No. 11-345

In The
SUPREME COURT OF THE UNITED STATES

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

AMICUS CURIAE BRIEF OF THE CENTER FOR INDIVIDUAL RIGHTS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Did the system of admissions employed by the University of Texas's undergraduate college in 2008 violate the Equal Protection Clause?

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INTEREST OF AMICI CURIAE[1]

The Center for Individual Rights is a public interest law firm based in Washington, D.C. It has litigated many discrimination lawsuits, including several in this Court. It has a particular interest in, and has brought numerous cases concerning, what it views as unconstitutional racial classifications by government, particularly in admissions systems of institutions of higher education. It represented the plaintiffs in *Gratz v. Bollinger*, 539 U.S. 244 (2003) and *Grutter v. Bollinger*, 539 U.S. 306 (2003).

SUMMARY OF ARGUMENT

In *Grutter*, this Court, relying on Justice Powell's *Bakke* opinion, held that universities are entitled to some deference in determining whether attaining a diverse student body is a goal so compelling to their mission that they are entitled to consider and weigh the race of applicants in determining whether those applicants should be admitted. *Grutter*, 539 U.S. at 329 ("'good faith' on the part of a university is 'presumed' absent 'a showing to the contrary.'") (quoting *Regents of the University of California v. Bakke*, 438 U.S. 265, 318-

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[1] This brief is filed with the parties' consent evidenced by blanket consent letters filed with this Court. 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 of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

319 (1978) (opinion of Powell, J.).

This deference was supported by two pillars. First, that "academic freedom" is a compelling interest entitling universities to consider race in selecting its student body. Second, that a system of admissions that considered race along with other possible diversity factors was substantially different from a system that set aside seats for minorities, or that used points to attain a given racial/ethnic mix.

This Court should reconsider these assumptions and the deference to the academy that they led to. The notion of "academic freedom" in Justice Powell's opinion is inconsistent with much other authority from this Court. Not only has this Court not yet reconciled this conflicting authority, no such reconciliation is possible. "Academic freedom" is a dangerous and uncertain basis for justifying the consideration of race in admissions.

Moreover, the line between a system that considers race in a "dispositive" way and one that considers it as one of many factors is evanescent and elusive. Both logic and experience since 1978 demonstrate that the two types of systems are far more alike than different. Whatever importance this Court chooses to place on it, it does not deserve to be the basis for a presumption of good faith that essentially eviscerates the strict scrutiny standard. To the contrary. Experience with racial preferences suggests that the harm to the "beneficiaries" of those preferences is far worse than assumed, and warrants

a return to true strict scrutiny.

ARGUMENT

Academic freedom, while an important value and, to some degree, protected by the First Amendment when asserted by private individuals or entities, has never been an adequate justification for discriminatory or exclusionary policies by public entities. Moreover, as any number of Justices on this Court have pointed out, the distinction between a valid "plus" system and an illegal system is mostly one of candor, in which a lack of candor is rewarded. These are inappropriate bases to lower the scrutiny by which this Court should examine any use of race by state institutions.

I. THE PROBLEMATIC RELIANCE ON "ACADEMIC FREEDOM" IN *BAKKE*

In *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), this Court found that the admissions program of the University of California Medical School at Davis, which set aside 16% of the places for incoming students for educationally or economically disadvantaged minorities, violated Title VI of the Civil Rights Act of 1964. *Id.* at 269-72. Five Justices, however, concluded that race could be considered in Davis's admissions process under some circumstances. No single theory, though, explained why that was so. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 218 (1995) ("Bakke did not produce an opinion for

the Court."); *cf. Alexander v. Sandoval*, 532 U.S. 275, 308 n.15 (2001) (Stevens, J., dissenting) (the *Bakke* majority for overturning the lower court's injunction against any use of race was "divided over the application of the Equal Protection Clause--and by extension Title VI--to affirmative action cases. Therefore, it is somewhat strange to treat the opinions of those five Justices in *Bakke* as constituting a majority for any particular substantive interpretation of Title VI.").

