

No. 11-345

In the Supreme Court of the United States

ABIGAIL N. FISHER

v.

UNIVERSITY OF TEXAS AT AUSTIN, ET AL.

***ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT***

**BRIEF FOR NATIONAL ASSOCIATION OF BASKETBALL
COACHES, WOMEN'S BASKETBALL COACHES
ASSOCIATION, BLACK COACHES & ADMINISTRATORS,
BETH BURNS, JOHNNY DAWKINS, JAMIE DIXON,
PAUL HEWITT, BEN HOWLAND, TOM IZZO, PHIL
MARTELLI, JOANNE P. MCCALLIE, MIKE
MONTGOMERY, SUE SEMRAU, ORLANDO "TUBBY"
SMITH, CHARLI TURNER THORNE, COQUESE
WASHINGTON AND ADDITIONAL INDIVIDUALS
AS AMICI CURIAE IN SUPPORT OF RESPONDENTS**

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INTEREST OF AMICI¹

Amici are organizations representing over 12,000 current and former collegiate basketball coaches and collegiate athletic administrators at the NCAA, NAIA, and community college levels, as well as forty-three current and former coaches and administrators who have signed in their individual capacity.² Collectively the amici organizations and individual coaches represent hundreds of years of experience working with tens of thousands of student-athletes. In this long experience we have seen firsthand the dramatic and lifelong benefits that our team members derive from working and competing alongside individuals of diverse backgrounds. We are also keenly aware of the importance of not isolating diversity at our university within the athletic department or other subsets of the whole institution. Our student-athletes, and all of the students who attend our institutions, receive the best education when they are able to interact with others within a university community that is broadly diverse across its entire scope. We file this brief to underscore these points and to urge this Court to permit our institutions to continue to use individualized discretion

¹ The parties have consented to the filing of amicus curiae briefs in support of either party or of neither party, in letters on file with the Clerk. No counsel for any party authored this brief in whole or in part, and no person or entity, other than amici curiae, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

² Individual signatories are expressing their own views, and are not signing on behalf of the institutions where they work or have worked.

in forming student bodies that reflect university judgment on how to foster such broader and more nuanced diversity on campus.

Each of the amici organizations has a history of seeking to foster conditions at our institutions that enhance the experiences of athletes, coaches and administrators far beyond the basketball court. The National Association of Basketball Coaches (NABC), originally founded in 1927 by University of Kansas coach Phog Allen, has sought in recent years to ensure that our own coaching ranks and the leadership of our athletic departments better reflect the diversity of our athletic teams. The Women's Basketball Coaches Association (WBCA) has for the past three decades worked to promote opportunities for collegiate academic and athletic success to female basketball players from a wide range of racial and socioeconomic backgrounds. The Black Coaches & Administrators (BCA) organization, formed in 1987, with a membership of 4,000 plus, has worked to generate an atmosphere of diversity and inclusion in all sports from high school to college, including the professional leagues. The BCA is considered to be the current leading advocacy group for ethnic minorities in collegiate sports.

Amici's interest in this case aligns with efforts taken in past years to build and maintain pathways of opportunity for collegiate success and future leadership to the broadest possible range of individuals, including those traditionally underrepresented in our colleges and universities. Intercollegiate athletics, which less than a lifetime ago was among the most exclusionary domains of American life, has since become a portal of

opportunity to many young men and women to receive a higher education, in some cases the first in their families to do so. Most of these individuals go on to professional careers in areas other than sports, in many cases becoming leaders in their fields. Many of them will aspire to go on to graduate school at the same institutions where they competed as undergraduates. Amici organizations and their members have witnessed the enduring benefits – for nonminority and minority students alike – that this increased diversity has produced, and have a deep interest in allowing our institutions to continue furthering this goal unfettered by external restraints. We have publicly voiced our opposition in recent years to ballot initiatives in various states that would categorically disable our institutions from holistically considering each of our applicants as entire persons, and similarly urge this Court to avoid imposing new categorical restrictions on our institutional discretion.

