No. 11-345

In the Supreme Court of the United States

ABIGAIL NOEL FISHER,
Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, ET AL.,
Respondents

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

BRIEF FOR THE NATIONAL BLACK LAW STUDENTS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

Deborah N. Archer
Counsel of Record
Aderson B. Francois
Susan J. Abraham
NEW YORK LAW SCHOOL RACIAL JUSTICE PROJECT
185 West Broadway
New York, NY 10013
(212) 431-2138
Deborah.Archer@nyls.edu

TABLE OF CONTENTS

Table of Contents

Page

Table of Contents

Page

TABLE OF CITED AUTHORITIES

Page(s)

CASES

OTHER AUTHORITIES

Cited Authorities

Page(s)

Page(s)

Page(s)

Page(s)

Page(s)

Page(s)

Page(s)

Page(s)

INTEREST OF *AMICUS CURIAE*

The National Black Law Students Association ("NBLSA") submits this brief as *amicus curiae* in support of Respondents, urging this Court to affirm the ruling of the United States Court of Appeals for the Fifth Circuit upholding the race-conscious admissions policy of the University of Texas at Austin ("UT Austin").[1] NBLSA is a membership organization formed in 1968 to promote the educational, professional, political, and social objectives of Black law students. Today, NBLSA is the largest student-run organization in the United States, with nearly 6,000 members, over 200 chapters in our nation's law schools, a growing pre-law division, and 6 international chapters or affiliates. NBLSA has an interest in this case because it is dedicated to protecting the racial diversity in legal education and the legal profession made possible by race-conscious college and university admissions programs.

SUMMARY OF ARGUMENT

Over 60 years ago this Court recognized that

> [t]he law school, the proving ground for legal learning and practice, cannot

[1] Pursuant to Supreme Court Rule 37, this brief is filed with the written consent of all parties. The parties' consent letters are on file with the Court. This brief has not been authored, either in whole or in part, by counsel for any party, and no person or entity, other than *amicus curiae* or their counsel has made a monetary contribution to the preparation or submission of this brief.

> be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned.

Sweatt v. Painter, 339 U.S. 629, 634 (1950). Thankfully, the blatant racial segregation of law students challenged in *Sweatt* is in the past and today almost all of this nation's law schools embrace the fact that a racially and ethnically diverse student body improves the quality of legal education for all students. However, there remains a systemic racial hierarchy that produces and perpetuates racial disparities in educational opportunities and outcomes. Race-conscious admissions programs, like the one used by UT Austin, are designed to overcome some of this systemic racism and serve as a vital pipeline to educational and professional opportunities for minority students.

This Court has held that race-conscious admissions programs in public colleges and universities are constitutional, *see Grutter v. Bollinger*, 539 U.S. 306, 335 (2003); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 320 (1978), with benefits that flow to the educational institution, the larger society and individual students. *See Grutter,* 539 U.S. at 335. Yet, opponents of race-conscious admissions programs continue to argue that these programs demoralize minority students, exposing them to stigma and academic environments in which

they are outmatched. In an *amicus curiae* brief submitted to the Court in this case, *amici* cite to class rank and bar passage rates of Black law students as evidence that race-conscious admissions programs lead minority students to attend colleges, universities and professional schools for which they are unqualified.[2] *Brief of Richard Sander and*

---

[2] Although *amici* Sander and Taylor present their arguments and analysis as unchallenged, their arguments have been presented before in law review articles authored by Professor Sander, and his analysis and conclusions have been widely challenged and criticized. *See e.g.* Deirdre M. Bowen, *Meeting Across the River: Why Affirmative Action Needs Race & Class Diversity*, 88 Denver U. L. Rev. 751 (2011); Katherine Y. Barnes, *Is Affirmative Action Responsible for the Achievement Gap Between Black and White Law Students?*, 101 Nw. U. L. Rev. 1759 (2007); andre douglas pond cummings, *"Open Water": Affirmative Action, Mismatch Theory and Swarming Predators – A Response to Richard Sander*, 44 Brandeis L.J. 795, 826-829 (2006); Ian Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 Stan. L. Rev. 1807 (2005); David L. Chambers et al., *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander's Study*, 57 Stan. L. Rev. 1855 (2005); Michele Landis Dauber, *The Big Muddy*, 57 Stan. L. Rev. 1899 (2005); David B. Wilkins, *A Systematic Response to Systemic Disadvantage: A Response to Sander*, 57 Stan. L. Rev. 1915 (2005); Daniel E. Ho, *Why Affirmative Action Does Not Cause Black Students to Fail the Bar*, 114 Yale L.J. 1997 (2005); Daniel E. Ho, *Affirmative Action's Affirmative Actions: A Reply to Sander*, 114 Yale L.J. 2011 (2005); Kevin R. Johnson & Angela Onwuachi-Willig, *Cry Me a River: The Limits of "A Systemic Analysis of Affirmative Action in American Law Schools"*, 7 Afr.-Am. L. & Pol'y Rep. 1 (2005); Beverly I. Moran, *The Case for Black Inferiority? What Must be True if Professor Sander is Right: A Response to A Systemic Analysis of Affirmative Action in American Law Schools*, 5 Conn. Pub. Int. L. J. 41 (2005). These authors have

Stuart Taylor. Jr. as Amicus Curiae in Support of Neither Party at 5-10 [hereinafter "Sander Brief"]. The statistics cited in the Sander Brief are indeed troubling and a legitimate cause for concern. But, the Sander Brief ignores the fact that "[r]ace continues to structure the opportunities and outlook of all Americans even as overt discrimination based on race recedes. Any dialogue about affirmative action, or about legal education and practice generally, must candidly acknowledge this complex reality." David B. Wilkins, *A Systematic Response to Systemic Disadvantage: A Response to Sander*, 57 Stan. L. Rev. 1915, 1961 (2005) [hereinafter "*Systematic Response*"]. Accordingly, to assess the impact of race-conscious admissions programs we must first acknowledge and address several critical factors that contribute to Black underperformance in the classroom and on the bar examination, including racial discrimination, stereotype threat and segregated and inadequate K through 12 education systems. The gap between the performance of Black and white law students is quite troubling, but race-conscious admissions programs cannot be faulted for those troubles.

