No. 11-345

In the Supreme Court of the United States

ABIGAIL N. FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS, et al,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

Brief of the Texas Association of Scholars As Amicus Curiae In Support of the Petitioner

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Table of Contents

Table of Authorities

Cases

U.S. Constitution

Other Authorities

Interest of Amicus[1]

The Amicus are college and university faculty who teach at institutions of higher education in Texas. They approach this appeal solely as American citizens who are concerned about the future of their country. The Amicus deeply believe in a merit based society and not an "equality of results" society. This desire is what motivates the University of Texas and others who support any form of racially preferential treatment. It does not matter whether that policy is described as "a hard quota" or "a holistic plus-up" or a self-serving need for "diversity". It is wrong under all circumstances. The Constitution's 14th Amendment requires that this practice be banned in state university admissions.

The Texas Association of Scholars is an organization that represents college and university professors through-out Texas. The Association has two key areas of concern. The first is preservation of the ideal that an academic institution of higher learning ought to be a merit based institution. Therefore, no preferential treatment should be accorded, directly or by subterfuge, in the admission of students or the selection or promotion of faculty.

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[1] Pursuant to Rule 37.6, no counsel for any party authored this brief, in whole or in part, and no counsel for a party, or party, made a monetary contribution to fund the preparation of this brief. No entity or person, aside from the amicus curiae and its counsel, made any monetary contribution for the preparation or submission of this brief. Counsel for the parties consented to the filing of this brief.

The Association opposes the alleged rationales for the University using any type of racially based preferences in its admissions process. These preferences are not only bad law, they are bad educational policy, for sociological, psychological and historical reasons. Therefore, the University of Texas' "holistic" admissions policy must be rejected.

Summary of Argument

The critical, unspoken, issue in this case is the undermining of merit as the outcome determining factor of success in American life. Starting in the mid-13th century, a feudal inspired, caste system existed in Europe, and in many parts of Asia. It still exists in some of those countries today. Ancestry determined destiny. American was founded on the opposite assumption. The preservation of America's merit based society is the unspoken issue in this case.

The University of Texas engages in two racially and ethnically discriminatory admissions practices, which constitute racial and religious discrimination that violates the 14th amendment's Equal Protection requirements.

1. The University of Texas (hereafter either "the University" or "Texas") grants a "plus factor", increasing applicants' chances of admission, based on an applicant being African-American or of Hispanic origin. The University does not grant non-merit "plus-ups" to applicants of Asian-American ancestry or to any religious minority.

As evidence of the University's lack of candor in attempting to justify its racially based "plus up – holistic admissions policy", the University does not impose this policy throughout all of the University undergraduate schools and colleges. There are stringent, non-race based additional admissions requirements for the School of Engineering, the

School of Business Administration and for admissions to undergraduate programs in all branches of engineering, chemistry, physics and the School of Business Administration. There is no "plusing up" in meeting those requirements.

2. Under Texas' Top Ten Percent program the University is required, by State law, to admit any student graduating in the top 10 percent of his or her high school class. Admission is granted irrespective of how that high school's top ten percent stands, in terms of grade point averages relation to the top ten percent of any other high school in the State. A student whose GPA places him (or her) in the top ten percent of that high school's class will be admitted even if, in another school, the identical grade point average would place that student in the bottom 10 percent.

3. The State of Texas claims that racial and ethnic diversity within its student-body is a critical facet of the total educational process and that the challenged practices that enable the State to attain this goal. Nevertheless, *the University employs these discriminatory admissions policies only at the University of Texas main campus in Austin and its satellite campus in Dallas. It is not imposed on its campuses in El Paso, Tyler, Arlington or San Antonio.* If diversity is so critical an educational value, why isn't it required everywhere in the University of Texas System?

Diversity's lack of educational value is further demonstrated by the fact that the entire Texas A&M

University System, including its flag ship campus in College Station, refused to use any form of racially biased admissions criteria. This has not diminished the quality of education at Texas A&M.

In baseball, the size of the strike zone does not change based on the pitcher's race or national origin. Black quarterbacks do not get a 5th down to gain 10 yards, even at the University of Texas. The University's admissions system is Constitutionally required to operate on the same equality of performance standard.

Argument

I. Dr. Martin Luther King Told Americans That We Should Judge Men by the Content of Their Character and Not the Color of Their Skin. The University of Texas Does Not.

A. The University of Texas' Holistic Admissions Policy is a de Facto Quota System. The Use of Such Policies is Banned by This Court's Decision in *Grutter v. Bollinger*.

The University is using a *de facto* quota system to regulate admissions. This is demonstrated by Judge Higginbotham's opinion in *Fisher v. University of Texas,* 631 F. 2d 213 (5th Cir. 2011). Judge Higginbotham stated that the University's race plus admissions program requires "that [it] must [review] an array of variables, *including an ever present question of whether to adjust the percentage of students admitted under the two diversity initiatives*", 631, F. 3d at 217 (emphasis added). In other words, if the number of protected minorities, e.g. African-Americans and Hispanics but not Asian-Americans, admitted is insufficient, then the criteria must be changed in order that an acceptable level of politically protected minorities are admitted the following academic year. This is a *de facto* hard quota.

Under this rubric, an "illegal quota" is not a "quota" when a court says so. Thus, there are no "quotas" unless a university openly states it wants

"10 percent of this group" or "no more than 20 percent of that group" in its freshman class. "Attempting to ensure that the student body contains some specified percentage of a particular racial group "is patently unconstitutional. . .[R]acial balance is not to be achieved for its own sake", *Fisher* at p. 234.

