-looking, mission-oriented statements reflect, diversity-related education goals and the race-conscious strategies that may be associated with them are not coextensive with policies associated with remedial aims. *See Grutter*, 539 U.S. at 328 (holding that race-conscious policies associated with diversity goals are legally distinguishable from "affirmative action" policies designed to remedy past discrimination); *PICS*, 551 U.S. at 791 (Kennedy, J., concurring in part and concurring in the judgment).

Diversity as an institutional priority and point of focus comes as no surprise, given that many of our nation's fastest-growing economic sectors require that workers have higher levels of reasoning, problem-solving, and interpersonal skills¹⁰—skills enhanced by experiences among diverse peers.¹¹ To the degree, then, that our nation's education system is able to serve students in diverse learning environments, we will better prepare our citizenry for a global economy that demands professionals who can work together effectively and productively, where differences of backgrounds and experience are foundations for—not obstacles to—success.

Consistent with the views expressed by Members of this Court, educators throughout our nation recognize that there is still work to be done: "Our highest aspirations are yet unfulfilled." *Parents Involved in Cmty. Sch. v Seattle Sch. Dist. No. 1*

¹⁰ See ANTHONY P. CARNEVALE & DONNA M. DESROCHERS, U.S. DEP'T OF EDUC., OFFICE OF VOCATIONAL AND ADULT EDUC., THE MISSING MIDDLE: ALIGNING EDUCATION AND THE KNOWLEDGE ECONOMY 15-19 (2002).

¹¹ See ASS'N OF AM. COLL. AND UNIV. AND HART RESEARCH ASSOCIATES, RAISING THE BAR: EMPLOYERS' VIEWS ON COLLEGE LEARNING IN THE WAKE OF THE ECONOMIC DOWNTURN 1-2 (2010) (explaining that more than 70 percent of employers "believe that colleges should place greater emphasis on a variety of learning outcomes . . . which include . . . [t]eamwork skills and the ability to collaborate with others in diverse group settings"); CONFERENCE BD. ET AL, ARE THEY REALLY READY TO WORK? EMPLOYERS' PERSPECTIVES ON THE BASIC KNOWLEDGE AND APPLIED SKILLS OF NEW ENTRANTS TO THE 21ST CENTURY U.S. WORKFORCE 49 (2006) (placing ability to handle diversity and to participate in teamwork and collaboration as two of the top five work-related skills expected to increase in importance over next five years).

(*PICS*), 551 U.S. 701, 782 (2007) (Kennedy, J., concurring in part and concurring in the judgment). And, in fact, while we aspire to a society in which race should not matter, "all too often it does." *Id.* at 787; see also ANNIE E. CASEY FOUND., *RACE MATTERS: UNEQUAL OPPORTUNITIES IN EDUCATION* (2006); ANNE HABASH ROWAN ET AL., EDUC. TRUST, *GAUGING THE GAPS: A DEEPER LOOK AT STUDENT ACHIEVEMENT* (2010). Thus, educators must continue to be able to make fundamental judgments regarding higher education admissions that will serve the many interests of their institutions, the students they enroll, and the nation.¹² To maintain the vital, visible pathways toward that success, educators must also retain the discretion to consider *all* factors associated with student qualifications, characteristics, and experiences, consistent with this Court's established precedent.

¹² "Perhaps, in the end, this is the point: [college and university] presidents and admissions officers share obligations that involve futures—students' futures, their institutions' futures, and society's future Both have opportunities to enable or empower people, especially students . . . [with] the goal of free[ing] women and men of the costs of ignorance and exclusion." John Casteen, *Perspectives on Admissions*, in *HANDBOOK FOR THE COLLEGE ADMISSIONS PROFESSION* 7, 10 (Claire C. Swann & Stanley E. Henderson eds., 1998).

II. EDUCATIONAL JUDGMENTS IN THE ADMISSIONS PROCESS THAT INVOLVE MANY STUDENT QUALITIES AND CHARACTERISTICS (INCLUDING RACE AND ETHNICITY) SHOULD BE RECOGNIZED AS ESSENTIAL FOUNDATIONS FOR ATTAINING MISSION-DRIVEN EDUCATIONAL EXCELLENCE.

A. This Court Should Reaffirm That The Admissions Process Is An Institution-Specific, Mission-Oriented Process Grounded In Academic Judgments Regarding How To Best Achieve Institutional Goals.

The work of personnel in the admissions field—from high school counselors who help guide and prepare students for their futures in postsecondary education, to admissions officers who make the judgments regarding the optimal composition of their incoming classes—centers on dual aims. One aim is helping students identify the institution(s) where they are most likely to thrive. The other complementary aim is helping students identify the institution(s) where they can materially contribute to the educational experience of their peers. The ultimate goal associated with these aims is preparation for fulfilling and productive lives in which they, and the society in which they live, will benefit.¹³

¹³ The importance of student expectations regarding their postsecondary pursuits—and the way in which they can "see" pathways to success—is an integral factor in promoting opportunity and expanding access for all students. *See, e.g.,*

In fact, within postsecondary institutions, themselves, the admissions process is not about merely admitting freshmen to a class. To the contrary, the admissions process is one of fully evaluating and making decisions about prospective graduates, who will in the course of their higher education experience, explore, and expand their potential and horizons, just as they challenge their peers to do the same for the benefit of *all* students who attend their institution. In sum, the admissions process reflects a blend of both art and science—grounded in standards, data, and evidence; and involving the careful application of human judgment and intuition. It is a humanistic endeavor, involving many factors shaped by the qualifications, backgrounds, and experiences of prospective students *in light of* the character and mission of the institution to which they apply. *E.g.*, Michele

PATRICIA M. MCDONOUGH, COUNSELING AND COLLEGE COUNSELING IN AMERICA'S HIGH SCHOOLS 7 (2005) (documenting several research studies demonstrating that college counseling has significant impact on postsecondary aspirations of students of color); PATRICIA M. MCDONOUGH, AM. COUNCIL ON EDUC., THE SCHOOL-TO-COLLEGE TRANSITION: CHALLENGES AND PROSPECTS 9 (2004) ("Creating an environment in which students are expected to achieve academically, and are encouraged and supported to do so, is an essential precondition for college attendance."); *see also* MONICA MARTINEZ & SHAYNA KLOPOTT, PATHWAYS TO COLL. NETWORK, IMPROVING COLLEGE ACCESS FOR MINORITY, LOW-INCOME, AND FIRST-GENERATION STUDENTS 6 (2003) (synthesizing research on elements necessary to increase college access for minority, low-income, and first-generation students and recognizing that the creation of "high expectations and clear pathways to postsecondary education" is essential to encouraging college attendance).