Furthermore, eliminating the consideration of race would drastically reduce the number of Black law students and lawyers, particularly at our nation's most selective law schools. *See, e.g.,* David Chambers, et al., *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander's Study*, 57

---

engaged Professor Sander's arguments on his terms, despite the flaws in his methodology.

Stan. L. Rev. 1855, 1857 and 1898 (2005) (concluding that eliminating race-conscious admissions programs would result in a "substantial net decline in the number of African Americans entering the bar"); *see also* Ian Ayres and Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 Stan. L. Rev. 1807, 1853 (2005) (arguing that race-conscious admissions programs mitigate racial disparities and are likely to produce more Black lawyers). Indeed, rather than supporting the abandonment of race-conscious admissions programs, the significant contributions by minority lawyers serve as compelling evidence of their success and value, and counsels in favor of continuing admissions programs such as UT Austin's.

Finally, arguments by *amici* urging this Court to adopt the position that there is no benefit to diversity on college and university campuses because positive interaction among members of different racial and ethnic groups is only possible when the number of non-white students is kept to a minimum should be rejected. That position would only lead us to a return to racial separatism and tokenism, and continued inequality.

ARGUMENT

I. The Primary Purpose of Race-Conscious Admissions Programs is to Benefit the Larger Educational Community and Society as a Whole.

As the Fifth Circuit held in the decision below, and as the Petitioner concedes, a public university

has a compelling state interest in achieving diversity in its student body because of the myriad benefits to the student body as a whole. *See* Brief for Pet. at 26; *Fisher v. Univ. of Tex.,* 631 F.3d 213, 230 (5th Cir. 2011). These race-conscious admissions policies "promote 'cross-racial understanding,' 'break down racial stereotypes,' enable students to better understand persons of other races, better prepare students to function in a multi-cultural workforce, cultivate the next set of national leaders, and prevent minority students from serving as 'spokespersons' for their race." *Fisher*, 631 F.3d at 230; *see also Grutter*, 539 U.S. at 330. This Court has long accepted that the educational mission of an American institution of higher learning goes far beyond the particular subject matter discussed in any single classroom to encompass the goals of ensuring availability of opportunity for all citizens, training students for leadership, and opening students' minds in an effort to create citizens who can collaborate, communicate and contribute meaningfully to an increasingly multi-ethnic and global community. *See, e.g.*, *Grutter*, 539 U.S. at 331; *Plyler v. Doe*, 457 U.S. 202, 221 (1982); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954). Therefore, the assertions in the Sander Brief, arguing that race-conscious admissions should be rejected because these programs lead to under achievement and stigma for minority students, Sander Br. at 2-3, are not persuasive.[3] Minority students are not the sole

[3] The Sander Brief argues, in essence, that Black students who underperform on the LSAT do not belong at top-tier schools because they experience an academic mismatch between their level of preparation and performance and that of

intended beneficiaries of race-conscious admissions programs. The benefits of race-conscious admissions programs are substantial and inure to many segments of society.

While educational institutions have an interest in creating a diverse learning environment, society has a larger interest in colleges and universities training a diverse group of future leaders. Indeed, there has emerged a "national consensus among university, business, and military leaders on the value of racial inclusiveness." Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of our Democratic Ideals*, 117 Harv. L. Rev. 113, 122 (2003) [hereinafter "*Admissions Rituals*"]; *see also Grutter*, 539 U.S. at 330-331 (citing to briefs on behalf of major U.S. corporations and military officials in support of the benefits of race-conscious admissions programs). Institutions of higher education are the training ground for our future leaders. "In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." *Grutter*, 539 U.S. at 332.

In short, institutions of higher education seek diversity in service of their "twin goals of educational excellence and democratic opportunity," *Admissions Rituals* at 199, not for the sole benefit of minority students admitted under race-conscious programs.

---

their white and Asian counterparts. Sander Brief at 3-4, 5-6, 8-9.

"[E]nsuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective." *Id.* at 331-32. "[N]owhere is the importance of such openness more acute than in the context of higher education. 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." *Id.* at 332.

II. Race-Conscious Admissions Programs are Not Harmful to the Professional Aspirations or Personal Well-Being of Black Law Students.

A. Black Law Students are Fully Aware of the Benefits and Risks of Attending Top-Tier Law Schools and are Capable of Making Their Own Informed Decisions.

The argument that race-conscious admissions programs should be outlawed because Black law students end up attending schools that are too academically challenging for them inappropriately seeks to displace the independent, informed judgment of minority students of the potential costs and benefits of attending flagship universities and top-tier graduate schools. The members of NBLSA are not misinformed and are not operating under a false consciousness. We are, like most other students, aware of the U.S. News and World Report rankings of the law schools to which we apply and to which we are accepted. *See* andre douglas pond

cummings,*"Open Water": Affirmative Action, Mismatch Theory and Swarming Predators – A Response to Richard Sander*, 44 Brandeis L.J. 795, 826-29 (2006). We have readily available access to the LSAT scores and undergraduate GPAs of entering classes at particular law schools. The choice to stretch and challenge ourselves academically at top-tier law schools in exchange for the academic opportunities and the potential of increased career opportunities is a valuable one that race-conscious admission programs have made possible. The ability to make these choices for ourselves should not be taken away. Like all law students, NBLSA students must be allowed to continue weighing potential benefits and risks, and have our decisions respected.