But, without a numerical goal, how does the University decide if its need, "for preparing students for work and citizenship within an increasingly diverse work force" is being met? *See Fisher,* 231 F. 3rd at 219-220. Without a numerical goal, how does the University determine if a protected minority is "underrepresented" unless it has already established "a satisfactory level of representation". How does the University determine if the required "critical mass" has been attained, if it does not use a set numerical target? See *Fisher* at p. 231

Notwithstanding this race conscious policy, various minorities are excluded from the alleged benefits that their presence is supposed to bring to the educational process. There is no "plus up" for students of Asian-American backgrounds, or for students of South American backgrounds, but *only for Hispanics*. That appears to mean exclusively persons of Mexican ancestry. If "Hispanic" means "of Hispanic ancestry", why are students whose parents were born in Spain excluded? If applicants whose parents came from Brazil are included, why exclude students whose parents came from Portugal?

If diversity is of such educational importance, why is religious diversity ignored? The religious

backgrounds of applicants, be they Catholic, Jewish, Baha'i, Buddhist, Hindu or any other eastern religion, are of no interest to the admissions office. They are not beneficiaries of the University's "holistic" admissions policy. Clearly, these applicants' diverse religious views, opinions and related life experiences are of value in stimulating classroom and dormitory interaction. Why is "diversity" for these favored groups more educationally important than "diversity" for the disfavored groups?

This Court held, in *Grutter v. Bollinger*, 539 U.S. 306, 338 (2003) that ["The law School's] admissions policy makes it clear that there are many possible bases for diversity admissions." The opinion provided, as examples, admittees who have lived or travelled widely abroad, are fluent in several languages, have overcome personal adversity [or] have exceptional records of extensive community service [or] have had successful careers in other fields". This non-racial standard was held to be constitutional.

The critical difference between the factors enumerated in the prior paragraph and Texas' "racial plus factors" is that those factors are 1) not based on impermissible considerations of race or ethnic background and 2) are quantifiable thus leaving little room for racial prejudice to contaminate the admissions process. This does not validate what the University Michigan did in *Grutter* since it clearly used race as the dominant basis for giving "extra points" to an applicant.

B. The Fifth Circuit's Opinion Conflicts with *Grutter's* Ban on Using Quotas in College Admissions Decisions.

The Fifth Circuit distorted the meaning of the word "quotas" in order to evade *Grutter's* prohibition against hard quotas. The Court redefined the term "quota" into meaningless poetry about "diversity" and its "value to society". When Harvard came under intense criticism for having an outright quota for Jewish students, starting in the 1920s, it sought to evade responsibility for what it was doing by announcing that it wanted "a national student body" meaning more students from the plains states, the Rocky Mountain States and the southwest. Conveniently, those states had few "undesirable" minorities in their populations.

What real difference is there between a fixed number of students (whether admitted or excluded) and "a good faith" effort to come within a range demarcated by the goal itself? Neither the Fifth Circuit, nor the University, ever admit what that precise range is or how the University determines if it has met its "goal" without having established an illegal "quota". The University's "acceptable range" must be based on the percentage of African-American and Hispanics as a percentage of Texas' overall population or another numerical frame of reference. Once such a policy is established, it is a quota no matter how it is linguistically disguised.

The discrimination inherent in the University's admissions policies is amply demonstrated by the 5th Circuit's statement that:

> The District Court expressly found that race can enhance the personal achievement score of a student from any racial background including whites and Asians. For example*, a white student who has demonstrated substantial community involvement at a predominantly Hispanic high school may contribute a unique perspective that produces a greater personal achievement score than a similarly situated Hispanic student* at the same school, 631 F. 3d at 236, (emphasis added).

Thus, if a white student associates himself or herself with students of a politically protected race or ethnic background, that student's work as a volunteer at a local hospital or soup kitchen is more valuable to society, and therefore more worthy of admission to the University, than that student doing the identical volunteer work but attending a predominantly white high school. If this philosophy is not unconstitutional race discrimination, barred by the 14th amendment, then no policy could be.

C. The University's Top Ten Percent Admissions Requirement is a *De Facto* Quota System.

Texas' Top Ten Percent law requires that the University admit any student in the top 10 percent of his, or her, high school class, irrespective of that applicant's grade point average or SAT scores. This

constitutes a *de facto* quota system. Despite its claims that it is not engaged in using an unconstitutional quota, Texas admitted that *the Top Ten percent plan*, *"was animated by efforts to increase minority enrollment and, to the extent it succeeds, it is because, at key points, it proxies for race". Fisher*, 321 F. 3rd at 243 (emphasis added).

These proxies injure all disfavored or excluded minorities. As Judge Garza stated in his dissent:

> *Courts now simply assume, in the absence of evidence to the contrary, that university administrators have acted in good faith, in pursuing racial diversity. . . [T]he deference called for in Grutter seems to allow universities, rather than the courts, to determine when the use of racial preferences is no longer compelling*. . . This new species of strict scrutiny only that those admissions programs employing the most heavy handed racial preferences. . . will be subject to exacting judicial examination. . .Others, like the University of Michigan, in *Grutter* and the University of Texas, here, can get away with something less", 631 F. 3d at 250 (emphasis added).

D. The Origin of the Top Ten Percent Plan was the Ivy League's Desire to Limit Minority Enrollment by Seeking a "National" Student Body.

Ivy League prejudice formed the basis for a new proposal that Harvard adopted in 1923. Wanting to limit the admission of "undesirable" students, a special Harvard Board of Overseer's Committee recommended that:

> Harvard [will] admit students whose scholastic rank places them in the Top Seventh of their graduating class. . .[This policy is] designed to facilitate the admission of 'a new group of men from the West and South...[T]he *Top One Seventh plan seemed to men like [Charles] Eliot and [Felix] Frankfurter [to be] a thinly disguised attempt to lower the Jewish proportion of the student body by bringing in boys who are – some of them academically ill-equipped for Harvard - from regions of the country where there were few Jews"* (emphasis added).

