

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 OF UNITED STATES STUDENT
ASSOCIATION AS *AMICUS CURIAE*
IN SUPPORT OF RESPONDENTS**

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INTEREST OF *AMICUS CURIAE*¹

The United States Student Association (“USSA”), the nation’s oldest and largest student-run, student-led organization, is comprised of more

¹ Pursuant to Rule 37.3, *Amicus* states that all parties have consented to the filing of this *amicus curiae* brief. Pursuant to Supreme Court Rule 37.6, *Amicus* states that no counsel for a party authored this brief in whole or in part and that no person or entity other than *Amicus* and its counsel contributed monetarily to the preparation or submission of this brief.

than four million students with diverse backgrounds who are currently enrolled in American colleges and universities.² USSA submits this brief as *amicus curiae* in support of Respondents University of Texas at Austin, *et al.*, urging the Court to affirm the Fifth Circuit's judgment that the promotion of diversity in higher education is a compelling government interest and that the holistic admissions process used by the University of Texas at Austin ("UT"), which allows the consideration of race and ethnic origin as one of a multitude of factors in selecting a diverse study body, complies with the Equal Protection Clause.

As the nation's official student voice, consisting of undergraduate, graduate and professional students in colleges and universities across the country, USSA has an important and substantial interest in this case.³ *Amicus* submits this brief to express to the Court its strong belief, based on the experience of its millions of members, that a student body that is both academically qualified and broadly diverse provides invaluable educational, social and professional benefits, and that an admissions program such as that adopted by UT will advance those compelling interests.

² USSA's membership includes State and System-wide Student Associations, direct member campuses and student organizations.

³ The White House, the Department of Education and Congress consistently pursue the advice of USSA regarding the effects of policies and legislation on matters of higher education and the daily lives of students.

SUMMARY OF ARGUMENT

Nine years ago, the Supreme Court recognized that public institutions of higher education have a compelling government interest in a diverse student body that permits them to consider race and ethnicity as one, non-predominant factor among many in admissions. *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003). The Court noted the “important and laudable” benefits stemming from a diverse student body, which *Amicus* believes are even more “important and laudable” in today’s more diverse America.

Amicus is uniquely situated to comment on the value of diversity in higher education today as its student body members both experience the benefits of diversity and suffer from its absence. Studies published after the decision in *Grutter* have confirmed what the Court recognized and *Amicus* knows as a matter of fact—that students benefit in at least three ways from greater diversity both in and out of the classroom. *First*, student body diversity exposes students to a robust exchange of ideas which promotes better learning outcomes. *Second*, diversity prepares students to become civic leaders. *Third*, diversity better prepares students as professionals to meet the challenges of a multicultural workforce in an increasingly global economy.

Amicus believes that *Grutter* is, and must remain, good law as the Fifth Circuit held. If the Fifth Circuit judgment is reversed, public institutions of higher education will fail to attract a critical mass of racially diverse students. College

students nationwide will be deprived of experiencing the full “diffusion of knowledge and opportunity” that should be available through public institutions of higher education (*Grutter*, 539 U.S. at 331) and the diverse learning environment and rich exchange of ideas they need to maximize their opportunities for civic leadership and professional success. As the Court recognized in *Grutter*, access to education “must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America.” *Id.* at 332-33.

ARGUMENT

I. PROMOTING DIVERSITY IN HIGHER EDUCATION IS A COMPELLING GOVERNMENT INTEREST

UT’s admissions program complies with Supreme Court precedent establishing diversity as a compelling government interest. For nearly 35 years, the Court has upheld the principle that a “State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin.” *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 320 (1978). In the narrowest opinion supporting that judgment, Justice Powell concluded that “the attainment of a diverse student body” was, in the context of “an institution of higher education,” a compelling government interest. *Id.* at 311-12. *Bakke* was followed twenty-five years later

by *Grutter*, in which the Court held that a public university “has a compelling interest in attaining a diverse student body” to 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 avoid placing minority students in the role of being expected to serve as “spokespersons” for their race, as is more likely to happen when they are not part of a critical mass of students of their own race. *Grutter*, 539 U.S. at 319-320, 330-33. To achieve these ends, colleges and universities may consider, as one factor among many, racial or ethnic origin in seeking to “enroll[] a ‘critical mass’ of underrepresented minority students.” *Id.* at 316.