Sandlin, *The "Insight Resume:" Oregon State University's Approach to Holistic Assessment*, in THE COLLEGE ADMISSIONS OFFICER'S GUIDE 99 (Barbara Lauren ed., 2008); *see generally* GRETCHEN W. RIGOL, COLL. BD. ADMISSIONS DECISION-MAKING MODELS: HOW U.S. INSTITUTIONS OF HIGHER EDUCATION SELECT UNDERGRADUATE STUDENTS, 7 (2003) [hereinafter RIGOL, ADMISSIONS MODELS]; GRETCHEN W. RIGOL, COLL. BD., SELECTION THROUGH INDIVIDUALIZED REVIEW: A REPORT ON PHASE IV OF THE ADMISSIONS MODEL PROJECT 3-7 (2004).¹⁴

B. This Court Should Reaffirm That Decisions Regarding Student Merit In The Admissions Process Are Grounded In Educational Judgments Associated With A Wide Range Of Factors That May Include Consideration Of A Student's Race Or Ethnicity.

Higher education institutions in the United States differ widely—from public to private; from large to small; from community college to major research institution; and more. There is remarkable diversity both among the types of institutions, as well as *within* each of these sectors—where service areas, academic strengths and pursuits, and other core

¹⁴ Educational judgments associated with the establishment of institutional missions, including the judgment that "diversity is essential" to those missions and the admissions processes that help fulfill those missions, merit deference in accordance with long-standing academic freedom principles. *See Grutter*, 539 U.S. at 329; *Bakke*, 438 U.S. at 312-13; *see also Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 (1985) (opinion of Powell, J.).

mission elements vary greatly. See NAT'L RESEARCH COUNCIL, MYTHS AND TRADEOFFS: THE ROLE OF TESTS IN UNDERGRADUATE ADMISSIONS 10 (1999) ("U.S. colleges and universities could hardly be less uniform."). Institution-specific admissions determinations are correspondingly varied:

Despite what the popular press and various guidebooks would suggest, gaining admissions to college is not equivalent to finding your place on the food chain. If one must use a biological metaphor, a more appropriate analogy would be finding your niche in an ecosystem. Different institutions aspire to serve different educational needs, and different students will have their educational needs served by different kinds and types of colleges. A particular institution's decision of whom and how to admit...must be related to the societal role that it elects to play.

GRETCHEN W. RIGOL, COLL. BD., TOWARD A TAXONOMY OF THE ADMISSIONS DECISION-MAKING PROCESS 5 (1999) [hereinafter RIGOL, TOWARD A TAXONOMY]; see also RIGOL, ADMISSIONS MODELS, *supra*, at 1 ("The primary conclusion this report reaches is that there are almost as many different approaches to selection as there are institutions."); ARTHUR L. COLEMAN ET AL., COLL. BD., A DIVERSITY ACTION BLUEPRINT: POLICY PARAMETERS AND MODEL PRACTICES FOR HIGHER EDUCATION INSTITUTIONS iii (2010) [hereinafter COLEMAN, DIVERSITY ACTION BLUEPRINT] ("As with the diversity interests themselves, which are inherently institution-specific, institutional policies should reflect the particular values, aims

and histories of the institutions with which they are associated.").

This variety of institutional type has significant implications regarding how race and ethnicity may be and should be considered to advance particular institutional goals. Specifically, the differences that define higher education institutions correspond to the variety of ways in which institutions reach conclusions about the merit of student applicants in light of admissions aims. This includes whether—and if so, how—they integrate considerations of race and ethnicity in the admissions decision to achieve their diversity goals.¹⁵ Regardless of type, however, those judgments rest upon three universal principles associated with the admissions process: A determination of merit (1) is aligned with mission;

¹⁵ At the same time, differences *within* institutions—between undergraduate and graduate/professional programs; and among schools within undergraduate institutions—also reflect mission orientations that are distinct, and that can generate differing admissions criteria.

These institution-by-institution and within-institution differences also correspond to the highly contextualized inquiry associated with strict scrutiny legal principles regarding race-conscious admissions. See *Grutter*, 539 U.S. at 327 (recognizing that "[c]ontext matters" regarding race-conscious action under federal law, and noting, as a consequence, that "generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts"). Such differences defy simplistic, cookie-cutter policy solutions: What works for one institution (or school within an institution) in light of its mission and processes will not necessarily work for another.

(2) embodies judgments regarding multiple factors that reflect who, in the first instance, is qualified; *and* who, then, should be admitted; and (3) can depend on limited but important considerations of race and ethnicity, among many other diversity-related factors. *See generally* RIGOL, ADMISSIONS MODELS, *supra*; RIGOL, TOWARD A TAXONOMY, *supra*; COLEMAN, DIVERSITY ACTION BLUEPRINT, *supra*.