This proposal was adopted on April 24, 1923. See *Report of the Committee Appointed to Report to the Governing Boards Principles & Methods for More Effective Sifting of Candidates for Admission to the University*, April 1923, cited by Karabel at pages 101-102.

Harvard's Top Seventh admissions policy is very similar to the University's state mandated Top Ten Percent admissions policy. That policy discriminates against students residing in Houston, San Antonio, Dallas and Austin. These students could be in the top 25 percent of their high school class but still have academic qualifications higher than students in the

top 10 percent of their classes residing in the 250 rural and small town counties in Texas. It is no accident that those students residing in those 250 counties will substantially tend to be minority group members.

Yale officials were as outspoken as President Lowell in their desire to restrict the admission of Jewish applicants. Robert Corwin, the Chairman of Yale's Board of Admissions wrote that:

> *The [Yale] Corporation's Committee* on Educational Policy has asked me to report. . .*on the number and status of students of Jewish origin now in the Undergraduate Schools and to discuss with the [Committee] the advisability or necessity of concerning measures limiting the number of this race or religion to be admitted to [Yale] college*. . . .We make the serious consideration of this question imperative. Letter from Robert M. Corwin to Fredrick S. Jones, Dean of Yale College, May 3, 1922. See, Professor Marcia Graham Synnott, *The Half Opened Door: Discrimination & Admissions at Harvard, Yale & Princeton, 1900-1970,* at page 125 (emphasis added).

Fifty years later, little in academia has changed. As another example, in 1970, the University of Wisconsin, "introduced a system whereby out-of-state admissions would be reduced to 15 percent. By September 1970, the number of Jewish students had dropped by two-thirds. Marcia Graham Synnott, *The Half Opened Door: The History of Discrimination at*

Harvard, Yale & Princeton (2006) at page 225. One motivation for this quota was that ,"New York Jews were a particular target of some Wisconsin legislators because of the Jews alleged campus 'activism". . .". This policy was denounced as being latently anti-Semitic, Synnott, op. cit. at page 225. Has the University of Texas really behaved differently?

II. The Historical Origin of Texas' Discriminatory Admissions Policies are the Anti-Semitic Admissions Policies Employed by Harvard, Yale, and Princeton Starting in the 1920s.

The Ivy League's history of anti-Jewish discrimination is well documented. *The Chosen: The Hidden History of Admission and Exclusion at Harvard, Yale and Princeton,* by Jerome Karabel, details the religious bigotry the controlled admissions at Harvard, Yale, Princeton, and at many other top tier academic institutions, from the early 1920s through the mid-1960s. Strictly enforced quotas barred substantial numbers of students from admission exclusively because they were Jewish. Students with appropriate blue blood and prep school backgrounds were admitted at 5 to 10 times the rate of far better academically qualified Jewish students.

Being Episcopalian or Presbyterian, especially if one had attended Groton, Hotchkiss or St. Paul's especially if coupled with being a legacy (i.e. the son of an alumnus) virtually guaranteed a student's acceptance. The sons of "St. Grottlesex" did not want

to associate with socially inferior students. The Jews presence created "*too much* diversity". Now, the same victims of political prejudice are, again, denied admission because "their presence fails to create *enough* diversity". The University of Texas, as did the Universities of Michigan, Washington and California, all employed the mirror image of what the Ivy League did in the 1920s.

In 1914, Columbia's Dean, Fredrick Keppel openly acknowledged that the large number of immigrants made Columbia, "socially uninviting for students who came from homes of refinement", Karabel at page 87. The only reason that Italian and other students of eastern European backgrounds did not face identical discrimination is that they did not apply for admission in any noticeable numbers. Having the highest grades at nationally recognized New York City public high schools such as the Bronx High School of Science or Stuyvesant High School virtually guaranteed an applicant's rejection. These schools were known to have very high proportions of Jewish students. See, generally, Daniel P. Moynihan and Nathan Glazer, *Beyond the Melting Pot*.

California, Michigan and Texas made similar references to the "need for a critical mass" of minority students in order to make "diversity" work. Harvard, Yale and Princeton also used the concept of "critical mass" as their reason for limiting the enrollment of Jewish students. Their critical mass was too high. As a result, the Columbia "undergraduate body [in 1908] contained a predominating (sic) element of students who have few social advantages and that, as a

consequence, there is little opportunity for making friendships of permanent value. . .As a result, most parents send their out of [New York] city to college". Karabel at page 86. "Every undesirable student admitted is not an advantage but a detriment to the University" Karabel, note 62, page 577. The difference between Columbia's thinking in 1908 and Texas' thinking, in 2012 is not all that different, nor is the identity of its victims.

III. The Challenged Policies of Racially Preferential Admissions Have Been Condemned by Eminent Jurists and Scholars Alike.

In *DeFunis v. Odegaard*, 416 U.S. 312, 343 (1974) Justice Douglas denounced racial preferences in college admissions. "One other assumption must clearly be disapproved: that blacks or browns cannot make it on their own. That is a stamp of inferiority that a State is not permitted to place on any lawyer". The University of Texas seems intent on doing precisely that.

Justice Douglas further opined that:

> *The Equal Protection clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized*. The purpose of the University of Washington cannot be to produce black lawyers for blacks, Polish lawyers for Poles, Jewish lawyers for Jews, [or] Irish lawyers for Irish. It should be

> to produce good lawyers for Americans. . . ", *DeFunis v. Odegaard*, 416 U.S. 312, 342 (1974) (emphasis added).