The underlying premise of *Grutter*, that achieving diversity in institutions of higher education is a compelling state interest, was reiterated four years later by a majority of the court in *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, wherein Justice Kennedy in his pivotal concurring opinion concluded:

This nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children. A compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise,

may choose to pursue. Likewise, a district may consider it a compelling interest to achieve a diverse student population. Race may be one component of that diversity, but other demographic factors, plus special talents and needs, should also be considered.

551 U.S. 701, 797-798 (2007).

UT's undergraduate admissions program is entirely consistent with this precedent. The program embraces diversity along many lines, as required under *Bakke*, and it satisfies the standard set forth in *Grutter* because it is "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight." *Grutter*, 539 U.S. at 334 (quoting *Bakke*, 438 U.S. at 317). The plan also passes muster under the standard articulated by Chief Justice Roberts in *Parents Involved* because it requires individualized consideration of each applicant's background and achievements, employs a very broad notion of diversity, is targeted to achieve demonstrable educational benefits, and is designed to cure the inadequacy of UT's race-neutral admissions process which failed in its goal of achieving a critical mass of diversity. *Parents Involved*, 551 U.S. at 722-23.

II. A DIVERSE STUDENT BODY IMPARTS INVALUABLE EDUCATIONAL, CIVIC AND PROFESSIONAL BENEFITS TO STUDENTS SEEKING A HIGHER EDUCATION

In *Grutter*, the Court recognized that diversity improves students' learning experiences, directly ensures that students are prepared "for work and citizenship" and serves as "a training ground for" leaders. 539 U.S. at 331, 332. Indeed, the Court has repeatedly acknowledged the "overriding importance of preparing students for work and citizenship, describing higher education as pivotal to 'sustaining our political and cultural heritage' with a fundamental role in maintaining the fabric of society." *Id.* at 331 (quoting *Plyler v Doe*, 457 U.S. 202, 221 (1982)).

Today's college-age students are part of a generation for which the importance of diversity in higher education has never been greater. They are more diverse than the general population,⁴ more diverse than the same age group was even 10 years ago,⁵ and they will emerge into a workforce that is more diverse than any past generation's.⁶ Yet,

⁴ U.S. Census Bureau Statistical Abstract of the United States: 2012 (131st ed. 2011), *available at* <http://www.census.gov/prod/2011pubs/12statab/pop.pdf>.

⁵ *Id.*

⁶ Jeremy S. Hyman & Lynn F. Jacobs, *Why Does Diversity Matter at College Anyway?*, US NEWS & WORLD REPORT, Aug. 12, 2009, <http://www.usnews.com/education/blogs/professors-guide/2009/08/12/why-does-diversity-matter-at-college-anyway>.

because of residential segregation, large numbers of America's young people have been and will continue to be deprived of any opportunity for cross-racial interaction in schools at the elementary and secondary level.⁷

Institutions of higher education thus have a critical role to play in providing the opportunity for a diverse education that is necessary to college students' future success in the workplace and as citizens and leaders. In "an increasingly diverse workforce and society," students who have reaped the educational benefits of diversity will be better equipped to succeed, and to assume leadership roles in commerce, the military, civic society and government. *Grutter*, 539 U.S. at 330-31 (citation omitted). *Amicus* recognizes from the personal experiences of its members the need for and advantage of such.

⁷ See Marta Tienda & Sunny Xinchun Niu, *Capitalizing on Segregation, Pretending Neutrality: College Admissions and the Texas Top 10% Law*, 8 AM. L. & ECON. REV. 312, 324 (2006) (describing restricted exposure of white students to black students, and vice-versa, in Texas schools); see also Gary Orfield, *Reviving the Goal of an Integrated Society: A 21st Century Challenge* (The Civil Rights Project/Proyecto Derechos Civiles at UCLA), 3 (Jan. 2009), available at <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/reviving-the-goal-of-an-integrated-society-a-21st-century-challenge/orfield-reviving-the-goal-mlk-2009.pdf> ("Fifty-five years after the *Brown* decision, blacks and Latinos in American schools are more segregated than they have been in more than four decades.").

A. Diversity Contributes to a Wide, Robust Exchange of Ideas That Improves Students' Learning Experiences

It is widely accepted that “the business of a university [is] to provide that atmosphere which is most conducive to speculation, excitement and creation” and that atmosphere is best promoted by a diverse student body. *Bakke*, 438 U.S. at 312. The force of these observations is greatest at the undergraduate level. *Id.* at 314. As the researchers Nida Denson and Mitchell J. Chang noted in their report *Racial diversity matters: The impact of diversity-related student engagement and institutional context*:

[U]ndergraduates are typically at a developmental stage where they are freer to explore new ideas, social roles, and relationships. Combining this developmental moment with a racially diverse environment that exposes students to surroundings that are dissimilar or incongruent with their home environments raises the potential for deeper and more critical thinking.