The issue as articulated in the Sander Brief comes down to a choice between grades and class rank on the one hand and the prestige and reputation of the law school on the other. *See* Sander Br. at 13, 31. However, the decision made by Black law students as to which law school to attend involves much more than this. As Black law students are working to become legal professionals, we make choices about which law school to attend by engaging in our own cost-benefit analysis, which often goes beyond potential GPA and class rank. Clearly,

> educational and placement benefits are undoubtedly a large part of why students of all races, creeds, and colors fight so hard to get into top schools. As important as these benefits are,

> however, they fail to capture anything approaching the full value of attending an elite law school. In addition to acquiring substantive knowledge and gaining preferential initial access to the employment market, students attending elite schools are also socialized into the habits and possibilities of eliteness and granted a lifetime membership in the elite networks to which the graduates of such institutions automatically belong.

A Systematic Response at 1931.

Despite statistics indicating lower-than-average GPAs, class rank and bar passage,[4] the fact is that most Black law students go on to be lawyers. Timothy T. Clydesdale, *A Forked River Runs Through Law School: Toward Understanding Race, Gender, Age, and Related Gaps in Law School Performance and Bar Passage*, 29 Law & Soc. Inquiry 711, 727 (2004). That some Black students graduate in the bottom half of their class or may not pass, or even take, the bar examination does not wholly negate the value of the legal education they received. To the contrary, their legal education will continue to be valuable to them as they pursue

---

[4] While reports that Blacks fail the bar examination at higher rates than other law school graduates are troubling, they are not entirely useful without information regarding which state bar examinations were taken and adjustments for the difficulty of each state bar.

[5] Although the recession and the resulting economic

careers in business, real estate, law enforcement or other law-related careers.[5] In addition to substantive knowledge, they have gained credentials employers will value, relationships and skills that will continue to serve them throughout their law-related careers. *See A Systematic Response* at 1943-44. Considering these potential benefits, it is hard to believe that the Black students who currently graduate from law school, even if they are not at the top of their class, would have been better off had they not been accepted into law school at all.

Rather than misguiding Black law students, race-conscious admission programs allow many an opportunity to attend a top-tier, highly ranked law school, where, yes, their test scores and GPAs may be below the average as compared to other admitted students. However, their legal careers are not undermined by the choice that many make to pursue this opportunity. In a study of graduates of the University of Michigan Law School, for example, the authors found that LSAT scores and undergraduate GPAs do not predict the future career success of minority students. Richard O. Lempert, et al, *Michigan's Minority Graduates in Practice*, 25 Law & Soc. Inquiry 395, 501 (2000) [hereinafter "*Michigan's Minority Graduates*"]. Despite the lower LSAT scores and undergraduate GPAs of many admitted minority students, these students went on

[5] Although the recession and the resulting economic realities have negatively impacted the job market and the market for legal services, there is continuing value in a legal education as law schools provide valuable training and credentials that prepare their students for legal and law-related careers.

to achieve levels of career success that met or surpassed the levels achieved by their white peers. *Michigan's Minority Graduates* at 504. Moreover, the study found that law school grades explain less than 5% of the variance in income across the students in the sample. *Id.* Accordingly, a decision to eliminate race-conscious admission programs should not rest on the perceived impact of the entering credentials of minority students or the fact that many Black law students do not graduate at the top of their class, when those factors have not been found to predict future success.

B. Black Students at Top-Tier and Flagship Educational Institutions Graduate at High Rates and Move on to Have Successful and Distinguished Careers.

Far from impeding their future achievements, the choices that Black students are making about which law schools to attend have led them to success, individually and for their broader communities. It is not disputed that Black graduates of top-tier law schools overwhelmingly complete law school and go on to pass the bar. Indeed, over 95% of Blacks attending the most elite schools graduate. *A Systematic Analysis* at 437. And while many Black students are not graduating in the top of their law school classes, we cannot ignore the fact that race-conscious admission programs at the undergraduate and graduate level have helped Black lawyers overcome systemic barriers that previously blocked the entrance to our

nation's flagship colleges and universities, creating pipelines to impressive and influential legal careers.

Black students at top-tier institutions in fact graduate at high rates and move on to have careers as distinguished and accomplished as their white classmates. *See* William G. Bowen & Derek Bok, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS at 55-57 (1998) [hereinafter "SHAPE OF THE RIVER"]; *Michigan's Minority Graduates*. In CROSSING THE FINISH LINE: COMPLETING COLLEGE AT AMERICA'S PUBLIC UNIVERSITIES (2011), the authors found a strong positive relationship between graduation rates and the selectivity of the educational institution. William G. Bowen et al., CROSSING THE FINISH LINE: COMPLETING COLLEGE AT AMERICA'S PUBLIC UNIVERSITIES at 192 [hereinafter "CROSSING THE FINISH LINE"]. The authors also directly challenged the assumption that "mismatching" led to lower graduation rates for Black students. In their study, the authors grouped Black men by their high school GPAs and then examined whether those with relatively low GPAs who enrolled in more selective public universities graduated at lower rates than those with the same GPAs who attended less selective institutions. The results proved just the opposite. To illustrate, of the students with high school GPAs below 3.0, those who went to the most selective colleges and universities in the study had a graduation rate six percentage points higher than those who went to second-tier schools and eight percentage points higher than those who went to third-tier schools. CROSSING THE FINISH LINE at 209.

Indeed, for all GPA levels Black men who went to more selective institutions graduated at higher rates than their peers with similar grades who went to less selective colleges. *Id.* at 209. "Moreover, contrary to what the overmatch or mismatch hypothesis would lead us to expect, the relative graduation rate advantage associated with going to a more selective university was even more pronounced for black men at the lower end of the high school grade distribution than it was for students with better high school records." *Id.*

Similarly, in the earlier study by Bowen and Bok, they found that "the more selective the college attended, the lower the Black dropout rate." SHAPE OF THE RIVER at 259.