Judge Henry Friendly fully shared Justice Douglas' views. Judge Friendly wrote that:

> *I have read a good many articles on the subject but [I] cannot get away from my gut reaction that reverse discrimination is just as unconstitutional as the other kind. . .* My criticism is addressed to the kind of discrimination where applicants known by everyone to be inferior are being selected over those better qualified. . . [T]he reverse discrimination in admissions procedures generally has to be accomplished by a continuation of this discrimination in grading, with the result that the institution is putting its imprimatur on people who have not really met its standards". See David M. Dorsen, *Henry Friendly: The Greatest Judge of His Era,* at pages 203-204 (emphasis added).

Even Justice Powell, who supported some types of racial preferences, believed that:

> *[T]here are serious problems of justice connected with the idea of preference itself. First, it may not always be clear that a so-called preference is, in fact, benign. .* .Nothing in the Constitution supports the notion that individuals may be asked to suffer otherwise

> impermissible burdens in order to enhance the societal standing of their ethnic groups. Second, preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth, *Regents of the University of California v. Bakke,* 438 U.S. 265, 298 (emphasis added).

Scholars, of national repute, share this judicial opposition to racial preferences. *"Those who use the term 'diversity', to justify their actions, 'have an agenda that favors ethnic and racial discrimination in order to achieve a particular and predetermined demographic mix while opposing merit and assimilation to American culture"* (emphasis added). See Professor Peter Wood, *Diversity: The Invention of a Concept* at page 3, (2003). Diversity is, "above all *a political doctrine asserting that some social categories deserve compensatory privileges* . . .(emphasis added). [I]t is a *belief* that the portion of our individual identities that derives from our ancestry. . .is somehow more powerful than our individuality. . .or our common humanity", id. at page 5 (emphasis in original).

Dr. Charles Murray, a nationally recognized sociologist and historian wrote that, "Asian Americans have long been represented in elite colleges far beyond their proportion of the population, even though they suffer systematic disadvantage in the [college] admissions process. . . ." ., Charles Murray, *Coming Apart* (2012) at pages

80-81, citing *Harvard Gazette,* May 11, 2011 found at news.harvard.edu/gazette/story. See, generally, T.J. Espanshade & Alexandria W. Radford, *No Longer Separate, Not Yet Equal: Race & Class in Elite College Admissions & Campus Life* (2009).

IV. Racial Preferences in State University Admissions are Unconstitutional Under All Circumstances.

A. Assertions of 'Academic Freedom' Do Not Authorize Destruction of a Citizen's Constitutional Right to be Free From Invidious Discrimination That Violates the 14th Amendment.

In *DeFunis v. Odegaard*, 416 U.S. 312 (1974), Justice Powell sought to sustain using race as a legitimate factor in determining law school admissions on the grounds that it was an element of an educational institution's academic freedom. He relied on just two cases: *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) and *Keyishian v. Board of Regents,* 385 U.S. 589, 603 (1967) to support his contention. *Neither case had anything to do with the controversies in DeFunis, Bakke, Grutter* or *Fisher*. *Sweezy* dealt exclusively with the constitutional validity of a state legislature investigating possible communist subversion among the faculty of the University of New Hampshire and the possibility that the suspect professors were teaching subversive ideas. *Keyishian* dealt only with a professor's dismissal from the faculty at the State University of

New York for refusing to sign a mandatory, state imposed, loyalty oath.

Neither case had anything to do with academic freedom in the context of racial preferences violating the 14th amendment rights of disfavored applicants for admission to a university. The Court found in favor of both plaintiff's because their First Amendment's free speech rights had been violated. This Court must rule in Fisher's favor because her 14th Amendment rights have similarly been violated. Nothing in the text, or history, of the 1st Amendment gives the University the right to engage in racial favoritism under the rubric of "academic freedom".

What Texas was forbidden from doing in 1950, it cannot do, in 2012, merely because the color of the victim's skin has changed from black to white. See *Sweatt v. Painter*, 339 U.S. 629 (1950).

B. Justice O'Connor's Hope That Race Based Preferences Will End Was an Illusion. Once Started, They Will Never Stop.

Justice O'Connor's view that, "Grutter requires that any race-conscious measure must have a logical end point and must be limited in time" 539 U.S. at 342 is to wish upon an unreachable star. *Once a politically favored minority is given a race based preference, the favored minority will always insist that it still "suffers from the effects of past discrimination", that the preference's termination would be "prejudicial to its interests" and that*

anyone supporting its termination is "biased against minorities".

The validity of this fear is proven in recent statements made by Lee Bollinger, the former President of the University of Michigan and now the President of Columbia. He stated that, *"Diversity is not merely a desirable addition to a well-run education. It is as essential as the study of the Middle Ages, of international politics and of Shakespeare*", Washington Post, April 29, 2012, Page B 5 (emphasis added). "Diversity" is no longer a means of "assisting the disadvantaged". "Diversity" now is on a par with Shakespeare and western civilization, ironically two subjects no longer required in many elite universities. Race based preferences will never end based on this "new criteria". There are few more powerful arguments for repudiating the reverse racism underlying *Bakke v. University of California* and *Grutter v. Bollinger* than Lee Bollinger's contemptible theory.

V. The Challenged Practices Harm Disfavored Minority Students.

A. Asian Americans are Seriously Injured by the University's Policies

Texas' prejudicial admissions process does not harm only white students versus African-American or Hispanic students. Students of Asian backgrounds are equally injured and it is no longer even an "open secret" that the University of California attempted to limit enrollment by Asian students because the more

academically qualified Japanese and Chinese ancestry student as were being admitted in numbers far beyond their ethnic groups' percentage of California's overall population. The practice ended only after California voters approved a state constitutional amendment barring its use.