AM. EDUC. RES. J., 46(2), 322, 326 (2009).

The point is simple and indisputable: each student's racial or ethnic background inevitably shapes, in various ways, the experiences and perspectives that student brings to both campus life and the classroom. The Court acknowledged as much in *Grutter*, when it said: “[j]ust as growing up in a particular region or having particular

professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters." *Grutter*, 539 U.S. at 333 (O'Connor, J.). Thus, students of different racial and ethnic backgrounds will bring to a university experiences, outlooks and ideas that enrich the rest of the student body and better equip all graduates to contribute their service in commerce, civic society and the military. The exchange and sharing of experiences among college students during the developmental stage considered most essential to the advancement of critical thinking is a key aspect of what makes a diverse student body a compelling educational interest of a college or university.⁸

⁸ A vast amount of empirical data demonstrates that campus and classroom diversity positively affects students' academic and social experiences. See Sylvia Hurtado, *Linking Diversity with the Educational and Civic Missions of Higher Education*, THE REVIEW OF HIGHER EDUCATION, 30(2), 185-196 (Winter 2007) (hereinafter the "Hurtado Study") (concluding that students who experienced positive informal interactions with diverse peers scored higher on tests designed to measure the complexity of their thinking, their cultural and social awareness and their ability to see things from someone else's perspective); Lisa M. Landreman, *et al.*, *A Phenomenological Study of the Development of University Educators' Critical Consciousness*, J. C. STUDENT DEV., 48(3), 275-295 (2007) (increasing diversity on campus, especially when coupled with initiatives that encourage discussion of different and opposing points of view, contributes significantly to the learning process); Mitchell J. Chang, *et al.*, *Cross-Racial Interaction Among Undergraduates: Some Consequences, Causes, and Patterns*, 45

Stories told by several students of diverse racial backgrounds illustrate the point. Take for example the story told by Max L., a rising senior at the University of Wisconsin (“UW”).⁹ Max grew up on a working farm in a small, nearly all white town in Wisconsin. After the September 11 terrorist attacks, Max became concerned about the scapegoating of Muslims in the United States. When he was accepted to UW, Max thought he had requested to live on a dorm floor for students interested in international issues. Instead, he was placed on the multicultural floor where he was one of three white students amongst nearly 50 students on the floor. The experience changed his life – for the better. By living and learning alongside people different from him, Max began to think about the world in a different way. Max is confident that his experience on the multicultural floor has prepared him to succeed at almost any workplace. As a fifth

RES. HIGHER EDUC. 529, 530 (2004) (noting that frequent interactions with diverse peers leads to a greater openness to diverse perspectives and a willingness to challenge one’s own beliefs); Sylvia Hurtado, *Benefits and Barriers: Racial Dynamics of the Undergraduate Experience*, in *THE NEXT TWENTY-FIVE YEARS: AFFIRMATIVE ACTION IN HIGHER EDUCATION IN THE UNITED STATES AND SOUTH AFRICA, 196-207* (David L. Featherman, *et al.* ed. 2010) (concluding that informal interaction with diverse peers affect all students intellectual engagement and academic skill and noting further that “such learning cannot solely be acquired through a diversity-oriented curriculum in the absence of a diverse peer group”).

⁹ See USSA site, <http://savecampusdiversity.org> (last visited Aug. 13, 2012) (posting six personal stories of USSA members).

generation UW student, Max also suspects he had an advantage in the admissions process because he was (as his admission file stated) a “legacy” student. Max challenges the notion that “legacy” status, but not a broader, more inclusive approach to diversity, may be an appropriate consideration in the admissions process.