1. A Determination Of Merit Is Aligned With Mission.

Admissions decisions are not made in a vacuum; they are, instead, driven by the missions of the institutions at which they are made. They are reflective of admissions officials' well-developed understanding of institutional missions and goals, and they are shaped by many factors, including the perspectives of faculty and leaders within the institution and feedback from employers who seek to hire from the pool of students admitted. *See* RIGOL, ADMISSIONS MODELS, *supra*, at 9, 19-36 (describing the complexity of the admissions process and the factors that affect those judgments). In this context, institution-specific academic standards, expectations, and aims established for graduates are important guideposts for the admissions judgments that are made, to which appropriate legal deference should be afforded.¹⁶ There is, as a consequence, no single

¹⁶ *See supra* note 14. Deference toward and respect for institutional autonomy, in fact, is an "important reason why American higher education has become pre-eminent in the world." WILLIAM G. BOWEN & BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS 298 (1998); *see generally* ROSS

definition of merit—and, more to the point, there *cannot be* a single definition of merit that would effectively satisfy all institutional goals, nationwide. *See id.* at 13-18, 39-46, app. D (describing numerous admissions models and processes pursued among various institutional types and listing over one hundred academic and non-academic factors possibly relevant to admissions decisions).

2. A Determination Of Merit Is Based On A Wide Range Of Factors Considered In An Institutional Context.

The determination of merit in any individual instance—a judgment that is inextricably "defined in light of what educational institutions are trying to accomplish," BOWEN & BOK, *supra*, at 278, is not a self-defining concept. To the contrary, it reflects an institutional judgment, in the first instance, about who is qualified and, therefore, likely to succeed; and in the second (within that pool of students deemed qualified), who should be admitted based upon their likely contributions to the university community. Said differently, admissions officers examine students' potential to succeed *and, as importantly*, they assess the characteristics of a prospective class of qualified students in light of what students collectively can bring to each other and to their institution. "For many institutions, finding the best balance of students with different academic interests, different talents and skills, and different background characteristics is the ultimate aim of the admissions process." RIGOL, ADMISSIONS MODELS, *supra* at 7. In

WILLIAMS ET AL., UNIVERSITAS 21, U21 RANKING OF NATIONAL HIGHER EDUCATION SYSTEMS 2012 (2012).

sum, the admissions process aptly illustrates the value of assembling a class where the whole is greater than the sum of its parts.

The mix of criteria considered by admissions officials reflective of their mission focus is vast, and multiple factors inform judgments about the academic qualifications of students and their potential to succeed at a given institution. These include grades, test scores, Advanced Placement performance, and rank in class. Those data points are but a baseline, however. More qualitative academic criteria tend to round out the picture of a student's readiness—including strength of the curriculum to which the student has been exposed, particular accomplishments, and evidence of drive and initiative.¹⁷ Even in the limited context regarding these kinds of academic qualifications, therefore, it is abundantly clear that the *amici* who would press for a simplistic judgment regarding a student's qualifications based merely on SAT or similar scores miss the mark—by a mile. There is, to the contrary, universal recognition among educators that while

¹⁷ See WARREN W. WILLINGHAM & HUNTER M. BRELAND, PERSONAL QUALITIES AND COLLEGE ADMISSIONS 12-17 (1982) [hereinafter WILLINGHAM & BRELAND, PERSONAL QUALITIES]; see also Angela L. Duckworth et al., *Grit: Perseverance and Passion for Long-Term Goals*, 92 J. PERSONALITY AND SOC. PSYCHOL. 1087, 1087 (2007) (finding grit, as a qualitative personal quality, "demonstrated incremental predictive validity of success measures over and beyond" traditional factors such as "IQ and conscientiousness"); Paul Tough, *The Character Test*, N.Y. TIMES SUNDAY MAGAZINE, Sept. 14, 2011, at MM38 (discussing "performance character" as a success predictor by measuring seven characteristics: "zest, grit, self-control, social intelligence, gratitude, optimism and curiosity").

admissions tests in higher education can provide important information upon which admissions judgments are appropriately grounded, they should never serve as a single basis for making admissions decisions—or, in other words, be the sole embodiment of "merit."¹⁸

This conclusion is not only consistent with the decades of experience reflected among higher education admissions experts, it also squarely aligns with core, long-standing principles regarding appropriate and psychometrically sound test use practices. Those time-tested principles are reflected, in fact, in the parameters established regarding the use of SAT scores. The predictive value of the SAT

¹⁸ See, e.g., NAT'L RESEARCH COUNCIL, MYTHS AND TRADEOFFS: THE ROLE OF TESTS IN UNDERGRADUATE ADMISSIONS 25 (1999) (asserting that to conclude "admissions tests measure ...a compelling distillation of academic merit that should have dominant influence on admissions decisions" is a "myth"); *id.* at 22 ("Both the SAT and ACT cover relatively broad domains... relevant to the ability to do college work. Neither, however, measures the full range of abilities that are needed to succeed in college; important attributes not measured include, for example, persistence [and] intellectual curiosity....").

Correspondingly, the admissions process is not, as some contend, a mechanical calculation of numbers. Were that the case, the judgment of admissions officers would be unnecessary. Pursuant to that view of reality, there would be no need for personnel to conduct the outreach to high school counselors and teachers working with students who are trying to determine the institutions that will be a "fit" for them, just as there would be no need for personnel to labor for months over the details of admissions applications as they work to understand their schools' applicants' profiles and potential for success within, and contributions to, their institutions.

for admissions purposes does not lead to the conclusion that SAT scores should be the sole (or even the principal) factor in judging a student's ability to succeed at a particular institution. SAT scores are, in the first instance, "contemporary and approximate indicators"—not "fixed and exact measures of a student's preparation for college-level work." COLL. BD., GUIDELINES ON THE USES OF COLLEGE BOARD TEST SCORES AND RELATED DATA 9 (2011) (emphasizing that responsible officials should "[u]se SAT scores in conjunction with other indicators, such as the secondary school record[s] (grades and courses), interviews, personal statements, writing samples, portfolios, recommendations, etc., in evaluating [an] applicant's admissibility at a particular institution"); *see also* AM. EDUC. RESEARCH ASS'N, AM. PSYCHOLOGICAL ASS'N & NAT'L COUNCIL ON MEASUREMENT IN EDUC., STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTING 146-47 (1999) ("In educational settings, a decision or characterization that will have a major impact on a student should not be made on the basis of a single test score. Other relevant information should be taken into account if it will enhance the overall validity of the decision."); *id.* at 141.¹⁹