Asian students are similarly burdened in violation of the 14th Amendment's equal protection requirements. There is substantial documented evidence proving this. Numerous elite academic institutions have openly stated that they use race based preferences in selecting students to be admitted. Other, equally elite institutions do not.

Table 1. Asian Americans as a Percentage of Matriculates at Several Highly Competitive Schools

Schools with Preferences		**Schools with No Preferences**	
Brown	11%	Cal Tech	42%
Dartmouth	14%	Berkeley	42%
Chicago	16%	UCLA	33%
Yale	16%		
Cornell	17%		
Harvard	17%		
Princeton	19%		
Penn	18%		
Stanford	21%		
Columbia	22%		
MIT	25%		

Source: College Board 2012, "College Search", See, *bigfuture.collegeboard.org/find-colleges*, accessed on April 12, 2012.

Such quotas, although they are never called "quotas" but merely "a holistic approach to admissions" or "a plus factor", injure disfavored minorities. Factually this is not disputable. These institutions are the famous STEM (i.e. science, technology, engineering and mathematics) schools that are the finest in the world. As examples, Harvard, Yale, Princeton and Columbia limit the number of Asian-Americans admitted. California Institute of technology, as a matter of deeply held belief, and the University of California at Berkeley, and UCLA, because they are compelled to evaluate applicants on a no-race preference basis by Proposition 209, admit substantially higher percentages of Asian-American students than do the Ivy League universities that openly disfavor Asian-American applicants.

During a meeting of the National Association for College Admissions Counseling an admissions officer at Stanford of how real is the bias against Asian-American applicants. Among applicants with the same academic and personal characteristics, whites were more likely to be admitted than Asians; literally four times as likely at the California Institute of Technology versus Brown and nearly three times as likely at Harvard, Yale, Dartmouth or Cornell. See Scott Jaschik, *"Too Asian",* Inside Higher Education, October 10, 2006 where another admissions officer referred to Asian applicants as

"one more AA applicant majoring in math", "they all play the violin" and "another boring Asian applicant". See: http://ered.com/news/2006/10.

This open bias against Asian-American applicants is known throughout the Asian-American community. One major company that consults with parents of Asian-American applicants stated that:

> College admissions directors will say that in addition to academic criteria, their applicants will be evaluated through "holistic" methods. This is a code word for racial discrimination *and an undocumented quota system* (emphasis added). It's no wonder that Asian applicants refer to their ethnicity as "the anti-hook" learning that it hurts their chances for admission. See *Asian American College Consultation,* "Frequently Asked Questions", http://www.asianadvantage.net.faq.

B. The University's Admissions Policy Discriminates Against Applicants Who Attend High Schools Operated by Religious Groups.

The University's policy also discriminates against students who attend religious secondary schools. A student attending a Yeshiva or a Catholic Church sponsored parochial school, or a Chinese or French immersion Montessori school (which may have a disproportionately smaller number of Hispanic or black students) will, under the University's policy, automatically have his or her extra-curricular and educational achievements devalued because that

applicant did not associate with a sufficient number of politically approved minority group students. Moreover, the University does not define how many Hispanic students are required in a given school for white or Asian students to be deemed to have associated with enough Hispanics to have an "acceptable rate of association with minorities" to qualify as attending a "minority school".

This policy equally injures a Hispanic child who attended a Catholic Church's parochial school. That child would likely not associate with a sufficient number of white students, so their academic and extracurricular accomplishments, at a hospital or on a baseball field, will similarly be devalued by the University's admissions committee.

If these activities were not devalued then the University would, again, be applying an unconstitutional double standard depending on whether the school's student body was predominantly white or predominantly Hispanic. Once the impact of the University's admissions policy is evaluated in this light, it cannot survive 14th amendment scrutiny under any standard, even an alleged "compelling state interest". A state cannot be permitted to have an "interest" in an applicant's racial associations in or out of the classroom.

Professor Peter Wood wrote that:

> The new perspective of diversity is not just about emphasizing groups at the expense of the whole; it is also about treating [politically

> protected groups] as having saved up a right to special privileges in proportion to how much their purported ancestors were victimized in the past. . It is invoked as a reason why the federal government should set aside a certain percentage of contracts for minority owned businesses and why the federal courts should not apply the equal protection clause of the 14th amendment to college admissions. Wood, *Diversity: The Invention of a Concept,* at pps. 44. 44-45. 3-4.

VI. Both the Ivy League and University of Texas Instituted Racial Preferences in Order to Protect their Perceived Institutional Interests. The University of Texas Perceived Institutional Interests Constitute Discriminatory State Action Prohibited by the 14th Amendment.

A. The Ivy League Imposed its Quotas to Appease the Prejudices of Wealthy Alumni.

Prior to the 1920's Harvard, Yale and Princeton, "admitted students almost entirely on the basis of academic criteria". See Karabel, pages vii-viii. Starting in the mid-1920s, this was no longer acceptable to these schools administrations and alumni. *"[I]t had become clear that a system of selection focused solely on scholastic performance would lead to the admission of increasing numbers of Jewish students, most of them of eastern European backgrounds",* Karabel at p. viii (emphasis added). The absence of similar animus towards students of Italian, Irish and Polish ancestry did not arise

because of an absence of applications from students of those ethnic and religious backgrounds.

"Charged with protecting their institutional interests the presidents of the Big Three wanted the latitude to admit the dull sons of major donors and to exclude the brilliant but unpolished children of immigrants. . .[s]uch latitude was missing from a policy of selection focused exclusively on academic excellence", Karabel at pages 101-102, citing, Harvard University Archives.