Also compelling is the story of Perla R., a senior at Loyola University Chicago.¹⁰ In one particular class called “Sociology of Chicago”, Perla described firsthand her unique and personal experiences derived from living on the South Side of Chicago as a Mexican American, thereby dispelling the stereotypical views held by a number of her classmates. Afterwards, several students approached Perla to learn more about her experiences, and thereby broaden their own knowledge and perspective. Perla strongly believes that without diversity in the classroom students are prevented from hearing different opinions and ideas borne from diverse experiences, and as a result, *all* students suffer. The benefits Perla recognizes from her own experience is amplified throughout college classrooms across the country.¹¹

¹⁰ *Id.*

¹¹ Similar are the stories of four other students: Ryan K., Molly L., Libby W.B. and Tynisha S. Ryan is a sophomore at the University of California at Santa Cruz. His educational experience suffers due to the lack of diversity at the top tier of the California higher educational system. As a white male student double majoring in Latin American/Latino and Feminist studies, Ryan selected his majors because they offer a

Amicus believes that an admissions program that considers an applicant's athletic or musical abilities, her geographic origin, or his language

strong analysis of critical race and gender issues. However, with so little racial diversity, Ryan believes he is missing out on a critical piece of his training by not being exposed to different perspectives that could benefit him in his envisioned career as a community organizer. Molly is a senior political science and sociology major at Brown University. Like Perla, she confronted racial and class stereotypical views from other students. In her case, it was the assumption that Asians are a monolithic community most closely having attained the socioeconomic and educational levels of successful whites. Molly, a Southeast Asian, was able to educate her classmates as to the wide range of socioeconomic statuses, income and educational levels of the many Asian communities in the United States. Libby, a rising senior at UW, recognizes the benefits of diversity from a slightly different angle. Although she grew up in a small, homogeneous town in Northern Connecticut where less than five percent of her high school classmates were minorities, at UW Libby has been involved in numerous student organizations. She now serves in the student government and on the board of directors for both USSA and the United Council of UW Students. Her experiences with student organizing taught her that: "You get better input and reach better decisions in a diverse group. Groups with different kinds of people are more creative and innovative." Last but not least is the story of Tynisha, a senior political science major at Howard University, who was valedictorian of her high school class. In deciding which college she would attend, Tynisha visited many schools. After being dismayed by the absence of a critical mass of diverse students on many of those campuses, and in some instances not seeing *any individuals of color*, she elected not to attend those schools for fear that they were not inclusive or committed to ensuring her success and development. This deprived her and the students at those schools of the benefits of greater diversity. *Id.*

skills, but not his or her racial or ethnic background, fails to promote the compelling government interest of a diverse student body. *Amicus* supports instead the type of admission decisions that result from a full assessment of students as individuals – taking into account the academic strength of each applicant’s record and an individualized, holistic review of the many ways in which the individual might contribute to, and benefit from, the rich, diverse, and challenging educational environment of a college or university.

In the dynamic learning environment of an institution of higher education, there is simply no substitute for the active participation of a critical mass of students of every race and ethnicity. A reading assignment may bear witness to the experiences of diverse people, but it cannot apply those experiences to questions and issues that arise in discussion. Textbooks may raise challenging questions but cannot compare with the exchange of viewpoints elicited in an actual discussion among students of different races and ethnicities, who when challenged with unfamiliar perspectives and ideas of their peers, are forced to question their own assumptions and develop a more informed understanding of the issues of the day. The consideration of race and ethnicity as one factor in the admissions process is necessary and permissible to achieve this compelling goal.

Ralph Waldo Emerson presciently said it best in his *American Scholar* essay written more than 175 years ago: “Colleges . . . can only highly serve us

when they aim not to drill, but to create; when they gather from far every ray of various genius to their hospitable halls, and by the concentrated fires, set the hearts of their youth on flame.”¹² Diversity in higher education teaches students to open themselves to the world’s “various genius,” and to ignite not only their own, but also the imaginations of their peers.

B. Diversity Prepares Students For Civic Leadership

The Court recognized in *Grutter*, that “universities . . . represent the training ground for a large number of our Nation’s leaders” and “if the dream of one Nation, indivisible, is to be realized,” “[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential.” *Grutter*, 539 U.S. at 332. “[T]o cultivate a set of leaders with legitimacy in the eyes of the citizenry . . . the path to leadership [must] be visibly open to talented and qualified individuals of every race and ethnicity.” *Id.* *Amicus* believes that a racially diverse student body assists in the goals of educating students to comprehend and reach informed views on issues of public import, engage in the deliberative aspect of democracy and support and lead the communities in which we all live. By gaining exposure to peers with differing backgrounds

¹² Ralph Waldo Emerson, *The American Scholar*, A Keynote Address delivered before the Phi Beta Kappa Society at Cambridge (Aug. 31, 1837), *reprinted in* NATURE; ADDRESSES AND LECTURES, 75 (J. Munroe, 1849).

and experiences, students will become better informed voters, jurors, school board and neighborhood association members, civic and military leaders and generally more engaged participants in their communities and in public affairs. As a majority of the Court recognized in *Grutter*: the “nation’s future depends upon leaders trained through wide exposure’ to the ideas and mores of students as diverse as this Nation.” *Id.* at 324 (quoting *Bakke*, 438 U.S. at 315).