The findings of several studies also directly refute any claim that Black students would fare better academically at schools where the average SAT score was similar to their own scores. The study found that the Black students in the lowest category of SAT scores graduated at higher rates the more selective the school they attended. *See* CROSSING THE FINISH LINE at 209; SHAPE OF THE RIVER at 61, 259. Moreover, for students of similar gender, socioeconomic status, high school grades and SAT scores, graduation rates were highest for those students who attended the most selective schools. SHAPE OF THE RIVER at 63, 259. Finally, students in the same category of SAT scores were more likely to ultimately earn an advanced degree the more selective the school they attended. SHAPE OF THE RIVER at 114. This was true even if the student

received a lower GPA at the more prestigious school. *Id*.

These studies support the conclusion that to help improve the academic and professional outcomes for minority students we should not "discourage them from enrolling in academically strong programs that choose to admit them. On the contrary, …[they] should be encouraged to 'aim high' when deciding whether and where to pursue educational opportunities beyond high school." CROSSING THE FINISH LINE at 211. Indeed, the problem of "undermatching," where students with strong academic credentials do not enroll in colleges or universities that match their academic credentials, is far more troubling for minority students than the alleged issue of mismatch advanced in the Sander Brief. *See Id.* at 100. A study of undermatching conducted by the authors of CROSSING THE FINISH LINE found that a disproportionate number of undermatches are among racial and ethnic minorities, with it being more common among Black students. *Id*. at 103. The issue of undermatching is connected to the issue of diversity and race-conscious admissions programs as one cause for students not attending colleges and universities that match their academic credentials is their belief that they would be "uncomfortable" in that community. *See Id*. at 104.

C. Access to Top-Tier Law Schools is Important to Maintaining Integration in the Legal Profession.

Eliminating race-conscious admissions programs could potentially eliminate many of the gains that such programs have facilitated. Several published critiques of the theories advanced in the Sander Brief found that without race-conscious admissions programs, the enrollment of Black law students and the number of Black lawyers would sharply decline.[6] David Chambers et al., *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander's Study*, 57 Stan. L. Rev. 1855, 1857, 1898 (2005) (concluding that eliminating race-conscious admissions programs would result in a

---

[6] Percentage plans, like the one used by UT Austin, alone cannot ensure meaningful diversity at the undergraduate or professional school level in the absence of race-conscious admissions programs. First, they often undermine the goals of diversity and integration by relying on continuing educational and residential racial segregation for their success. *See* Michelle Adams, *Isn't It Ironic?: The Central Paradox at the Heart of "Percentage Plans"*, 62 Ohio St. L.J. 1729 (2001); U.S. Commission on Civil Rights, *Beyond Percentage Plans: The Challenge of Equal Opportunity in Higher Education* (2002). Indeed, admissions of a meaningful number of minority students occurs under percentage plans when members of the same race compete against each other for the top positions in their class. Second, percentage plans were designed to address admission to undergraduate institutions, *see* Brief of the Authors of the Texas Ten Percent Plan as Amicus Curiae in Support of Respondents in *Gratz v. Bollinger* at 8-9, and there is no evidence that they can be translated to admissions programs at the law school or graduate school level. *Grutter* at 340. Finally, percentage plans are unlikely to achieve the diversity sought by law schools. *Id.* (finding that percentage plans "may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university.").

"substantial net decline in the number of African Americans entering the bar"); *see also* Ian Ayres and Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 Stan. L. Rev. 1807, 1853 (2005) (arguing that affirmative action mitigates racial disparities and is likely to produce more Black lawyers).

Furthermore, simply having access to *a* legal education will be insufficient to continue the presence of Black lawyers in prestigious legal institutions and critical leadership positions. The legal profession is still far from achieving significant levels of integration, particularly at the most elite levels of practice. *See* Elizabeth Chambliss, *Miles to Go 2000: Progress of Minorities in the Legal Profession*, A.B.A. Comm'n on Opportunities for Minorities in the Profession (2000). Although minority graduates of top-tier law schools go on to achieve similar success to their white classmates, racism continues to impact and impede the careers of minority attorneys, particularly those who do not have the credential of a degree from a top-tier school. David B. Wilkins, *Rollin' On the River: Race, Elite Schools, and the Equality Paradox*, 25 Law & Soc. Inquiry 527-28 (2000) [hereinafter "*Rollin' on the River*"]; *see also* William D. Henderson & Rachel M. Zahorsky, *The Pedigree Problem: Are Law School Ties Choking the Profession*, ABA Journal, July 2012 (Finding "[d]ecades after graduation, elite law schools continue to open doors closed to graduates of less-favored schools"). The success of Black lawyers cannot be divorced from the access to top-tier law schools facilitated by race-conscious admissions programs. Powerful and influential Black lawyers

are most often graduates of "elite" law schools, and have used their success to help open the doors for other Black lawyers. *A Systematic Response* at 1938-39; Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 Harv. L. Rev. 1327, 1329 (1986).

There is evidence that a law degree from a top-tier institution is a credential required of Black lawyers more often than their white colleagues. In a survey of the 250 largest law firms in the country, in New York and Washington, D.C., more than 50% of all Black associates hired graduated from either Harvard Law School or the top schools in those local markets, i.e. Columbia Law School and NYU Law School in New York and Georgetown University Law Center in Washington, D.C. *Rollin' On the River* at 534. The numbers for white associates in those two cities were 40.4% in New York and 23% in Washington, D.C. *Id.* The numbers are even more stark for those who have achieved partnership in firms: in 1993, 77% of the Black partners profiled in the ABA's directory of minority partners at predominantly white corporate law firms attended elite law schools, with nearly 47% of those graduating from either Harvard Law School or Yale Law School.[7] *Rollin' On the River* at 534.

---

[7] This study defined elite law schools as Harvard Law School, Yale Law School, Stanford Law School, University of Chicago, University of Michigan, Columbia Law School, NYU Law School, Berkeley, University of Virginia, University Pennsylvania and Northwestern University. *Rollin' On the River* at 534 n.8 (2000).