¹⁹ Differences in test performance may be manifested due to differences in preparation, illustrated by different opportunities associated with family income and school quality, which to this day still correspond along race/ethnicity lines. *See generally* BRENT BRIDGEMAN & CATHY WENDLER, EDUC. TESTING SERV., CHARACTERISTICS OF MINORITY STUDENTS WHO EXCEL ON THE SAT AND IN THE CLASSROOM (2004) (analyzing background and behaviors of high-scoring minority students and concluding rigorous high school coursework better prepares students for the SAT); WAYNE J. CAMARA & AMY ELIZABETH SCHMIDT, GROUP DIFFERENCES IN STANDARDIZED TESTING AND SOCIAL STRATIFICATION (1999) (analyzing racial gaps on high-stakes

Beyond the question of who is qualified (and, therefore, likely to succeed), the focus on who should be admitted implicates a significantly expanded examination of background qualities, characteristics, and experiences that can and do inform judgments about what a student may be able to bring to an institution to enrich the learning and growth of peers. Among them are: life experiences including overcoming adversity or hardships, military experience, community service-related experiences, and the like; family backgrounds including first-generation college-going experience, family economic circumstances, and unique family profiles; particular skills and interests including artistic talents, interests in science, etc.; and characteristics emblematic of other diversity factors, including race, ethnicity, geographic origin, socio-economic status, and life experiences in different cultural settings or in diverse learning environments.²⁰

admissions tests, standardized assessments, and other indicators of educational attainment and finding that consistency of achievement gaps indicates inequitable access to high quality education).

²⁰ See RIGOL, ADMISSIONS MODELS, *supra* note 9, at app. D (listing "Factors That May Be Used in Making Admissions Decisions Based on Internal Evaluation Guidelines," including those illustrative of: Academic Achievement, Quality and Potential; and Nonacademic Characteristics and Attributes (Geographic, Personal Background, Extracurricular Activities, Service and Leadership, Personal Attributes, Extenuating Circumstances, and Other)); *id.* at app. E (listing over 100 academic and non-academic factors reflected in "What Colleges Tell Students About What They Are Looking For"); Michele Sandlin, *The "Insight Resume": Oregon State University's Approach to Holistic Assessment*, in THE COLLEGE ADMISSIONS OFFICERS GUIDE 99 (Barbara Lauren ed., 2008).

Importantly, as well, these factors are judged through multiple avenues embedded in the holistic review process (where, for instance, race is not merely a designation on an application, but is reflected in discussions of backgrounds, life experiences and the like). For instance, essays designed to elicit how the student sees himself or herself in light of contributions that can be expected from an applicant often trigger discussion of racial and ethnic background, among other factors that may not otherwise surface in the admissions process.²¹

²¹ Questions posed by higher education institutions elicit such information about a student's background and experience in various ways. Illustrative application questions include:

From Harvey Mudd College: “Scientific research is a human endeavor. The choices of topics that we research are based on our biases, our beliefs, and what we bring: our cultures and our families. The kinds of problems that people put their talents to solving depends on their values.” – Dr. Clifton Poodry
How has your own background influenced the types of problems you want to solve? *available at* <http://www.hmc.edu/admission1/applyingforadmission.html> (link to application).

From Rice University: The quality of Rice’s academic life and the Residential College System are heavily influenced by the unique life experiences and cultural traditions each student brings. What perspective do you feel that you will contribute to life at Rice? *available at* http://futureowls.rice.edu/uploadedFiles/Future_Owls/FreshmanSupplement.pdf (link to application).

From The University of Maryland: "The whole is greater than the sum of its parts."- Aristotle
The intellectual, social and cultural differences embraced by the University of Maryland are integral to the fabric of our community. The strength of the University is realized through

In the end, the admissions reality today is as it has been for decades: with "much emphasis on academic performance...[as well as] consider[ation of] other personal qualities" that include a focus on students who will "make a contribution to the institution, bring unique skills and interests, add cultural diversity and different points of view, help maintain important institutional ties and continuity, and also fit reasonably well the particular types of programs that the college offers."²²

3. A Determination Of Merit May Include The Consideration Of An Applicant's Racial/Ethnic Diversity As Part Of Individualized, Holistic Review.

Among the array of factors considered by admissions officers to meet institutional goals, the consideration of race and/or ethnicity is often essential, given the long-established compelling educational benefits associated with racial and ethnic diversity, among other kinds of diversity. As described *supra* Part I, the realities associated with workforce preparation and 21st Century citizenship make this even more of a vital focus for many institutions today.

The practical reality is that in a number of institutional contexts, race-neutral means are simply the contributions of every member of our campus. We understand each individual is a result of his/her personal background and experiences. Describe the parts that add up to the sum of you. *available at* <https://app.applyyourself.com/?id=umd> (link to application).