Justice Powell, in an opinion only for himself, applied strict scrutiny to the Davis program. He concluded that "academic freedom," although not a specifically enumerated constitutional right, was a "special concern" of the First Amendment and thus a sufficiently compelling interest to meet strict scrutiny. *Bakke*, 438 U.S. at 312 (opinion of Powell, J.). The Regents specifically wanted their institutions to select a group of students who would contribute to a robust exchange of ideas, and argued that "ethnic diversity" was a means of achieving that goal. *Id.* at 313-15. While rejecting the argument that Davis's specific program of reserving spaces for disadvantaged minorities was necessary to achieve the robust exchange of ideas that the Regents allegedly wanted, Justice Powell did state that race and ethnicity could be considered as "plus" factors by universities seeking to achieve that goal. Justice Powell opined that a state interest in a robust exchange of ideas would not justify the consideration of race to achieve the ethnic diversity promoted by UC Davis, but could justify its consideration to

achieve a diversity which "encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Id.* at 315.

The first thing to note about Justice Powell's compelling interest of academic freedom is how different it is from the generally-understood notion of academic freedom. Academic freedom is committed to the robust exchange of ideas, *Keyishian v. Bd. of Regents of the University of the State of New York*, 385 U.S. 589, 603 (1967), with no ideas deemed better than others simply because they are more widely held. Yet Justice Powell *rejected* Davis's idea of how a university should select its students in order to maximize learning for all. *Id.* at 315 ("[P]etitioner's argument that [ethnic diversity] is the only effective means of serving the interests of diversity is seriously flawed."). Accordingly to Justice Powell, Davis's view of proper class formation "focused *solely* on ethnic diversity, would hinder rather than further attainment of genuine diversity." *Id.* (emphasis in original). Justice Powell preferred Harvard's use of race in admissions to achieve diversity. *Id.* at 316-17; *cf. Grutter*, 529 U.S. at 324 ("Justice Powell was, however, careful to emphasize that *in his view* race 'is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body.'") (emphasis added) (quoting *Bakke*, 438 U.S.at 314).

Thus, Justice Powell had a very constrained

and idiosyncratic vision of academic freedom: the freedom to imitate Harvard.

In *Grutter*, this Court first mentioned Justice Powell's rationale and its grounding in academic freedom. *Grutter*, 539 U.S. at 324. It further stated that "[o]ur conclusion that the Law School has a compelling interest in a diverse student body is informed by *our view* that attaining a diverse student body is at the heart of the Law School's *proper* institutional mission, and that 'good faith' on the part of a university is 'presumed' absent 'a showing to the contrary.'" 539 U.S. at 329 (emphasis added) (quoting *Bakke*, 438 U.S. at 318-319). Thus, again, this Court suggested that the exercise of "academic freedom" protected by the First Amendment was subject to approval by this Court as "proper"; only *after* such imprimatur came does the Court then go on to presume the good faith of the institution.

This notion of academic freedom contrasts with the much more limited notion of academic freedom provided in cases like *Runyon v. McCrary*, 427 U.S. 160 (1976). There, of course, the Court rejected a First Amendment argument by a segregationist *private* school to the effect that it had the right to select its students in a way that would not undermine its segregationist message. *Id.* at 176.

When *Runyon* is considered with Justice Powell's *Bakke* opinion and this Court's opinion in

Grutter, this Court's jurisprudence appears to reach the counterintuitive conclusion that the First Amendment provides better protection for *public* institutions to engage in race-consciousness in admissions than it does for private ones. *But see Coalition to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 247 (6th Cir. 2006) ("It is not clear, for example, how the Universities, as subordinate organs of the State, have First Amendment rights against the State or its voters. *See, e.g., Trs. of Dartmouth Coll. v. Woodward*, 4 Wheat. 518, 17 U.S. 518, 629, 4 L.Ed. 629 (1819). One does not generally think of the First Amendment as protecting the State from the people but the other way around — of the Amendment protecting individuals from the State."); *Hopwood v. Texas*, 78 F.3d 932, 943 n.25 (5th Cir. 1996).

Worse, it suggests that the Court's deference to, and protection of, "academic freedom" of institutions depends upon those institutions adopting ideas with which a majority of the members of this Court agree.

This Court should abandon the notion that "academic freedom" – whether to choose a more racially diverse student body, to choose a more generally diverse student body, or to choose a more homogenous student body – is a compelling governmental interest that supports the use of race to determine who is admitted to a public school. The current course diminishes two crucial parts of the Constitution: the First Amendment (by suggesting

that some ideas are entitled to more protection than others) and the Equal Protection Clause (by abandoning the principle of equal treatment in favor of implementing fashionable academic theories). No good can come of continuing on it.