As the Court acknowledged in *Grutter,* law schools are a training ground for our country's leaders in federal, state and local government, business and social institutions, both public and private. *Grutter*, 539 U.S. at 332. In order to ensure that we achieve a representative democracy and democratic society, we need to make sure the bench and bar, as well as our elected leaders, business leaders, and leaders of public institutions represent all ethnicities and backgrounds. As a practical matter, law schools cannot succeed in their quest for a well-qualified, racially and ethnically diverse student body unless flagship colleges and universities admit racially and ethnically diverse students to their undergraduate programs.

D. Race-Conscious Admissions Programs Have Not Been Found to Create Stigma for Minority Students.

In addition to the clear benefits to the educational and career opportunities for Blacks brought about by race-conscious admissions programs, the individual harms that were feared would befall minority students under these programs have not come to pass. A prominent critique of race-consciousness is that minority students admitted under race-conscious admission programs will experience "internal" and "external" stigma, both doubting their own abilities and merit and having their fellow students assume they were admitted because of their race and not their

qualifications.[8] If race-conscious admissions programs in fact cause external or internal stigma for minority students, one would assume that minority students enrolled at colleges and universities in states that have banned race-conscious admissions programs would not experience this stigma. Or, that the stigma experienced by these students would be less than the stigma experienced by students attending schools on campuses actively employing race-conscious admissions programs. Yet, no causal connection between race-conscious admissions programs and racial stigma has ever been established. In fact, recent studies have discounted any role of race-consciousness in promoting racial stigma on college and university campuses. Rather, students attending schools in states banning the consideration of race are likely to find themselves in unwelcoming environments, and are more likely to encounter racial hostility and stigma. In many respects, they are not faring as well as their counterparts attending schools that embrace the value of racial diversity and employ race-conscious admissions programs.

In the first study, a study of the experiences of minority students currently enrolled in

---

[8] In fact, those who argue that race-conscious admissions programs should be banned because it stigmatizes minority students are only aiding racial discrimination. Stamping all minority students with "badges of inferiority" by assuming they lack qualifications is itself racial discrimination. *See* andre douglas pond cummings, *The Associated Dangers of "Brilliant Disguises," Color-Blind Constitutionalism, and Postracial Rhetoric*, 85 Ind. L.J. 1277, 1282 (2010).

undergraduate and graduate programs in the "hard sciences," the author found that minority students in states that allow the use of race-conscious admissions programs experience far less stigma than students in states that have banned racial considerations.[9] *See* Deirdre M Bowen, *Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action*, 85 Ind. L.J. 1197 (2010) [hereinafter "*Brilliant Disguise*"]. First, the study confirms that overt acts of racism continue on college and university campuses, in fact occurring twice as often on campuses in the four states in which the consideration of race has been banned. *Brilliant Disguise* at 1222.

Furthermore, the study suggests that in states where race-consciousness is banned, minority students are the victims of stigmatization more often than students attending school on campuses openly practicing race-conscious admissions. *Id*. at 1218. Contrary to what opponents of race-conscious admissions have argued, the consideration of race may in fact help reduce the racial stigma suffered by minority students, not produce it.

Finally, the study suggests that increased racial diversity, not less, may help to alleviate feelings of stigma. Racial isolation on campuses may increase feelings of internal and external stigma, as minority students who have been the sole minority

---

[9] Four states included in the study—California, Washington, Florida, and Michigan—have banned race-conscious admissions programs. *Brilliant Disguise* at 1217. Twenty-three other states and two territories where affirmative action is allowed were also included in the study. *Id*. at 1218

student in a course experience more stigma "than do their counterparts who have taken no classes in which they were the sole minority student." *Id.* at 1229. Unsurprisingly, minority students enrolled in schools in states that have banned race-conscious admissions programs were disproportionately more likely to attend classes in which they were the sole minority student. *Id.* at 1227. Indeed, the study found that 68.6% of students who attended school in states that banned the consideration of race in admissions decisions had one or more class in which they were the sole minority student. *Id.* Minority students who were the lone minority student in a class experienced overt racism from other students at a rate of four times as often as students who have never taken a class in which they were the only minority, *Id.* at 1228-29, and "…encountered racism from faculty at twice the rate of students who have never found themselves as the lone minority in the classroom." *Id.*

In another study based on survey responses of white and minority students at seven upper-tier public law schools,[10] the authors also sought to examine whether racial stigma would dissipate if race-conscious programs were eliminated. To the contrary, the study found that there was no statistically significant difference in feelings of

[10] The law schools included in this survey were the University of California, Berkeley; the University of California, Davis; the University of Cincinnati; the University of Iowa; the University of Michigan; the University of Virginia and the University of Washington. Angela Onwuachi-Willig et al., *Cracking the Egg: Which Came First – Stigma or Affirmative Action?*, 96 Cal. L. Rev. 1299, 1304 (2008).

stigmatization for minority students who attended schools that did have race-conscious programs and those that did not. Angela Onwuachi-Willig, et al., *Cracking the Egg: Which Came First – Stigma or Affirmative Action?*, 96 Cal. L. Rev. 1299, 1332 (2008).

The fact remains, the root causes of racial stigma reach back much further than race-conscious admissions programs; minority students faced racial stigma long before the use of these programs and that stigma will continue without these programs. Not only do the alleged harms of race-conscious admissions programs not outweigh their documented benefits, there is no proof that those harms exist at all. Minority students are less likely to suffer from stigmatization where they are part of a critical mass of minority students, often made possible through the use of race-conscious admissions programs. Walter R. Allen & Daniel Solorzano, *Affirmative Action, Educational Equality and Campus Racial Climate: A Case Study of the University of Michigan Law School*, 12 Berkeley La Raza L.J. 237 (2001). Concerns about the impact of racial stigma, therefore, weigh in favor of expanding race-conscious admissions programs, not decreasing or abolishing them.