SUMMARY OF THE ARGUMENT

Less than a decade ago this Court affirmed the bedrock principle that “[e]ffective 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 v. Bollinger*, 539 U.S. 306, 332 (2003). Institutions of higher education have a particularly crucial role to play in working toward this compelling national aspiration. The Court has long recognized the “special niche” of the university in our constitutional jurisprudence and granted substantial deference to its academic judgment as to the optimal composition of its student body. *Id.* at 329;

Univ. of Cal. Regents v. Bakke, 438 US 265, 312 (1978) (Powell, J.). In assessing such academic discretion, the Court has noted the “substantial” benefits that campus diversity produces, in “promot[ing] cross-racial understanding, help[ing] to break down racial stereotypes, and enabl[ing] students to better understand persons of different races.” *Grutter*, 539 U.S. at 330. These benefits from diversity are “not theoretical but real,” and they reverberate through time far beyond the college years as graduates learn to work, interact and lead within an increasingly diverse national and global society. *Ibid.*

Amici fully endorse these judicial affirmations of the compelling importance of campus diversity, and are in a unique position to attest to the transformative function that a diverse collegiate atmosphere serves in creating the next generation of leaders. Collectively we have coached and taught tens of thousands of student-athletes over the past several decades. Few university officials come to know their students as well as we do our team members. Often we first meet our student-athletes while they are still in high school, and even more often our relationship with them continues for many years after they leave college. Our long-term interaction with our student-athletes affords us a unique perspective and allows us to see with crystal clarity the transformative effect that their time on campus has on their future development: the lessons they learn at our institutions echo throughout their lifetimes and contribute to their success as leaders in the workplace and in their communities.

Among the most important of these enduring lessons is the ability to work with, learn from, and interact with individuals from diverse backgrounds. At one time not long ago the realm of intercollegiate sports was among the most segregated areas of American life; today our teams reflect a high degree of racial and socioeconomic diversity. Today 45.6% of all NCAA men's basketball players are African-American, as are 32.8% of women's basketball players, and an additional eight to ten percent of players on men's and women's teams are from other minority backgrounds. NCAA, *2009-2010 Student-Athlete Ethnicity Report* 112 (2010), available at <http://tinyurl.com/3y9btlh>.

This diversity is more than just a number: each day in practices and games we witness, and aim to foster, the positive dynamic of student-athletes working together toward a common purpose. Many of our athletes come to college without having had meaningful opportunities for close interaction with individuals of different races, and the chance to do so while in college broadens their understandings in ways that are both significant and enduring. And this perspectival benefit accrues to all student-athletes – nonminority as well as minority – who have the opportunity to train and compete alongside teammates from different backgrounds.

But the positive impact of the diversity we see on our teams is merely one part of a larger picture. While we are well aware of the tangible benefits our student-athletes reap from practicing and competing with teammates from different backgrounds, these benefits are undercut and stifled if they do not similarly interact

with students from diverse backgrounds away from the basketball court. Our athletes do not, and should not, exist on an athletic department island segregated from the rest of the university. The more interaction they have with the broader campus community, the greater their achievements and contributions to the whole university. Many of them will go on to graduate or professional schools once their playing days are over, and it is important that these pathways of opportunity remain open. Our colleagues across the university also see, in different contexts, the substantial value that students gain from interaction within a diverse community, and it is important that the entire university have the discretion to work toward this broader vision through a nuanced consideration of individual applicants unfettered by categorical restrictions.

We have also witnessed the unfortunate consequences that follow when, by either judicial decree or change in policy, a university no longer has the discretion to build a diverse community. Many times after such policies have been implemented, minority athletes are a substantial proportion of all the minorities remaining on campus. Minority student-athletes, deprived of peers and role models who share similar backgrounds, find integrating into the college community difficult and achieving academic success more challenging. Moreover, the benefits of campus diversity are almost entirely lost since, because many of the minorities on campus are athletes, they for a large part share similar talents, interests, and extra-curricular activities – and a true diversity of opinions,

perspectives, and life experiences is largely absent on the broader campus.