²² WILLINGHAM & BRELAND, PERSONAL QUALITIES, *supra* note 17, at 2-3.

insufficient, standing alone, to generate the kind of racial/ethnic diversity institutions seek in order to achieve their mission-related goals. While institutions pursue many race-neutral means to achieve their diversity goals, these measures often are not sufficient to yield the kind of significant presence on campus that is essential to ensure sufficient compositional diversity or critical mass, which is a critical foundation for improved teaching and learning and other benefits of diversity. *Cf. PICS*, 551 U.S. at 788 (Kennedy, J., concurring in part and concurring in the judgment) ("In the real world,...[color-blindness] cannot be a universal constitutional principle.").²³ Indeed, race-conscious measures that do not treat individual students "in different fashion solely on the basis of a systematic, individual typing by race," *id.* at 789, but rather that embody a holistic process of individualized review

²³ Inextricably linked to the benefits of diversity, critical mass can serve as a contextual foundation for decisions about ways to enhance learning experiences for all students. Judgments about critical mass are highly contextualized—dependent upon the relevant institution, the field of study within an institution, or the size of the setting of relevance. It is, in fact, "reasonable to conclude that a decision as to what size would entail a critical mass in relation to an admissions policy can only be determined case by case by those who have access to the profile of the student body admitted and the structure of the system of interaction in which these students are to relate to one another." Adeno Addis, *The Concept of Critical Mass in Legal Discourse*, 29 *CARDOZO L. REV.* 97, 133-34 (2007). *See also* ARTHUR L. COLEMAN & SCOTT PALMER, *COLL. BD., ADMISSIONS AND DIVERSITY AFTER MICHIGAN: THE NEXT GENERATION OF LEGAL AND POLICY ISSUES* 33-41 (2006) [hereinafter *COLEMAN & PALMER, ADMISSIONS AFTER MICHIGAN*] (describing institution-/context-specific nature of the inquiry in light of social science principles and Court's *Grutter* decision).

inclusive of the kinds of factors described above are the constitutionally permissible norm, *see Grutter*, 539 U.S. at 337 (finding constitutional an admissions policy based on "a highly individualized, holistic review of each applicant's file" and aimed at achieving the educational benefits of diversity).

The breadth and depth of factors affecting judgments by admissions officials in selective institutions—some going directly to academic preparation, some to qualities and characteristics that an individual may bring that will enhance the learning experience of all—also demonstrate in compelling terms why percentage plans are not the silver bullet that some may assert.²⁴ Rather, admissions processes that are aligned with institutional missions and goals, grounded in educational judgment, and include a

²⁴ Although appropriately designed plans in limited contexts and for certain institutions may have some benefits, *see e.g.*, Mark C. Long & Marta Tienda, *Changes in Texas Universities' Applicant Pools after the Hopwood Decision*, 39 SOC. SCI. RES. 48, 53 (2010), they do not provide a viable, comprehensive alternative to holistic, individualized review. In fact, mechanical and formulaic processes that do not fully incorporate human judgment as part of the selective admissions process are destined to undermine the very principles that for decades have guided individualized, holistic review by higher education admissions officers. Thus, even in instances in which percentage plans might be considered authentically neutral so as not to trigger strict scrutiny review, they would pose a significant threat to the integrity of academic judgments that have been and are the foundations for institutional selectivity and excellence, consistent with this Court's decisions in *Bakke*, *Grutter*, and *Gratz*.

practiced deliberation of a wide range of applicant factors (including, where appropriate, race and ethnicity) accord with more than three decades of this Court's jurisprudence and elucidate, in part, the international preeminence of our nation's schools of higher education.

III. THE BALANCED AND WORKABLE GRUTTER FRAMEWORK SHOULD BE PRESERVED AS IT HAS BEEN EFFECTIVELY IMPLEMENTED BY EDUCATION INSTITUTIONS TO GUIDE THEIR POLICY DEVELOPMENT AND ENSURE THE ATTAINMENT OF COMPELLING EDUCATIONAL GOALS ASSOCIATED WITH DIVERSITY.

Education leaders, including admissions officials, have endeavored to fulfill their institutional goals associated with student diversity over the course of decades by adherence to the principles first articulated by Justice Powell in *Bakke*, which then were amplified and settled by this Court in *Grutter* and *Gratz*.²⁵ The strict scrutiny framework

²⁵ For decades, higher education institutions relied on the principles articulated by Justice Powell in his 1978 *Bakke* opinion as a foundation for their diversity-related policy development. *Grutter*, 539 U.S. at 323 (observing that Justice Powell's opinion served as the "touchstone for constitutional analysis" during this period, on which institutions of higher education "modeled their own admissions programs"). In 1996, that reliance was called into question with a panel opinion in *Hopwood v. Texas*, 78 F. 3d 932 (5th Cir. 1996). Although other federal circuits refused to adopt the Fifth Circuit's *Hopwood* conclusion that diversity was not a compelling interest, confusion ensued. This Court's subsequent resolution in *Grutter* and *Gratz* reaffirmed key principles regarding diversity

articulated by this Court that is associated with admissions has become an industry standard—to which educators nationwide consistently have turned in the development, articulation, and execution of such policies. Abundant evidence documents the reliance on and institutional investment based upon the Court's guidance, and illustrates the ways in which strict scrutiny principles have been (and are being) practically and faithfully applied.²⁶ Given the

as a compelling interest and narrow tailoring upon which educators had relied—and would continue to rely.

This reliance by education policymakers has been informed and guided by U.S. Department of Education [Department] regulations and policies, which have consistently cited to this Court's authorities in establishing rules regarding enforcement of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* (2012), which prohibits discrimination on the basis of race and national origin in a manner coextensive with the Fourteenth Amendment to the U.S. Constitution. *See, e.g.*, U.S. Dep't of Educ., Policy Interpretation on Use of Race in Postsecondary Admissions, Analyzing the *Bakke* Decision, 44 Fed. Reg. 58,509 (Oct. 10, 1979); Nondiscrimination in Federally Assisted Programs; Title VI of the Civil Rights Act of 1964, 59 Fed. Reg. 8756 (Feb. 23, 1994) (citing to *Bakke* as foundation for permissible institutional policy development); Magnet Schools Assistance Program, Notice Inviting Applications for New Awards for Fiscal 2001, 65 Fed. Reg. 46,698-706 (July 31, 2000); DEAR COLLEAGUE LETTER AND GUIDANCE (Dec. 2, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague201111.html> (addressing voluntary policies to achieve diversity or avoid racial isolation pursuant to Title VI of the Civil Rights Act of 1964 and Equal Protection Clause of the Fourteenth Amendment to U.S. Constitution, in light of *Grutter* and *Gratz*).