B. The University of Texas Instituted its Challenged Policies to Protect its Institution's Political Interests.

1. Currying Political Favor is Not a Compelling State Interest. It is Merely Politics.

Texas wants to protect its institution's political interests by currying favor with minority populations – and politicians – who now account of 48.1 percent of Texas' population. It needs to maintain political support within these minority communities and among their elected state officials. In order to do so, and to evade the underlying problem of poor academic achievement by minority students from rural and inner city public schools, Texas devised its own quota system. Not wanting to run afoul of the University of Michigan's undergraduate hard quota system that was rejected in *Gratz v. Bollinger*, 539 U.S. 244 (2003). Texas devised its "race is a plus

factor" system in order to evade this Court's decision banning hard quotas.

Achieving a quota, without using that term, was also the approach followed by Yale, during the 1920s. The Chairman of Yale's Board of Admissions, Robert Corwin, received a letter from a prominent member of the Yale Corporation complaining about the large number of Jewish students being admitted. Cowin assured him that "the racial problem is never far from the minds of the Board of Admissions. *Rather than stir up a major controversy, as had happened at Harvard, 'which is now. . .sawing through wood and not saying a word'. . . .Yale should follow a middle course, limiting the number of Jews to roughly 10 percent without publicity and informally"*, Karabel at page 117 (emphasis added).

2. Using "Character" as an Admissions Criteria is a Subterfuge for a Quota. Texas' "Holistic" Admissions Policy Does the Same Thing.

Harvard began to place a premium on unquantifiable concepts such as "character" to weed socially undesirable applicants. "To prevent a dangerous increase in the proportion of Jews, I know at present only one which is. . .effective, and that is a selection by a personal estimate of [an applicant's] character on the part of the Admissions authorities . . .", Harvard President A. Lawrence Lowell, quoted by Karabel at page 107.

Princeton also adopted new admissions criteria is similar to those employed today by Texas. Princeton's 1921 Committee on Limitation of Enrollment recommended that each applicant "be assessed on 'mental qualifications', 'manhood qualifications', 'physical qualifications', and 'leadership qualifications' and not 'mere book worms'. There was also an emphasis on. . . extra-curricular activities' as proof of leadership. Finally, the Committee proposed to. . .collect data on 'home influence' and 'race and nationality'. *Committee on Limitation of Enrollment,* 1921, Princeton University Archives, cited in Karabel, pages 121-122.

Is Texas' "holistic" admissions policy, which asses character, community service - versus the Ivy League assessing an applicant's "value to the Yale family" - different in any meaningful way?

VII. Diversity is Not a State Interest, Let Alone a Compelling One. "Compelling Interest" is Merely a Euphemism for Racial Quotas.

A. The Historical Development of the Doctrine of a Compelling State Interest Proves That it Does Not Apply to College Admissions.

Justice Powell conceded that racially based factors were "non-objective". No one should be permitted to use non-objective criteria to establish a compelling state interest in violating someone else's Constitutional rights. Prior to *Bakke*, the only

instances where the Court sustained race based discrimination was during the Second World War when it upheld the forced removal of Japanese-Americans from the west coast and their forced internment in detention centers in the interior of the United States. The reasons were "war time national security". See *Korematsu v. United States,* 323 U.S. 214 (1944) and *Hirabayashi v. United States*, 320 U.S. 81 (1943). Those race based "compelling state interest" policies were so immoral that the United States apologized and paid reparations to that policy's victims.

"Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification*," Parents Involved in Community Schools v. Seattle School District #1*, 551 U.S. 701, 720 (2007). "At the heart of the Constitutional guarantee of equal protection lies the command that the government must treat citizens as individuals, not simply as components of a racial, religious, sexual or national class", 551 U.S. at 730, quoting *Johnson v. Miller*, 515 U.S. 900, 911 (1995). *"The principle that racial balancing is not permitted is one of substance, not semantics. Racial balancing is not transformed from 'patently unconstitutional' to a 'compelling state interest' simply by relabeling it 'racial diversity'"*, 551 U.S. at 762 (emphasis added).

["T]he 14th Amendment itself was framed in universal terms without reference to color, ethnic origin or condition of prior servitude. . .[T] 39th Congress was intent upon establishing in the federal law a broader principle than would be necessary

simply to meet the particular and immediate plight of the newly freed Negro slaves", 438 U.S. at 293, quoting *McDonald v. Sante Fe Trail Transportation Co.*, 427 U.S. 273, 296 (1976). Therefore, no racial or ethnic group may benefit from, or be disadvantaged by, racial or ethnic preferences

B. Mandated "Diversity" is an Illegitimate Governmental Interest.

Government mandated "diversity" is a subversive attempt to destroy the cultural assumptions that underlie the American ideal of equal opportunity and not government mandated equal results. "Diversity has contributed to falling educational and performance standards (e.g. attacking SAT scores, undermining love of country (by elevating racial separatism . . .and [it has] made certain forms of racialism respectable again", Peter Wood, *Diversity: The Invention of a Concept*, at p. 3.

1. Diversity Has No Societal Value, and May Cause Significant Harm, to All Americans.

In *Bakke,* the Court asserted that a medical student "with a particular background – whether ethic, geographic culturally advantaged or disadvantaged – may bring a professional school of medicine experiences, outlooks and ideas that enrich the training of its student body. . ." *Bakke,* 438 U.S. at 314.

That assertion is pernicious. Is small pox diagnosed or treated differently if a patient is black instead of white? Does an Asian-American patient with a fractured spinal cord require different treatment that a Hispanic with the same injury? Would a black physician use different diagnostic tests, or standards, for determining if a patient had suffered a heart attack?