In such circumstances, minorities may even be a numerically substantial proportion of the students on campus. These raw statistics, however, obscure the fact that many of the minorities are student-athletes, and so the university community lacks true diversity, despite appearances based on numbers alone. This was in fact the case at the University of Texas at Austin under the Top 10% Law before the University implemented its current race-conscious admissions policy: although the University had a sizable number of African-Americans on campus, many of the University's African-American students were athletes. Petitioner contends that universities have no compelling interest in implementing a race-conscious admissions program where some arbitrary percentage of minorities enroll, but this fails to take into account this experience and so threatens to act like a straight-jacket on universities, preventing them from crafting policies to promote a more broadly diverse campus community.

In this brief we amplify all of these points in greater detail. First, we use the history of intercollegiate sport over the past half-century to illustrate the challenges of opening opportunity to all individuals, and some successes we have achieved. Second, we describe the tangible and durable benefits to our students as a result of their time spent as student-athletes at our institutions, and in sharing those experiences with a range of teammates from a variety of backgrounds. Next, we emphasize the

importance of diversity within the broader university, and discuss the importance of permitting institutions of higher learning the discretion to frame their own goals and individualized methods toward furthering the compelling goal of a pluralistic campus.

ARGUMENT

I. THE PAST AND PRESENT OF INTERCOLLEGIATE ATHLETICS YIELDS LESSONS ABOUT THE ONGOING RELATIONSHIP BETWEEN ATHLETIC PARTICIPATION AND LEARNING FOR ALL ATHLETES

Sport in the United States is firmly situated within the broader currents of American culture, and over time has served to illustrate the complex challenges associated with opening doors of opportunity to individuals of all races, and to men and women alike. Many observers have noted the manner in which dynamics of inclusion and exclusion in athletic competition yield lessons for our broader consideration of diversity and discrimination in society at large. Judge Patrick Higginbotham in the panel opinion below made express reference to this fact, noting that “the role of black athletes in the southern universities forty years ago presents diversity’s potential better than can we.” *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 247 (5th Cir. 2011).

Judge Higginbotham’s words ring true for our sport as for others. Less than a lifetime ago, many of the institutions where we now coach had basketball teams that were open only to white male athletes. To take one high profile example, as late as 1967 no African-American had ever donned the uniform of a Southeastern Conference varsity athletic team. When Vanderbilt sophomore basketball player Perry Wallace Jr. became the first to do so in the fall of that year, he was regularly greeted with vicious taunts and death threats by fans in opposing venues. Even decades later

Wallace has spoken of the extreme psychological distress he felt from playing under such circumstances and the toll that his college experience placed on him. Linda T. Wynn, *Perry E. Wallace Jr.*, in *The Tennessee Encyclopedia of History and Culture* (2010), available at <http://tinyurl.com/clhqtsc>; Antonya English, *Former Vanderbilt Star Perry Wallace Learned to Overcome Hatred as Southeastern Conference's First Black Basketball Player*, Tampa Bay Times, Jan. 25, 2009, available at <http://tinyurl.com/8ntky5r>.