Rather, the determination of whether the state has a compelling interest should come from rigorous evidence that the use of race leads to substantial improvements in the educational process. That assessment should be made, in the same fashion, for *any* use of race, be it preferences to attain a diverse student body or race-segregated elementary schools (to cite another currently-fashionable educational theory). No state actors, not even university administrators, are entitled to deference in their use of race.

II. THIS COURT'S CURRENT "NARROW TAILORING" JURISPRUDENCE ENCOURAGES STEALTH

In *Bakke*, Justice Powell distinguished between a "plus" system and the system employed by the Davis Medical School (reserving some spots for qualified, disadvantaged minorities). In *Grutter* and *Gratz*, this Court distinguished between the "point" system employed by the University of Michigan's undergraduate school of Literature, Science, and Arts and the more "holistic" system employed by that university's law school.

In both cases, a minority of the Justices of this

Court found that these distinctions elevated form over substance. *Bakke*, 438 U.S. at 379 (Brennan, J., concurring in the judgment in part and dissenting in part) (there was no basis "for preferring a particular preference program simply because in achieving the same goals that (Davis) is pursuing, it proceeds in a manner that is not immediately apparent to the public."); *Gratz*, 539 U.S. at 305 (Ginsburg, J., dissenting) ("If honesty is the best policy, surely Michigan's accurately described, fully disclosed college affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises.").

Similarly, most lower courts have found the distinction between a goal and a quota difficult to discern. *Middleton v. City of Flint*, 92 F.3d 396, 412-13 (6th Cir 1996) ("[W]e note that quotas and preferences are easily transformed from one into the other.") (*citing Bakke*, 438 U.S. at 378 (Brennan, concurring and dissenting)); *Hopwood*, 78 F.3d at 948 n 36 (noting that "even if a 'plus' system were permissible, it likely would be impossible to maintain such a system without degeneration into nothing more than a 'quota' program") (*citing Bakke*, 438 U.S. at 378 (Brennan concurring in the judgment in part and dissenting in part)); *Valentine v. Smith*, 654 F.2d 503, 510 n.15 (8th Cir 1981) ("Any distinction between goals, quotas, and targets is primarily semantic.") (*citing Bakke*, 438 U.S. at 378 (Brennan concurring in the judgment in part and dissenting in part)).

This is particularly so given Justice Powell's suggestion that weights applied to race and other diversity factors "may vary from year to year depending upon the 'mix' both of the student body and the applicants for the incoming class," *Bakke*, 438 U.S. at 318, and his somewhat vague references to the degree to which a school could look at numbers. *Id.* at 316 (quoting Appendix to Brief for Columbia University, Harvard University, Stanford University, and the University of Pennsylvania, as Amicus Curiae, Regents of the University of California v. Bakke, No 76-811, *2-3 (filed Jun 7, 1977)). Examining the mix, and varying the weight given to race (or membership in a given race) can only be for one purpose: to achieve a proper racial mix. *But cf. Grutter*, 539 U.S. at 335-36 (holding that the law school's attempt to achieve a "critical mass" of underrepresented minorities, its attention to numbers, and its consultation with daily reports that provided racial breakdown of its incoming class did not change its "flexible admission system" into a "rigid quota").

For Justice Powell, at least, a system that considered race explicitly, but along with other factors, *was not even racially discriminatory*. *Bakke*, 438 U.S. at 318-19 (opinion of Powell, J.) (stating that "a facial intent to discriminate" does not "exist[] in an admissions program where race or ethnic background is simply one element--to be weighed fairly against other elements--in the selection process"; in such a system, "good faith

would be presumed.").[2] Further, there would be "a presumption of legality and legitimate educational purpose," and "there is no warrant for judicial interference in the academic process." *Id.* at 319 n.53.

Justice Powell's opinion, and its adoption in *Grutter*, suggest a much different kind of strict scrutiny than the searching one this Court previously had described. It is based on the notion that there is a substantial difference between the Harvard and University of Michigan Law School systems on the one hand, and the Davis Medical School and UM Literature, Science and Arts system on the other. As any number of Justices of this Court have recognized, though, those systems, and the manner in which they consider race, are far more alike than they are different.