The national danger posed of Texas' policies is emphasized by American history. There was no mandatory "diversity" at Los Alamos. The scientists and engineers working on the Manhattan Project came from very similar cultural and religious backgrounds and national origins. No asked about "diversity" in recruiting them. They were asked only to demonstrate high levels of expertise. It did not matter that Nobel Prizes in Chemistry and Physics are not awarded on a culturally diverse basis. No one thought that anyone's life experiences mattered. Consideration of the hardships these scientists faced in being forced to emigrate to America or the fact that English was a foreign language to virtually all of these men - and there were no women - would have been thought madness if used as selection criteria.

2. The Absence of Racially Based Preferences Does Not Harm Minority Students.

Students from economically or socially disadvantaged backgrounds are not injured by the absence of racially or ethnically based preferential treatment. Moreover, they are not entitled to

preferential treatment. At a Conference on The Theology of Work and the Dignity of the Worker, William, Cardinal Egan, of New York, told the Conference that:

> [I] would not agree that students today are needier and less able to learn because of poor family life than were students when my grandparents came to this nation. Read the histories of New York, Chicago and other urban centers of this nation of ours during the era of great immigration from Europe. Crime, horrendous health conditions and poverty were everywhere; and somehow, the children were taught the essentials and built this nation as a result. I believe that the problems back then were as challenging as the problems we have now". William, Cardinal Egan, *St. John University Law School, 50 Journal of Catholic Legal Studies* 45, 69 (2011).

Moreover, these terrible problems were overcome without racial and ethnic preferences being given and without anyone's college application being "plused-up" based on their national origin.

VIII. The University's Diversity Programs Have No Quantifiable Educational Benefit.

The University claims that "diversity" provides an educational benefit to its students. It fails to offer any documented, scientifically peer reviewed, proof of that assertion. The record is devoid of validated

studies, to substantiate what are, at essence bogus, politically motivated, assertion as to diversity's value.

These assertions assume that there are significant racial and ethically based differences that can only be brought to the academic fore in a racially diverse setting. The University's assertion is pedagogic nonsense. The methodology for conducting a multiple-regression analysis of social science survey data is the same whether a student is black, white or brown. The engineering techniques for designing a micro-processor are the same no matter what the ethnic background of the engineer. The validity of Einstein's theory of relativity does not change based on the class' racial make-up. Texas' rationalization make as little educational sense as Michigan's Law School's implicit argument that there is a black point of view about the Rule Against Perpetuities, a Hispanic view on the last clear chance doctrine and white point of view as to the requirements of permissible versus compulsory joinder of parties under the Federal Rules of Civil Procedure.

The University's theory also implicitly assumes that all African-Americans or all Hispanics have a uniform point of view about major issues that substantially differs from those held by white students and that this creates a legally compelling state interest in broadening the interaction between diverse ideas.

> [R]ace is not a 'plus factor' in performing surgery, practicing law any other form of advanced study. The diversity achieved by racially preferential admissions does not affect the quality of the medical care given. *Diversity is not educationally invigorating; it is intellectually threadbare and ethically contemptible*", Peter Wood, *Diversity: The Invention of a Concept*, at page 145 (emphasis added).

IX. The University is Incapable of Evaluating its Racial Preference Program Objectively.

If the University's assertions as to the educational value of diversity were genuine, then one ought to inquire how many conservative political science, economics, history and sociology professors are on the University of Texas faculty. Dr. Charles Murray noted, in *Coming Apart: The State of White America* that, *"The dominance of liberal views among faculty members at elite universities is well documented*", *Coming Apart* at page 95 (emphasis added).

This overwhelming partisan bias, which cannot help but affect faculty and administration views towards racial preferences, was documented by Christopher Cardiff and Daniel B. Klein in Volume 17 *Critical Review* pages 237-255. Their study determined that, in the humanities and social sciences, liberals on the faculty outnumbered conservatives by 7.4 to 1 in English, 6.2 to in history

and political science 5.8 to 1 in the humanities, 4.1 to in physics and 4.0 to 1 in biology. Faculties in elite schools are even further to the left than they are in less selective schools. See *Coming Apart The State of White America,* Note 25, pages 370-371.

The constitutional significance of this data is that these are the very same faculty and administration members who determined the need for these preferences. They are the same individuals who determine how racially preferential admissions policies are administered. Most senior admissions policy setting administrators were originally members of the faculty. They are the individuals making decisions about the "value of diversity" and the self-justifying determination that "diversity is a societal and an educational benefit" that "compels" the violation of an applicant's Constitutionally protected right to equal protection of the law. No proof is offered, merely their self-justifying conclusion. Some judges insist that judicial deference must be given to any educational institution's admissions criteria with little explanation of why save for unsupported references to a First Amendment right to set admissions standards.

X. Achieving Genuine Equality is Possible Within the Mandate of the 14th Amendment.

The path to genuine equality of opportunity is not paved with racial and ethnic preferences. It is paved with genuine achievement. In 1947, John Gunther wrote, in *Inside the U.S.A,* that major Wall Street law firms were, "the last frigid citadel of

Anglo-Saxon Protestantism" and the Jews were barred from being hired, even as associates, at these law firms. See *Inside the U.S.A.,* chapter entitled *"New York City"*. Similarly, World War I hero, and founder of the Office of Strategic Services, General William Donovan, was forced to found his own law firm because of a similar anti-Catholic animus on Wall Street.

That world has substantially changed during the past 40 years. Wall Street law firms are heavily staffed with Jewish and Asian-American partners and associates, not because of quotas or ethnic "plusing up" but because genuine talent and law school achievement became the criteria for hiring attorneys and not an applicant's religious affiliation or ranking in the Social Register.