Yet Wallace's pathbreaking undergraduate experience was only the first chapter in his long and distinguished career. After graduating from Vanderbilt he received a law degree at Columbia, practiced law for many years at the U.S. Department of Justice, and then joined the faculty of American University's Washington College of Law where he remains today. Wynn, *Perry E. Wallace Jr.*, in *The Tennessee Encyclopedia of History and Culture*

Wallace's trajectory – from interscholastic athletic opportunity to professional success – is representative of a recurring pattern amongst our student-athletes, and is similarly illustrated by female athletes who were belatedly given opportunities to compete at high levels and have since gone on to break barriers in other fields. Lynn Elsenhans was a member of the first varsity women's basketball team ever at Rice University, and later rose to become the first female CEO of a major oil company when she took the helm at Sunoco in 2008. Jodi Gillette, who played basketball at Dartmouth more than two decades ago, is today the White House's Senior Policy Advisor on Native American issues and among the most important Native American officials in

the federal government. Loretta Reynolds, who is now one of only a few female generals in the U.S. Marine Corps, played varsity basketball at the Naval Academy years ago. See Press Release, Women's Sports Found., 40 Women Who Have Made a Significant Impact on Society After Playing High School or College Sports (May 17, 2012), *available at* <http://tinyurl.com/7hxgoh5>. For thousands of other student-athletes who have since followed a similar path, the same dynamic holds true: collegiate athletic experience is one early chapter in their success, but far from the last.

Moreover, as this Court has recognized, opening all aspects of our universities to the broadest range of students also yields benefits for those who have traditionally been in the majority at such institutions. Another feature of stories like Perry Wallace's from the history of collegiate sport serves to illustrate this crucial additional dimension of diversity that remains important today: playing alongside Wallace and witnessing the challenges that he and others faced provided important lessons to the white athletes and coaches on his and opposing teams. See, *e.g.*, English, *Former Vanderbilt Star Perry Wallace Learned to Overcome Hatred as Southeastern Conference's First Black Basketball Player*.

This educative aspect of diversification of athletic teams was not an isolated instance in that era: Harvard University's basketball team famously chose not to travel to segregated Louisiana to play in a game in December 1956 due to a state law forbidding interracial athletic teams. Although the team that season was all-white, the Harvard players who voted not to go cited

their experience playing with their African-American teammate Bob Bowman in prior years as a key factor in their vote to make “the right decision, just on principle.” Bill Pennington, *In 1956, a Racial Law Soured Harvard on a Trip to New Orleans*, N.Y. Times, Mar. 14, 2012, available at <http://tinyurl.com/cus2pjt>. Similarly, the white members of University of Buffalo’s highly-ranked football team voted unanimously in 1958 to reject participation in a major bowl to be held in an Orlando, Florida stadium that would have barred their two African-American teammates from taking the field, based in large part on the sense of collective solidarity that had been formed across racial lines by interacting with each other all season. Eric Neel, *All or Nothing*, ESPN, Nov. 13, 2008, available at <http://tinyurl.com/6qeqw3>.

Former Senator Bill Bradley, in looking back at his long and distinguished career in public service, specifically gave voice to what he learned from playing basketball in a diverse setting as a younger man. Describing an ideal of cross-racial understanding and cooperation, he asked:

Why, of all the places in America, is that ideal closest to being achieved on a basketball court? I believe it’s because the community of a team is so close that you have to talk with one another; the travel is so constant that you have to interact with one another; the competition is so intense that you have to challenge one another; the game is so fluid that you have to depend on one another; the high and low moments are so frequent that you learn to

share them; the season is so long that it brings you to a mutual acceptance. That is not to say that no racists have ever survived a multiracial team experience with their prejudices intact, but my guess is that the numbers are few.

Bill Bradley, *Values of the Game* 78-79 (1998).

Although the dynamics and challenges of race in our current interscholastic setting are different in many respects than they were a half-century ago, the essential importance of building cross-racial understanding and an inclusive atmosphere remain. Today, our athletic departments have fortunately moved far from the outright exclusionary racial practices of a prior generation, even as challenges persist. An institution like the University of Kentucky, which notably fielded an all-white basketball team as late as 1970, won the national title with an African-American coach just over a quarter-century later. The basketball court that was once a fulcrum of racial exclusion has become a venue for unusually mixed athletic teams: today 45.6% of all NCAA men's basketball players are African-American, as is 32.8% of women's basketball players. NCAA, *2009-2010 Student-Athlete Ethnicity Report* 112 (2010), available at <http://tinyurl.com/3y9btlh>.