III. Stereotype Threat Provides an Empirical Explanation for Race-Based Achievement Gaps in Law School and the Legal Profession.

In arguing that Black students who underperform on the LSAT do not belong at top-tier

schools because they experience an academic mismatch between their level of preparation and performance, nowhere does the Sander Brief offer an explanation for the root-causes of the alleged mismatch, except to note by implication that it is simply a function of cultural upbringing. Sander Br. at 22 n.58. Instead, the brief casually dismisses stereotype threat by suggesting that the threat exists only in the artificial environment of the psychology lab and is wholly absent in the real world. Sander Br. at 25. Moreover, in *amici* Sander's and Taylor's view, to the extent that stereotype threat does exist as a real world phenomenon and does result in underperformance in academia and the profession, it only further establishes that most Black students do not belong in elite institutions, where the stereotype threat is presumably at its highest, but instead are better off at less competitive institutions, where their alleged academic mismatch is less pronounced and, therefore, less threatening. Sander Br. at 11-14, 25-26. This argument represents a misunderstanding of stereotype threat, a social science body of work that, unlike the academic mismatch theory, has been peer-reviewed, replicated and confirmed in over 400 studies over the course of fifteen years.

A. Stereotype Threat is a Universal Phenomenon in Which People Underperform When Social and Historical Cues Conspire to Tell Them That They are Less Than Competent.

Social scientists define stereotype threat as "a situational predicament in which individuals are at risk, by dint of their actions or behaviors, of confirming negative stereotypes about their groups." Claude Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African-Americans*, J. of Personality & Soc. Psychol., 69 (1995) [hereinafter "*Stereotype Threat and the Intellectual Test Performance of African-Americans"*]. According to stereotype threat, the mere existence and awareness of cultural and historical negative stereotypes creates in individuals who are the subject of the stereotype a tendency to perform at a level below their potential. *See* Michael Inzlicht & Tony Schmader, STEREOTYPE THREAT: THEORY, PROCESS, AND APPLICATION 7 (2011) (hereinafter "STEREOTYPE THREAT"). Scientists term it "a threat in the air." *See* Claude Steele, *A Threat In the Air: How Stereotypes Shape Identity and Performance*, 52 Am. Psychologist 613 (June 1997), because, unlike nature-based claims that ascribe biological causes to the achievement gaps among different groups, or nurture-based arguments that trace low intellectual performance to an individual's upbringing, culture or lack of preparation, stereotype threat describes a process by which, controlling for all other factors, an individual may perform below his or her potential—and indeed below his or her level of preparation—because social cues signal negative stereotypes about the individual's groups, thereby creating an atmosphere in which the individual feels pressured and ultimately fails to overcome the stereotype. STEREOTYPE THREAT at 6.

For example, "because African-Americans are well aware of the negative stereotypes impugning their intellectual ability, whenever they are in a situation—say, a standardized testing situation—they may fear confirming the stereotype." *Id*. For another example, because women have historically been the subject of negative stereotypes about their intellectual capacity for math and science work, their fear of living down to the stereotype often has a significant impact on math and science tests. *See* Christine Logel et al., *Threatening Gender and Race: Different Manifestations of Stereotype Threat*, in STEREOTYPE THREAT at 161-62. But lest stereotype threat be misunderstood as targeting only those groups that have historically been disadvantaged or marginalized, the fact is all of us, in one way or another, experience the effects of stereotype threat, including, for example, white males who, when told prior to a math test that their performance on the test will be used to examine Asian superiority in math, performed significantly below their level of preparation. *See* Joshua Aronson et al., *When White Men Can't Do Math: Necessary and Sufficient Factors in Stereotype Threat*, 35 J. of Experimental Psychol. 29 (1999).

Two social scientists, Claude Steele and Joshua Aronson, first demonstrated the phenomenon of stereotype threat in a now-classic article in the Journal of Personality and Social Psychology. Their research grew out of a simple question:

> From an observer's standpoint, the situation of a boy and a girl in a math classroom or of a Black student and a

> White student in any classroom are essentially the same. The teacher is the same; the textbooks are the same; and in better classrooms, these students are treated the same. Is it possible, then, that they could still experience the classroom differently, so differently in fact as to significantly affect their performance and achievement there?

Claude Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, American Psychology 52 (1997). Steele and Aronson's insight, borne out of empirical evidence, was that for the girl in the math classroom and the Black student in any classroom the seemingly neutral environment held the key to their diminished performance because the environmental cues that signal to the girl that she was less competent in math and to the Black student that he was intellectually inferior produced not merely test and performance anxiety but rather mind-body changes that significantly lowered their performance. Put plainly:

> It is not just the case that individuals feel anxious when they are stereotyped and that is why they underperform. Furthermore, it is not just the case that stereotypes are activated and automatically induce stereotype-consistent behavior. The phenomenon…involves both cognitive and affective components and engages

> both automatic and controlled processes.

Toni Schmader & Sian Beilock, *An Integration of Processes That Underlie Stereotype Threat*, in STEREOTYPE THREAT at 35.