²⁶ In the immediate wake of this Court's *Grutter* and *Gratz* decisions, for example, the College Board established the Access and Diversity Collaborative ("the Collaborative"),

<http://advocacy.collegeboard.org/admission-completion/access-diversity-collaborative>, to provide assistance to college admissions officers and others regarding application of *Bakke*, *Grutter* and *Gratz* decisions. That national effort resulted in ten publications (manuals, policy papers, and toolkits); well over a dozen national seminars where over a thousand attendees focused on legal parameters; blueprints for action; institutional team trainings; and other outreach. See COLL. BD., THE ACCESS AND DIVERSITY COLLABORATIVE: A SIX-YEAR RETROSPECTIVE (Oct. 27, 2010) <http://diversitycollaborative.collegeboard.org/sites/default/files/document-library/adc-2004-2010-overview.pdf>. More recently, an on-line professional development video series building on this effort, has been produced. See *Access and Diversity and the Law: Understanding the Legal and Policy Fundamentals*, COLL. BD., <http://diversitycollaborative.collegeboard.org/video-library> (last visited July 19, 2012); *From Law to Policy Development: Setting the Stage for Action*, COLL. BD., <http://diversitycollaborative.collegeboard.org/video-library> (last visited July 19, 2012).

Illustrative of the postsecondary effort is the publication of institutional policy models identified by the Collaborative, reflective of efforts to conform policy development with the teachings of this Court regarding mission-driven diversity goals and means. See ARTHUR L. COLEMAN ET AL., COLL. BD., A DIVERSITY ACTION BLUEPRINT: POLICY PARAMETERS AND MODEL PRACTICES FOR HIGHER EDUCATION INSTITUTIONS, 8-10, 35-38 (2010) (citing to and analyzing institutional policies identified to reflect efforts to align institutional goals and practices with federal legal principles).

Correspondingly, after this Court's decision in *PICS*, the National School Boards Association, working with the Collaborative and more broadly, provided legal and policy guidance to the elementary and secondary field regarding key principles from the Court's decision. These efforts were directed at many different groups within the K-12 community, including school board members, state school boards association leaders, and attorneys. Guidance was delivered through various means, including presentations, technical legal articles, community engagement guides, sharing of effective diversity policies and practices, ongoing reporting of litigation, and video messaging. See, e.g., JOHN BORKOWSKI & MAREE SNEED, STUDENT

evidence of reliance, investment, and practical application, there is no reason for this Court to

ASSIGNMENT AFTER THE SUPREME COURT'S DECISION IN THE SEATTLE AND LOUISVILLE CASES (2007); ARTHUR COLEMAN ET AL., NAT'L SCH. BOARDS ASS'N, COLL. BD., & EDUCATIONCOUNSEL, LLC, ACHIEVING EDUCATIONAL EXCELLENCE FOR ALL: A GUIDE TO DIVERSITY-RELATED POLICY STRATEGIES FOR SCHOOL DISTRICTS (2011); ARTHUR L. COLEMAN ET AL., NAT'L SCH. BOARDS ASS'N & COLL. BD., NOT BLACK AND WHITE: MAKING SENSE OF THE UNITED STATES SUPREME COURT DECISIONS REGARDING RACE-CONSCIOUS STUDENT ASSIGNMENT PLANS (2007), *available at* <http://www.nsba.org/Services/CUBE/Publications/CUBEResearchReports/NotBlackandWhite/NotBlackandWhite.pdf>; ARTHUR L. COLEMAN ET AL., RACE-CONSCIOUS STUDENT ASSIGNMENT PRACTICES IN ELEMENTARY AND SECONDARY EDUCATION: KEY ISSUES FOR BOARDS TO CONSIDER IN THE 2006-07 SUPREME COURT TERM (2007), *available at* <http://www.nsba.org/Services/CUBE/ConferencesMeetings/CUBEMeetingsHeldin2007/CUBEIssuesForumCongressionalLuncheon/RaceConsciousStudentAssignmentPracticesinElementaryandSecondaryEducation.pdf>; Jollee Patterson & Michael Porter, *Closing the Achievement Gap with a Race-Neutral Framework*, in *SCHOOL LAW IN REVIEW 2012* (2012); Celia Ruiz, *The Use of Race in Public Primary and Secondary School Assignment Programs: Where Do We Draw the Line?* in *SCHOOL LAW IN REVIEW 2007* (2007); Francisco Negrón & Jay Worona, Presentation at NSBA Council of Urban Boards of Education Annual Conference: Diversity: Dead or Different? Guidance on Implementing Diversity in Student Assignment after *PICS v. Seattle* (Sept. 30, 2010).

Similar efforts have been undertaken by other organizations, as well. *See, e.g.*, ROBERT BURGOYNE ET AL., AM. ASS'N FOR THE ADVANCEMENT OF SCI. & ASS'N OF AM. UNIV., HANDBOOK ON DIVERSITY AND THE LAW: NAVIGATING A COMPLEX LANDSCAPE TO FOSTER GREATER FACULTY AND STUDENT DIVERSITY IN HIGHER EDUCATION (2010); *see also* AMY N. ADDAMS ET AL., ASS'N OF AM. MED. COLL., ROADMAP TO DIVERSITY: INTEGRATING HOLISTIC REVIEW PRACTICES INTO MEDICAL SCHOOL ADMISSIONS PROCESSES (2010).

depart from the parameters and principles on which admissions officials have in good faith relied and on which they continue to rely. *See Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854-55 (1992) (ruling that a "series of prudential and pragmatic considerations designed to [among other things] . . . gauge the respective costs of reaffirming and overruling a prior case" should be evaluated when questions about the legitimacy of prior authority have been raised—including whether precedent "def[ies] practical workability," "is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation" and whether it is still timely and viable).