This change has not happened overnight and even in the past decade we have made significant gains. Many of us have witnessed this during our careers, and worked to achieve such progress. We have achieved this diversity on our teams using the ultimate in individualized assessment: recruits are assessed primarily on a multitude of nonracial criteria, including

academic potential, athletic talent, and leadership and interpersonal skills. See, *e.g.*, Lisa E. Wolf-Wendel et al., *There's No "I" in "Team": Lessons from Athletics on Community Building*, 24 Rev. Higher Ed. 369, 392 (2001) ("In athletics, coaches emphasize what each individual can bring to the team"). No recruit is reduced mechanically to a racial label, nor, in the competitive interscholastic atmosphere in which we operate, would it be in our interests to do so.

However, to say that race matters little in our recruitment of athletes is emphatically not to say that race has become irrelevant in those students' lives. It is impossible and unrealistic to erase the fact that our student-athletes come from dramatically different backgrounds and face dramatically different challenges in their collegiate experiences, based in part on their race. Many of our team members, particularly those from minority communities, are the first in their families to attend college. See Dawn R. Person & Kenya M. Lenoir, *Retention Issues and Models for African American Male Athletes*, 80 New Dir. Stud. Servs. 79, 80 (1997) (data "reflect a high first-generation college student population" among minority student-athletes). Lacking an experienced support structure among family and friends at home, it is imperative that these students are able to connect with others around the broader university as in the athletic department, and a university that is diverse on multiple dimensions both within and outside the athletic department is instrumental to this end. See Rhonda Hyatt, *Barriers to Persistence Among African*

American Intercollegiate Athletes, 37 Coll. Stud. J. 260, 267-68 (2003).³

Equally unrealistic would be to ignore race entirely in the interactions of our team members with each other. As this Court has noted in a different context, the opportunity to learn from and interact with others from “the greatest possible variety of backgrounds” can be a durable and substantial benefit from time spent in the academy as a young person. *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (quotation omitted).

Our athletes experience this dynamic every day, and benefit substantially from it. Our collective experience teaches us of the value of this interaction; so too do numerous academic studies that have found that “[s]tudent athletes in certain racially diverse sports have a unique opportunity to engage in extracurricular multicultural experiences” Scott Hirko, *Intercollegiate Athletics and Modeling Multiculturalism*, 148 New Dir. Higher Ed. 91, 92 (2009). In one large-scale survey, Indiana University researchers found that “[b]ased on a sample of over 55,000 seniors attending 153 NCAA Division I institutions . . . student athletes in general have significantly greater engagement with diversity than their non-athlete peers.” Ty M. Cruce & F. Nelson Laird, *What’s the Score? Diverse Experiences Among*

³ Even in the most ostensibly neutral setting of all, on the basketball court itself, there is evidence that a player’s race may matter at the margins of referees’ official judgment in unintentional but identifiable ways. See Joseph Price & Justin Wolfers, *Racial Discrimination Among NBA Referees*, 125 Q. J. Econ. 1859, 1859-1860 (2010).

Collegiate Athletes and Non-Athletes 15 (2009) (manuscript available at <http://tinyurl.com/cavelg9>).