In the years since Professor Steele's original article, stereotype threat has become one of the most widely and rigorously researched topics in all of social psychology, producing over 400 studies on the effects of stereotype threat in different groups, on different tasks, and even in different countries. *See* STEREOTYPE THREAT at 6. These studies, spread over fifteen years, have conclusively shown that stereotype threat contributes to low performance not only among Blacks, but also Latinos and the poor in standardized testing, women in math and science, the elderly in memory, and whites in athletics. *See* Patricia Gonzalez et al, *The Effect of Stereotype Threat and Double-Minority Status on the Test Performance of Latino Women*, 28 Personality & Soc. Psychol. Bull. 659 (2002); Christine Logel et al., *Threatening Gender and Race: Different Manifestations of Stereotype Threat, in* STEREOTYPE THREAT at 163; Jean Claude Croizet & Mathias Millet, *Social Class and Test Performance: From Stereotype Threat to Symbolic Violence and Vice Versa, in* STEREOTYPE THREAT at 188; Alison Chasteen et al., *Aging and Stereotype Threat, in* STEREOTYPE THREAT at 202; Jeff Stone et al., *The Impact of Stereotype Threat on Performance in Sports, in* STEREOTYPE THREAT at 217. "Indeed so reliable are stereotype threat effects on performance that much of the current research on the topic

focuses on *why* it happens rather than *if* or *when*." Wendy Mendes & Jeremy Jamieson, *Embodied Stereotype Threat: Exploring Brain and Body Mechanisms Underlying Performance Impairments, in* STEREOTYPE THREAT at 51 (emphasis in original). Thus, from a psychological standpoint, we now know that stereotype threat above all describes how context is the key to performance, such that the more cues present in the environment signaling negative stereotypes, the harder individuals fight to overcome the stereotype, but perversely the worse the individual's performance as a result. Mary Murphy & Valerie Jones Taylor, *The Role of Situational Cues in Signaling and Maintaining Stereotype Threat,* in STEREOTYPE THREAT at 18-19. In terms of physiology, we also know that in situations in which individuals are expected to perform, the psychological stresses brought about by the experience of negative stereotypes trigger neurobiological changes that decrease performance. *See* Mendes & Jamieson, *Embodied Stereotype Threat, in* STEREOTYPE THREAT at 51.

We are all potentially subject to stereotype threat because it is a manifestation—albeit a maladaptive one—of an indispensable human cognitive and emotional trait: our capacity to interact effectively with other human beings by reading social cues in order to anticipate what they think of us and how they will react to what we say or do. Claude Steele, *Extending and Applying Stereotype Threat Research*, in STEREOTYPE THREAT at 298. Stereotype threat arises when, in the process of developing behavior appropriate to a particular social milieu, we pick up on social cues that signal to

us that other people harbor negative stereotypes about us and are likely to judge us negatively based on that stereotype. STEREOTYPE THREAT at 7. The point is not that others do in fact judge us based on the stereotype, nor is the point that we in fact believe in the stereotype about ourselves, but rather that our awareness of the stereotype, our fear of confirming the worst of it, and our often desperate fight to disprove it, end up "hijacking" the very cognitive and emotional energy and systems we otherwise need to perform well at the task at hand. Gonzales et al., *The Effect of Stereotype Threat and Double-Minority Status on the Test Performance of Latina Women*, 28 Personality & Soc. Psychol. Bull. at 659.

B. Peer-Reviewed Research has Conclusively Demonstrated the Effects of Stereotype Threat Upon Blacks and Latinos in Academic Settings.

While every group, given the right conditions, may fall prey to the effects of stereotype threat, peer-reviewed research has amply demonstrated its impact on Blacks and Latinos in various intellectual domains. *See Stereotype Threat and the Intellectual Test Performance of African Americans* at 797; Gonzales et al., *The Effect of Stereotype Threat and Double-Minority Status on the Test Performance of Latina Women*, 28 Personality & Soc. Psychol. Bull. at 659.

In fact the initial Steele and Aronson study that first identified the concept of stereotype threat

involved academic performance by Black students. The same test was administered to Black and white Stanford students under two different conditions, one in which they were told that the test would diagnose their intellectual ability, the other in which they were informed that the test was a mere problem-solving task not intended to evaluate their intellectual ability. Under the former condition, Black students performed substantially worse than their white counterparts, whereas under the latter the racial gap was virtually eliminated. *Stereotype Threat and the Intellectual Test Performance of African Americans* at 797. Similarly, when told that a math test would evaluate their intellectual ability Latino college students scored much lower than White students, whereas when told that the test did not evaluate their ability, they performed as well as White students. Gonzales et al., *The Effects of Stereotype Threat and Double-Minority Status* at 659.

The effect of stereotype threat on Black and Latino students has real world consequences. Social scientists have shown, for example, that the higher high school dropout rate for Black students as compared to white students is due in part to an attempt by Black students to avoid being judged by negative stereotypes of their intellectual abilities. J.W. Osborne & C. Walker, *Stereotype Threat, Identification with Academics, and Withdrawal from School: Why the Most Successful Students of Colour Might Be Most Likely to Withdraw*, 26 Educ. Psychol. 563-577 (2006). Indeed, for so-called non-Asian minorities, the most pernicious effects of stereotype threat comes to this:

> Because stereotypes about the academic ability of Blacks and Hispanics target a domain that is essential to a broad range of careers, behaviorally avoiding the stereotype by skipping a test, enrolling in easy rather than challenging classes, or, at the extreme, dropping out of school may contribute to poverty and poor life outcomes.

Christine Logel et al., *Threatening Gender and Race: Different Manifestations of Stereotype Threat*, in STEREOTYPE THREAT at 163.

C. The Elimination of Race-Conscious Programs Will Exacerbate Rather Than Ameliorate the Effects of Stereotype Threat Upon Blacks and Latinos.

The Sander Brief repeatedly insists that benign, race-conscious remedies in fact stigmatize Blacks and Latinos, and cause even students who would otherwise be expected to perform to the top of their class to underperform out of an internalized sense of inferiority. The solution, according to that argument, is simply to eliminate all race-conscious programs.

This argument is premised on a fundamental misunderstanding of stereotype threat and an almost willful blindness of the research described above. Whatever feelings of inferiority Blacks and Latinos may or may not feel when attending top-tier

institutions does not originate or flow from the fact that, for example, in any given year these students happened to be part of the one percent of candidates UT Austin did not admit under its percentage plan. Rather, these feelings of inferiority, such as they may be, are rooted in an ancient and malignant narrative passed on from generation to generation and repeated in so many subtle and not so subtle ways that in time they have become, to paraphrase Professor Steele, the very air we breathe.