The University seeks to create artificial diversity. "It is, at best, a morally neutral contrivance. But sometimes it is much worse: a set of social arrangements that are unjust and thwart our higher aspirations", Wood, op. cit., at pages 39-40. Moreover, these false admissions demean the alleged beneficiaries of reverse discrimination.

> To admit students in this fashion is to tell them that the college - and perhaps society at large - does not believe that they could succeed on their own abilities. It plants the idea that "equality itself is an artificial social arrangement imposed by the actions of others. . .To indict people into college even partly because of race is to hand down a life

> sentence of corrosive self-doubt, based on the suspicion that one could not have made it on merit alone". Wood, at page 41

Nowhere in the Constitution, or the Declaration of Independence, does the word "diversity" appear. Nor does it appear in the 14th Amendment. "Equality" and "liberty" are discussed repeatedly. Diversity is never mentioned. *"Diversity is not about fine tuning American society. . .it aims no less than transforming American society through and through*", Wood, op. cit., at page 15 (emphasis added). There is no Constitutional basis for the Courts, let alone a state university, to engage is such a radical restructuring of America, allocating education, jobs and contracts, based or race.

There is no Constitutional underpinning for Justice Powell's lone opinion in *University of California v. Bakke*, 348 U.S. 265, 305, that a state government has any interest, let alone a compelling state interest, in the diversity of the student body in its medical school. It became so only because Justice Powell said that it was so.

Is a Hispanic doctor better qualified to treat a Hispanic patient needing open heart surgery than a better trained white surgeon merely because he is Hispanic? When an African-American needs a kidney transplant does she really want to be operated on by a doctor who gained admission to medical school because of a racial preference or does she want the best nephrologist available?

XI. The Imposition of State Compelled Diversity Programs Harms Society.

The diversity movement has substantially harmed America. "[It] has contributed significantly to declining academic standards (e.g. attacks on SAT testing as a method of identifying which students who have an aptitude to succeed in college...and made certain forms of racialism respectable again", Wood, op. cit. at 16. And so they have, for "*what proclaims itself as diversity turns out to be little more than prejudice*. . . .the [civil rights] movement has appropriated the name of diversity, not to achieve a better kind of national unity, but to give license to ethnic privilege and other forms of separatism", Wood at page 17 (emphasis added).

As Professor Wood wrote, "*Such group identities may seem real enough to politicians trolling for votes. . .but they are shadowy formulations and deeply at odds with our cultural imperative to treat individuals as individuals regardless of their ethnic backgrounds*", Wood, op. cit. at page 25 (emphasis added). Political expediency is not a compelling state interest to violate the civil rights of everyone in Texas who is not African-American or Hispanic, as Texan "defines" Hispanic.

The value of a merit based society is exemplified by the history of merit based hiring, by the New York Police Department (during the Depression) as

opposed to the race based hiring rejected by this court in *Ricci v. DeStefano*, 129 U.S. 2658 (2006). In 1939, with the Depression still in full fury, the NYPD had nearly 33,000 applicants for 350 positions. "The NYPD decided to select exclusively on the basis of test scores. . .and no edge for a favorable impression in a job interview. The Applicants took two tests, one of cognitive ability. . .and a test of physical ability" with the cognitive test being 70 percent of an applicant's grade. As a result, "only those applicants with the highest scores were accepted. "The best estimate is that they had a mean I.Q. of 130-near the mean I.Q. of incoming freshmen at elite schools today.

In 1980, a review was made of the professional accomplishments of that group of merit selected candidates. "[T]he results had been spectacular. Within the Department the class produced 4 [police chiefs, 4 deputy police commissioners, 2 chiefs of personnel, 1 chief inspector and 1 Police Commissioner". Many who subsequently left the department to pursue other careers, as the Depression ended, in 1945, "had successful careers as lawyers, businessmen and academics", Murray, *Coming Apart: The State of White America* at pages 117-118.

Politically inspired "diversity" prevents this merit based achievement from happening. As Professor Wood wrote:

> Diversity that is achieved by racial, ethnic or other quotas in college

> admissions; diversity that . . .consists of books included or excluded because of the race, nationality, gender or gender preference of the authors. . .these are, every one of them, pernicious forms of diversity. . .To admit students in this fashion is to tell them that the college – and perhaps society at large – does not believe that they could succeed on their own abilities. It plants the idea that "equality" itself is an artificial social arrangement. . .and it negates the idea of equality as the underlying and inherent condition of all humanity. *To induct people into college even party because of race is to hand down a life sentence of corrosive self-doubt, based on the suspicion that one could not have succeeded on merit alone.*" Peter Wood, *Diversity: The Invention of a Concept,* at pages 40-41.

Historian Victor Davis Hanson summed up the damage that race based programs have caused to the United States:

> Identities. . .are sometimes put on and taken off, like clothes, as elf-interest dictates-given that thy are no longer ascertainable by appearance. If that sounds crass or unfair, ask Elizabeth Warren who dropped her Native American claims as soon as she received tenure and found her 1/32 con suddenly

> superfluous-to the apparently similarly cynical but now mum employer Harvard [Law School]. . . [N]o on knows who qualifies as an oppressed victim... The real worry is that soon we will have so many recompense-seeking victims that we will run out of concession-granting oppressors. Wall Street Journal, page A 15, May 14, 2012.

E Pluribus Unum has been replaced by "*E Unum Pluribus*". America is the worse for it.

Conclusion

For all of the foregoing reason, *Fisher v. University of Texas* must be reversed, and the prior holdings in *University of California v. Bakke* and *Grutter v. Bollinger* must be overruled.

Respectfully submitted,

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