Such exposure to diverse students during the formative years of college yields tangible and durable benefits. “[I]nteracting across race is related to several important educational outcomes, including intellectual and social self-confidence, openness to diversity, critical thinking, and problem-solving.” Cruce & Laird, *What’s the Score? Diverse Experiences Among Collegiate Athletes and Non-Athletes* 4. These benefits are magnified in the case of college athletes given their relatively greater exposure to diversity, and their focus on a common goal in such a setting. Wolf-Wendel, *There’s No “I” in “Team”: Lessons from Athletics on Community Building* 369-370. Research has shown that our student-athletes are aware of this and appreciate the benefits they receive: one survey found that “on average, college athletes perceived that they had an important opportunity to learn from racial diversity, and that this learning benefited their education.” Scott Hirko, *Do College Athletes Learn from Racial Diversity in Intercollegiate Athletics? A study of the Perceptions of College Athletes from the State of Michigan* 26 (2007) (unpublished dissertation available at <http://tinyurl.com/cfnayc8>). In sum, “[d]espite a history marred by the most blatant forms of discrimination, intercollegiate athletics has responded particularly well to challenges associated with diversity—and now enjoys the advantages associated with bringing together people from different backgrounds in the pursuit of a common goal.” Wolf-Wendel et al., *There’s No “I” in “Team”: Lessons from Athletics on Community Building* 370.

The understanding and sense of perspective that these interactions produce persist long after our student-athletes leave college. Many of the nation's most prominent leaders, including our current President, have cited the lasting influence of organized team sports participation on their success much later in life. Austin Murphy, *Obama Discusses His Hoops Memories at Punahou High*, Sports Illustrated, May 21, 2008, *available at* <http://tinyurl.com/7dq9j5d>. One of the enduring lessons that sport can teach is the ability to work with and learn from others from diverse backgrounds. It is important that our institutions remain free to take steps to set the stage for such learning by assembling a diverse student body without externally-imposed restrictions on that goal.

II. OUR EXPERIENCE COACHING STUDENT-ATHLETES DEMONSTRATES THAT ACHIEVING TRUE DIVERSITY IS CRUCIAL FOR BOTH STUDENT-ATHLETES AND THE BROADER COLLEGE COMMUNITY

While we recognize the importance of diversity on our teams, we are also keenly aware that our student-athletes do not, and should not, exist on an island apart from the broader university. The diversity that is important to us as coaches is no less important when our athletes interact as students in the broader university. Over 400,000 student-athletes every year will “go pro” in something other than sports. See, *e.g.*, NCAA, *How Do Athletic Scholarships Work?* (2011), *available at* <http://tinyurl.com/c9rqfdb>. Many of them have the potential to be leaders in such fields. It is crucial that in the formative years they see pathways of

opportunity in multiple contexts. The diversity of the broader university directly leverages, and is connected to, the diversity within our teams, and the broader campus diversity is essential for the future success of our student-athletes.

For this reason, it is imperative that our institutions have the academic freedom to create a university community that serves this and other important goals. However, it is our experience that when universities are deprived of the ability to consider race in admissions and build a truly diverse community, the resulting student body is often such that minority student-athletes comprise a sizable portion of *all* the minorities on campus. The all-too-common dynamic, which we have seen repeat itself on campuses throughout the country, is that minority student-athletes are admitted on athletic scholarships, but their peers are denied admissions in a process that fails to consider the racial composition of the class. In some cases, college campuses may look on paper to be numerically racially diverse, but the numbers belie the fact that diversity *within* minority groups, based on interests, talents, and experiences is virtually nonexistent. Indeed, as we discuss in detail below, this was in fact the case with the University of Texas under the Top 10% Law before it implemented its current admissions policy.

Integrating into the broader college community is difficult for student-athletes who are the only minorities on campus; they are deprived of peers and role models from similar backgrounds with a diverse set of talents and interests. The rest of the campus is

also deprived of interacting with a truly diverse student body in such situations, since many of the minorities one may interface with will also be athletes. It also reinforces the stereotype that members of some minority groups are all athletic or are interested primarily in sports. Such stereotyping and isolation can create a “self-fulfilling prophecy whereby fellow students, professors, counselors, and collegiate sports fans assume that the African-American athlete is on campus only for sport participation and not to obtain an education or to excel in academics.” Earl Smith, *Race, Sport, and the American University*, 17 J. Sport & Soc. Issues 206, 210 (1993).