Indeed, *Grutter* reflected agreement of at least six Justices on the lawfulness of diversity as a compelling interest among higher education institutions, as well as the legitimacy of a limited and nuanced consideration of race to achieve those goals. *See Grutter*, 539 U.S. at 325-26, 334, 337; *id.* at 387-88 (Kennedy, J., dissenting) (agreeing with the Majority that "[o]ur precedents provide a basis for the Court's acceptance of a university's considered judgment that racial diversity among students can further its educational task, when supported by empirical evidence;" but disagreeing as to the way in which that standard was applied by the Majority on the *Grutter* facts).

Moreover, a mere four years later, *all nine* Justices agreed that *Grutter* had established the operative legal framework that permitted postsecondary institutions to pursue diversity-related goals that

could justify race-conscious admissions practices. *See PICS*, 551 U.S. at 722; *id.* at 837 (Breyer, J., dissenting).

Absent clear and compelling evidence that the principles articulated in *Bakke*, as affirmed and expanded upon in *Grutter* and *Gratz*, have been routinely ignored or misapplied, or have had unintended and unconstitutional systemic consequences in their implementation—and such evidence does not exist—any dilution of this Court's precedent is simply not justified. In fact, such action likely would have significant adverse consequences—affecting education institutions, the students they serve, and the goals they seek to achieve for the benefit of all in society.

The time, effort, and fiscal cost to higher education institutions of all kinds to understand the Court's guidance and then faithfully to apply it in multiple settings, are simply incalculable. *See supra* note 26 and accompanying text. Given the significant investment in the development of policies and practices that conform to the *Grutter* and *Gratz* framework and principles, the disruption and cost to higher education institutions resulting from a material change in that framework would be immense. Indeed, such a change in legal standards affecting colleges and universities would have an impact well beyond the words in discrete policies affecting enrollment practices. The impact would be felt in an overhaul of staff development and training materials; materials developed for the education of students, parents, and the public to describe those policies and practices (including, as necessary,

governing board deliberations and approval of key changes); a reorientation of other related policies and practices connected to, but distinct from, admissions policies and practices; and more. In short, among institutions where diversity goals are mission-central and where discrete race-conscious practices support those goals, the very fabric of institutional action on many campuses likely will be undone if a core thread affecting institutional priorities is removed or significantly cut.

This kind of impact also likely would occur beyond the walls of postsecondary institutions. *See PICS*, 551 U.S. at 791 (Kennedy, J., concurring in part and concurring in the judgment) (explaining that the compelling interest in diversity in higher education "help[ed] inform the...inquiry" regarding elementary and secondary diversity goals). Among elementary and secondary educators, the principles of *Bakke*, *Grutter*, and *Gratz* have established important foundations for action, amplified by this Court's 2007 decision in *PICS*. *See* sources cited *supra* notes 25 and 26.

Second, and importantly, such action likely would chill the environment in which so many institutions are working to explore and innovate within the current parameters of federal law. In the postsecondary context, colleges and universities are different. Missions and policies are different. Personnel responsible for executing and implementing policies are different. Thus, even within a common framework and set of standards, the ability to find the best ways to adapt policies to practice to achieve success is varied; and the need to

preserve institutional and individual creativity and innovation within a rigorous but context-sensitive framework is essential if higher education institutions are to achieve their potential—and more importantly, help the students they serve realize theirs.

Correspondingly in the elementary and secondary setting, a re-reading of *Grutter* that eliminates its fundamental support for the rule that race may be utilized within certain strictures to achieve a school's interest in diversity could adversely affect the implementation of voluntary diversity programs in public school districts. Without *Grutter* to buttress the current understanding of *PICS* that “[d]iversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue,” *PICS*, 551 U.S. at 783 (Kennedy, J., concurring in part and concurring in the judgment), public schools could feel compelled to abandon their good faith efforts to afford the educational benefits of diversity to their students. In other words, without the protective umbrella that *Grutter* provides to color the understanding of an elementary or secondary school's compelling interest in the wake of *PICS*, schools may be unwilling to voluntarily explore avenues for diversity in their classrooms that could both diminish the harms of racial isolation and enhance the benefits of diversity for all students. *Id.* at 788. To limit *Grutter* would be to ignore this reality and needlessly restrict the prospects for schools to address the educational needs of their students.

This Court has for decades recognized and valued the special role that education in America serves, including its connection to helping future generations find their paths, achieve their potential, and succeed in their contributions to the communities in which they live. *Grutter*, 539 U.S. at 331; *Brown v. Bd. of Educ.* 347 U.S. 483, 493 (1954). As this Court recognized, "Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized." *Grutter*, 539 U.S. at 332. This is but one part of a broader quest by educators throughout our nation—all of whom should have at their disposal every legitimate strategy and tool to achieve their goals. The limited consideration of race and ethnicity in admissions—consistent with the principles of *Bakke*, *Grutter*, and *Gratz*—is among those strategies and tools, and should be preserved in line with this Court's well-established, long-standing precedents.

CONCLUSION

For the foregoing reasons, and those in Respondents' brief, the judgment below should be affirmed.

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APPENDIX A

AMICI CURIAE

American Association of College Registrars and Admissions Officers—a professional association of more than 11,000 higher education admissions and registrations professionals who represent more than 2,600 institutions and agencies in over 40 countries.

American Association of Colleges for Teacher Education—membership of 800 public and private colleges and universities in every state, the District of Columbia, the Virgin Islands, Puerto Rico, and Guam.

American Association of School Administrators—membership of more than 13,000 educational leaders, including chief executive officers, superintendents, and senior level school administrators, in the United States and throughout the world.

Association of Teacher Educators—individual membership organization devoted solely to the improvement of teacher education both for school-based and postsecondary teacher educators, with members representing over 700 colleges and universities, over 500 major school systems, and the majority of state departments of education.

Council of Chief State School Officers—a nonpartisan, nationwide, nonprofit organization of public officials who head departments of elementary

and secondary education in the states, the District of Columbia, the Department of Defense Education Activity, and five U.S. extra-state jurisdictions. CCSSO provides leadership, advocacy, and technical assistance on major education issues. The Council seeks member consensus on key educational issues and expresses their view to civic and professional organizations, federal agencies, Congress, and the public.