IV. Assertions That Limiting the Number of Minority Students on College Campuses Would Improve Cross-Racial Interactions are Simply Advocating Racial Tokenism

In their *amicus curiae* brief in support of Petitioner, Abigail Thernstrom, Stephan Thernstrom, Althea K. Nagai and Russell Nieli [hereinafter "Thernstrom Brief"] attempt to persuade this Court that its conclusion in *Grutter,* that the goal of achieving a diverse student body constitutes a compelling state interest, was wrong. Thernstrom Br. at 3-4. Based on little more than anecdotes and their own previous writings, the Thernstrom Brief argues that contact between people of different races, ethnicities and cultures only exacerbates tension and distrust and leads to separatism; therefore, encouraging contact between people of different races, ethnicities and backgrounds is neither a laudable goal nor constitutional under the Equal Protection Clause of the Fourteenth Amendment and should be struck down by this Court. Thernstrom Br. at 10. Shockingly, these *amici* argue in favor of racial

isolation because "the more ethnically diverse the people we live around the less we trust them." *Id*. at 12. This argument is both erroneous and offensive.

The cross-cultural contact that a diverse student body provides contributes to breaking down stereotypes, cross-cultural communication, and positive cognitive and social growth for all students. *See, e.g.,* Mitchell J. Chang et al., *Cross-Racial Interaction Among Undergraduates: Some Consequences, Causes, and Patterns,* 45 Res. Higher Educ. 529 (2004); Gretchen E. Lopez, *Interethnic Contact, Curriculum, and Attitudes in the First Year of College,* 60 J. Soc. Issues 75 (2004); Victor B. Saenz et al., *Factors Influencing Positive Interactions Across Race for African American, Asian American, Latino, and White College Students,* 48 Res. Higher Educ. 1 (2007). In an effort to discredit this accepted premise, the Thernstrom Brief ignores reams of reliable data, and relies instead on personal feelings. First, the brief points to global ethnic tensions and strife in places such as Yugoslavia and Central Africa to argue that "contact between people of different racial and ethnic groups is more likely than not to lead to tension, ethnic conflict, and a tendency to self-segregate and harbor deep suspicions of outsider groups than it is to further intergroup cooperation and trust." Thernstrom Br. at 10. They argue, without any empirical evidence, that increasing diversity on college campuses similarly leads only to separatism. Thernstrom Br. at 23-24.[11]

[11] The self-segregation hypothesis promoted by Abigail Thernstrom and Orlando Patterson, among others, has been frequently disputed and undermined. *See, e.g.,* Robert DeFina, *Do African-Americans Prefer To Live in Self-Segregated*

Although the brief stops short of articulating the logical conclusion of their position, there is no way around the fact that this argument leads to a claim in support of segregation by race or ethnicity.

Indeed, it is in part because of the tension that results from ongoing segregation in areas such as housing and primary and secondary education that diversity in higher education is paramount. *See, e.g.*, Janea F. Shekleton, *Strangers at the Gate: Academic Autonomy, Civil Rights, Civil Liberties, and Unfinished Tasks*, 36 J. of College & University 875, 940-41 (2010). Rather than abandon the efforts universities are making to resolve conflicts and disparities, this Court must reaffirm that the contact students have with those from other racial and ethnic groups is beneficial to society and increases the educational value of a college or university community.

The Thernstrom Brief also argues that diversity is only beneficial when it is "organically occurring." Thernstrom Br. at 10. It further argues that race-conscious admissions programs do more damage than good by adding to the natural tension of contact. *Id.* at 18. This argument is nothing more than a thinly-veiled description of the kind of racial tokenism that has obstructed true integration, equality and justice, and rings of the segregationist sentiments espoused in *Plessy v. Ferguson,* 163 U.S. 537 (1896), and other cases upholding racial segregation.

Communities?, Business Review, Issue Q4 (2007); Martin Kilson, *Critique of Orlando Patterson's Blaming the Victim Rituals*, Souls, Winter 2001.

Tellingly, the only illustration of "natural" diversity offered in the brief is that of Jackie Robinson being signed by the Brooklyn Dodgers in 1947, a time when Black baseball players were prohibited from playing alongside White players. Thernstrom Br. at 14-16. Nothing paints a clearer picture, however, of the impossibility of relying on "naturally occurring" diversity. Jackie Robinson was an extraordinarily talented athlete, whose talents so far exceeded those of many other professional athletes that he earned national and international respect. However, the signing of Jackie Robinson did not change the conditions for other Black baseball players for many years. Indeed, the signing of Jackie Robinson has been described by many as a clear example of tokenism that assuaged the guilt of the white community by creating a spectacle of the achievements of one Black man while not actually moving in any significant way toward truly integrating professional baseball for many years. Alvin Hall, THE COOPERSTOWN SYMPOSIUM ON BASEBALL AND AMERICAN CULTURE: 1997 (Peter M. Rutkoff, ed. 2000).

Indeed, it helps to remember that members of his own team signed a petition objecting to his signing, players on other teams threatened to strike rather than play against him, and for years fans treated him to boos and racial taunts every time he took the field. Jackie Robinson's experience was far from unique. Few if any American institutions have been organically integrated. The sort of merit-based "natural diversity" to which the Thernstrom Brief refers is one that exists only in the misty memory of sentimental historians. Eliminating the ability of

colleges and universities to consider race in their admissions decisions will undercut the ability to encourage a more racially inclusive and integrated academic community and society.

CONCLUSION

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

Respectfully Submitted,

Deborah N. Archer
Counsel of Record
Aderson B. Francois
Susan J. Abraham
NEW YORK LAW SCHOOL JUSTICE PROJECT
185 West Broadway
New York, NY 10013
(212) 431-2138
Deborah.Archer@nyls.edu

AUGUST 2012