This Court has recognized that diversity is a deeper concept than enrolling a certain number of students of certain races. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 329-330 (2003) (explaining that the law school’s admissions policy “is not simply ‘to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin,’” but rather focuses on “the educational benefits that diversity is designed to produce” (quoting *Univ. of Cal. Regents v. Bakke*, 438 US 265, 307 (1978) (Powell, J.))). As the experience of our student-athletes reinforces, it is of great importance that the student body is diverse across a multitude of characteristics; it disserves a college community, for example, to only have African-American athletes, but no African-American physicists, journalists, or engineers. Petitioner’s argument turns these core principles upside down: she asks this Court to find that once a university has reached some arbitrary quantum of “enough” diversity, it is then

foreclosed from exercising its customary discretion in forming the remainder of the academic community. See Pet. 20; *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 234 (5th Cir. 2011) (Petitioner “question[s] whether UT *needs* a *Grutter*-like policy” because of the Top 10% Law.) The compelling interests of our academic institutions, and our nation, warrant a far more individualized approach than this.

A. The Diversity of the Broader University Interacts with the Diversity of Our Teams in Multiple Ways

Our long experience at institutions of higher learning makes us keenly aware of the importance of building a diverse community in the university at large, not merely within the athletic department. Such diversity yields direct benefits to our student-athletes while they are in school, and also after their graduation, and facilitates the broadest possible beneficial interaction between all students.

First, it is clear that our student-athletes have a substantially richer and more successful collegiate experience when they are able to engage with the university as a whole. We see this every year in the large numbers of our players who take part in a range of academic and extracurricular activities other than basketball. Academic studies confirm our experiential observations: collegiate athletes achieved greater academic success when they “perceived their campus environment to be more supportive of their academic and social needs.” Peter D. Umbach et al., *Intercollegiate Athletes and Effective Educational Practices: Winning Combination or Losing Effort?*, 47

Res. in Higher Educ. 709, 725 (2006). These beneficial interactions are most likely to take place when the broader university reflects the diversity of the broader society, and when they can connect with peers who share similar backgrounds and experiences.

Second, our athletes and all students from diverse backgrounds are more likely to succeed after their undergraduate years when they are fully aware of all the pathways to future success open to them. A university that is broadly and eclectically diverse is more likely to produce the role models who in turn will inspire and attract future leaders to follow their path. Most of our student-athletes will not have a career playing professional basketball – it is crucial that they are aware of and engage with other options for the future. We are aware of our own athletic departments' past shortcomings on this dimension – the diversity of our student-athletes has not historically been reflected in our own ranks or in the leadership of our departments, a situation we have actively sought to remedy in recent years. NCAA, *2009-2010 Race and Gender Demographics Report 7* (2010), available at <http://tinyurl.com/c9rqfdb>. But just as it is important for our student-athletes to imagine career options in athletic leadership, we want to ensure that the full range of options in graduate and professional school is tangibly visible to them as potential career paths.

B. When Universities are Deprived of the Ability to Build a Racially Diverse Class, Minority Student-Athletes are Often a Substantial Number of the Minorities on Campus, Which Undermines the Universities' Ability to Build True Diversity

As this Court has recognized repeatedly, the broader university community also benefits from diversity and the ability to interact with people of different races, backgrounds, talents, and interests. *Grutter v. Bollinger*, 539 U.S. 306, 330-331 (2003). A university that is diverse only within the confines of its sporting venues fails to advance these important values. This is illustrated by unfortunate recent experience. Several of us have worked at institutions whose ordinary academic discretion over admissions was curtailed by judicial or legislative fiat. Such external strictures have often produced a skewed and imbalanced campus community where the diversity of the athletics department, and of society generally, is not reflected across the university.