Horace Mann League—perpetuates the ideals of Horace Mann, the founder of American public school systems, to strengthen the public school system of the United States.

National Association for College Admission Counseling— a non-profit education association of more than 12,000 secondary school counselors, independent counselors, college admissions and financial aid officers, enrollment managers, and organizations that work with students as they make the transition from high school to postsecondary education.

National Association of Independent Schools—represents over 1,400 independent elementary and secondary schools in the United States. NAIS member schools are implicated by the present case to the extent the schools receive federal funds.

National Association of Secondary School Principals—represents more than 25,000 members, including principals, assistant principals, and aspiring school leaders from across the United States and more than 45 countries around the world.

Public Education Network—network of community based organizations in high poverty school districts across the country devoted to increasing quality of public education and engaging the public in their communities.

Texas Association of School Boards Legal Assistance Fund—advocates the interest of nearly 800 public school districts in Texas in litigation with potential statewide impact.

APPENDIX B**MISSION STATEMENTS****Austin College**²⁷

Austin College is a private, residential, co-educational college dedicated to educating undergraduate students in the liberal arts and sciences while also offering select pre-professional programs and a graduate teacher education program. Founded by the Presbyterian Church in 1849, Austin College continues its relationship with the church and its commitment to a heritage that values personal growth, justice, community, and service. An Austin College education emphasizes academic excellence, intellectual and personal integrity, and participation in community life. Thus Austin College affirms the importance of:

- A community that through its size, diversity, and programs fosters lively intellectual and social interaction among persons of different origins, experiences, beliefs, accomplishments, and goals.
- A program that does not discriminate with regard to religion or creed, gender, gender identity, sexual orientation, national or ethnic origin, physical disability, age, or economic status.
- A faculty that acknowledges teaching, sustained by active commitment to

²⁷ *Mission*, AUSTIN COLLEGE, <http://www.austincollege.edu/about/mission> (last visited July 27, 2012).

professional growth and development, as its primary responsibility.

- A student body of committed learners, actively involved in the programs of the college and in service to the greater community.
- A climate of civility and respect that encourages free inquiry and the open expression of ideas.
- A non-sectarian education that fosters the exploration and development of values through an awareness of the world's religious, philosophical, and cultural traditions.

The mission of Austin College is to educate students in the liberal arts and sciences in order to prepare them for rewarding careers and for full, engaged, and meaningful lives.

Dartmouth University²⁸

OUR CORE VALUES

Dartmouth expects academic excellence and encourages independence of thought within a culture of collaboration.

Dartmouth faculty are passionate about teaching our students and are at the forefront of their scholarly or creative work.

²⁸ *Mission Statement*, DARTMOUTH UNIVERSITY, <http://www.dartmouth.edu/~jameswright/archive/mission/index.html> (last visited July 27, 2012).

Dartmouth embraces diversity with the knowledge that it significantly enhances the quality of a Dartmouth education.

Dartmouth recruits and admits outstanding students from all backgrounds, regardless of their financial means.

Dartmouth fosters lasting bonds among faculty, staff, and students, which encourage a culture of integrity, self-reliance, and collegiality and instill a sense of responsibility for each other and for the broader world.

Dartmouth supports the vigorous and open debate of ideas within a community marked by mutual respect.

Texas Tech University²⁹

As a public research university, Texas Tech advances knowledge through innovative and creative teaching, research, and scholarship. The university is dedicated to student success by preparing learners to be ethical leaders for a diverse and globally competitive workforce. The university is committed to enhancing the cultural and economic development of the state, nation, and world.

²⁹ *Mission Statement*, TEXAS TECH UNIVERSITY, <http://www.ttu.edu/about/mission.php> (last visited July 27, 2012).

The University of Maryland³⁰

Vision Statement

During the next decade, the University of Maryland will enhance its standing as a world-class, preeminent institution of higher education. The University will achieve this goal through an unwavering commitment to excellence in all that it undertakes. The University will attract a diverse student body that possesses the ability and passion for learning. Innovative and relevant programs, whether within or built upon traditional disciplines in the arts and sciences, will prepare students to be engaged and self-realized citizens and leaders in a complex, democratic society. The University will foster research, scholarship, and arts programs noted for their quality, creativity, and impact, and provide affordable access. As befits its proximity to the nation's capital, the University will expand its international influence and address great and challenging problems of our time. Taking maximum advantage of its special location, the University will be a world center for creation and refinement of knowledge; advancement in science and technology, humanities, and social sciences; global leadership; and innovative production in the creative and performing arts.

³⁰ *Vision Statement*, THE UNIVERSITY OF MARYLAND, http://www.provost.umd.edu/vision_statement.cfm (last visited July 27, 2012).

The University of North Carolina at Chapel Hill³¹

The University of North Carolina at Chapel Hill, the nation's first public university, serves North Carolina, the United States, and the world through teaching, research, and public service. We embrace an unwavering commitment to excellence as one of the world's great research universities.

Our mission is to serve as a center for research, scholarship, and creativity and to teach a diverse community of undergraduate, graduate, and professional students to become the next generation of leaders. Through the efforts of our exceptional faculty and staff, and with generous support from North Carolina's citizens, we invest our knowledge and resources to enhance access to learning and to foster the success and prosperity of each rising generation. We also extend knowledge-based services and other resources of the University to the citizens of North Carolina and their institutions to enhance the quality of life for all people in the State.

With *lux, libertas*—light and liberty—as its founding principles, the University has charted a bold course of leading change to improve society and to help solve the world's greatest problems.

³¹ *Mission Statement of the University*, THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, <http://oira.unc.edu/facts-and-figures/general-information-about-the-university/mission-statement-of-the-university.html> (last visited July 27, 2012).