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[2] It would seem that *Grutter* at least formally (albeit implicitly) rejected this argument. *Grutter* purported to apply strict scrutiny to the University of Michigan Law School's admissions system. *Grutter*, 539 U.S. at 327 ("we turn to the question whether the Law School's use of race is justified by a compelling state interest"); *id.* at 334 ("Contrary to Justice Kennedy's assertions, we do not 'abando[n] strict scrutiny . . .'"). The application of strict scrutiny implies that the Court found intentional discrimination. *Wisconsin v. City of New York*, 517 U.S. 1, 19 n.8 (1996) ("Strict scrutiny of a classification affecting a protected class is properly invoked only where a plaintiff can show intentional discrimination by the Government."). But, as noted in the text, *Grutter* adopted Justice Powell's deference to university administrators and thus applied a much different strict scrutiny than the searching one that the Court previously had applied.

As a consequence, university administrators can comply with the law simply by avoiding the specific tools that this Court has condemned, and by declaring that their use of race is part of a "holistic" process of evaluation. Since there is no way for anyone outside the process ever to assess that declaration, strict scrutiny devolves into a simplistic scrutiny of the admissions' officers ability to place the correct labels on their process. No evaluation is made of whether the preferences are small or large, and what consequences that might have for the academic performance of the students. As shown in the next section, there is increasing evidence that the extent of the preferences is having deleterious, rather than salubrious, effects on the education process.

III. EXPERIENCE WITH RACIAL PREFERENCES BY UNIVERSITIES FURTHER MILITATES IN FAVOR OF A SEARCHING STRICT SCRUTINY

Justice Powell assumed that the preferences he envisioned, regardless of size, would not preclude the beneficiaries of these preferences from competing academically. Increasing evidence suggests that when the size of the preferences are large – as is true more often than not in higher education – Justice Powell's assumption fails. This consideration must be accounted for both in the level of scrutiny chosen and its application.

In determining the proper level of scrutiny for

so-called benign racial preferences (that is, ones in which certain favored groups are benefitted), this Court has considered both the harm to the disfavored groups *and* the favored groups. *E.g.*, *Adarand Constructors v. Pena*, 515 U.S. 200, 228 (1995) ("'Although [the legislation at issue] stigmatizes the disadvantaged class with the unproven charge of past racial discrimination, it actually imposes a greater stigma on its supposed beneficiaries'") (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 516-17 (1989) (Stevens, J., concurring)) (brackets as in *Adarand*). *Cf. Bakke*, 438 U.S. at 360 (Brennan, J., concurring and dissenting) (The Court has "recognized that the line between honest and thoughtful appraisal of the effects of past discrimination and paternalistic stereotyping is not so clear and that a statute based on the latter is patently capable of stigmatizing all women with a badge of inferiority.").

As set forth in the petition-stage amicus brief of Richard Sander and Stuart Taylor, there is increasing evidence that the so-called beneficiaries of racial preferences are actually harmed by them. Indeed, the evidence provided by Sander and Taylor suggest that these beneficiaries are producing weak educational outcomes: failure to pass professional competency exams, poor grades, or just plain dropping out. This Court ought to consider that evidence in determining the kind of scrutiny that racially-preferential policies like those at issue here deserve.

The harm, it deserves mention, is twofold. First, of course, when the beneficiaries of racially-preferential policies are unable to achieve minimal educational or professional goals, that harms them. *Cf. Grutter*, 539 U.S. at 372 (Thomas, J., dissenting) ("These overmatched students take the bait, only to find that they cannot succeed in the cauldron of competition. And this mismatch crisis is not restricted to elite institutions."). But by creating a class of beneficiaries who conspicuously fail to achieve those goals when admitted to particular schools, preferential policies reinforce and compound the very stereotype of inferiority that those policies were intended to overcome.

Members of preferred groups who did not need any preference at all are unfairly stigmatized, to be sure. *See id.* at 373 ("[T]he Law School admits a handful of blacks who would be admitted in the absence of racial discrimination. . . . [B]ecause of this policy all are tarred as undeserving. This problem of stigma does not depend on determinacy as to whether those stigmatized are actually the 'beneficiaries' of racial discrimination"). When members of preferred groups drop out of school or fail a professional competency exam, there is, in addition, an even worse stigma attached to them: that of incompetence. And this is so even though the evidence now suggests that they would have been far more successful had they attended schools with students of comparable academic talents.

CONCLUSION

This Court should examine the University of Texas's admissions system with the searching, strict scrutiny traditionally applied in cases involving racial classifications. If it does so, it will find that system wanting for the reasons that petitioner supplies.

Accordingly, for the foregoing reasons, and those set forth by petitioner and the other *amici* supporting petitioner, this Court should reverse the judgment of the court below.

Respectfully submitted,

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