The result in some situations is that our student-athletes represent a large portion of all the minorities on campus. Following the passage of Proposition 209 in California, which prohibits the consideration of race in admissions, African-American enrollment at UCLA fell to a thirty-year low. See Rebecca Trounson, *A Startling Statistic at UCLA*, L.A. Times, June 3, 2006, available at <http://tinyurl.com/dy58neh>. Only ninety-six African-American freshmen were in an entering class of 5000 at UCLA in 2006, and a substantial

fraction of that number was recruited athletes. *Ibid.* The University of Texas itself provides another example. The entering freshman class of 2004, the last class admitted under the Top 10% Law but without considering race in its admissions process, enrolled only 309 African-American students out of an incoming class of nearly 7000. Office of Admissions, Univ. of Texas at Austin, *Implementation and Results of the Texas Automatic Admissions Law* 6 tbl. 1 (2008), available at <http://tinyurl.com/bobwsrsc>.

This imbalance disserves all students, athletes and non-athletes alike. Students in such situations are deprived of experiencing a truly diverse college community; the minorities that students interact with, because many are athletes, will share interests, talents, and extracurricular activities. It is not enough to simply have diversity as measured by a numerically high grouping of minority students – for campus diversity to have its full intended benefits, the university must ensure that there is diversity *within* racial groups. See *Gratz v. Bollinger*, 539 U.S. 244 (2003) (O'Connor, J., concurring) (explaining that an admissions program should “tak[e] into account diversity within and among all racial and ethnic groups”); see also *Smith v. Univ. of Wash.*, 392 F.3d 367, 378 (9th Cir. 2004), cert. denied 546 U.S. 813 (2005) (explaining that law school was justified in seeking to ensure diversity amongst its Asian American students).

This is no different from what we do while building our teams. We do not recruit basketball players generally – we recruit, from the general pool of talented basketball players, specific athletes who bring a unique

skill set that suits them best for a specific position. Without that diversity of talents and experiences, our teams would surely falter; a team of only point guards would lose every game, even if they were exceptionally talented.

In sum, we know from long experience that the diversity within the athletic department cannot, and should not, exist in a vacuum apart from the broader university and society at large. We share the belief of our colleague, Michigan State men's coach Tom Izzo, that "our basketball teams are like a little tiny part of this big picture which is our university first, our city second, our state third, and it just keeps growing." One United Michigan Press Conference, Apr. 6, 2006, *available at* <http://tinyurl.com/cthwmggh>. This Court has repeatedly endorsed the compelling importance of diversity to the educational mission of American colleges and universities, including the appropriate use of means to foster such diversity, and ought not revise that principle in this case.

C. Petitioner's Argument Would Force Our Institutions to Rigidly Ignore all of These Goals, Which Cannot Be Achieved Without Individualized Consideration of Race

Petitioner argues that the University of Texas no longer needs to consider race in admissions because of the Top 10% Law. See Pet. 20, 35-37; *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 234 (5th Cir. 2011). Specifically, Petitioner argues that, because the Top 10% Law draws what Petitioner believes to be sufficient "levels of Hispanic and African-American

enrollment,” there is no “possible need to continue using race” in the university’s admissions process. Pet. 35; see also *Fisher*, 631 F.3d at 253-254 (Garza, J., specially concurring). Apparently, according to Petitioner, a university should never be permitted to consider race in its admissions process if it achieves certain “levels of Hispanic and African-American enrollment.” Pet. 35.

Given the compelling importance of diversity in achieving the multiple goals described above, the Petitioner’s argument would dramatically injure the enterprise in which we are engaged. Such mechanistic restrictions based on nothing more than the raw number of minority students on campus have, and would, severely hamper our institutions in their ability to serve society by providing diverse opportunities and by fostering interaction among future leaders from different backgrounds.

The Petitioner’s position here is actually more rigid and mechanical relative to the racial composition of the University of Texas than the more nuanced review practiced by the University and many other institutions. We have witnessed firsthand the compelling fruits afforded by the University’s current individualized review. Acceptance of Petitioner’s argument, however, runs contrary to our collective experience, undermines the benefits to be realized from a diverse environment and directly interferes with our efforts to aid the future development and success of our athletes.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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