Amicus agrees with the Court’s observation. American cities, suburbs and small towns are all facing complex problems that can only be solved with innovative approaches and alliances that cut across racial and ethnic lines. Among other compelling issues, communities must seek to provide affordable health care and housing, restore the environment, protect fiscal health, respond to natural disasters, increase economic opportunity, support veterans and military families and tutor and mentor underprivileged children. Better solutions depend on engaging all parts of the community to raise awareness, promote policy solutions and mobilize public investment. Unquestionably, college students already exposed to a diverse learning environment will be in the best position to build on and apply their experiences to successfully engage in bettering their own communities, as well as those that may be farther afield but more in need.¹³

¹³ See Hurtado Study at 191 (finding that students who experienced positive informal interactions with diverse peers had increased “democratic sensibilities, including their

A compelling analogy can be made with the Court's conclusion in *Grutter* regarding the importance of diversity in the military. Just as the Court found a highly qualified, racially diverse military corps of officers "essential to the military's ability to fulfill its principle mission to provide national security" (*Grutter*, 539 U.S. at 331) (citation omitted), so too must it find a highly qualified, racially diverse civilian corps of civic leaders essential to sustain our democracy. And just as the Court found it essential for the military to "train and educate a highly qualified, racially diverse officer corps in a racially diverse setting" (*id.*), so too must it find it essential for American colleges to train and educate a highly qualified, racially diverse civil leadership corps in a racially diverse setting. *Amicus*, which represents college students who aspire to be among the nation's future civic leaders, strongly believes that the interests of its members are best served by a racially diverse student body.

C. Diversity Develops in Students the Necessary Skills to Succeed in a Global Workforce

As dozens of leading American businesses that filed *amicus* briefs in the *Grutter* case made clear,

pluralistic orientation, interest in poverty issues, and concern for the public good"); Patricia Gurin, *et al.*, *The Benefits of Diversity in Education for Democratic Citizenship*, J. SOC. ISSUES, 60(1), 17, 24-26 (2004) (participation in a multicultural education program promotes "democratic sentiments" that better enable students to participate in a "heterogeneous and complex society").

the benefits that flow from a diverse student body in higher education are “not theoretical but real” and “the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas and viewpoints.” *Grutter*, 539 U.S. at 330.¹⁴ For example, the joint *amicus* brief submitted by sixty-five leading businesses—including major companies such as General Electric Company, General Mills, Inc., The Dow Chemical Company, Johnson & Johnson, The Procter & Gamble Company, and Xerox Corporation—explained that workers at all levels of an institution must have the skills to work well with diverse individuals, and that the ability to elicit different ideas and creatively combine them to reach solutions at work is an important proficiency that must be fostered through teaching future workers in a diverse educational environment.¹⁵

For most students, college is the last stop before entering the workforce. Their future professional contacts will undoubtedly include individuals as diverse as our nation. Higher

¹⁴ Social scientists have come to the same conclusion. See Uma M. Jayakumar, *Can Higher Education Meet the Needs of an Increasingly Diverse and Global Society?: Campus Diversity and Cross-Cultural Workforce Competencies*, HARVARD EDUC. REV., 78(4), 615, 617 (Winter 2008) (finding that students’ exposure to racial diversity during college benefited their post-college cross-cultural workforce competencies that Fortune 500 companies seek in their employees).

¹⁵ Brief for *Amici Curiae* 65 Leading American Businesses in Support of Respondents, at 7 (Feb. 18, 2003), *Grutter v. Bollinger* (No. 02-241).

education, therefore, has a vital role in ensuring that future workers, managers, and owners are adequately equipped with the skills necessary to meet the increasing challenges of a global workforce: communication, team-building, problem-solving, analytical thinking and global consciousness. *Amicus* believes these skills can only be developed by experiencing real relationships with individuals of a wide variety of racial backgrounds.

The consistent message students hear from guidance counselors, employers interviewing on campus, and management at part-time jobs and internships, is that innovation and business success thrive in an inclusive culture that values diverse ideas, leverages unique perspectives and invites everyone to achieve collaborative success. Today's college students are reminded repeatedly that their performance will be measured by their ability to lead teams of people with different perspectives, communicate and work well with individuals from diverse backgrounds or experiences, address the needs of diverse employees and customers in an effective manner and promote an inclusive workplace sensitive to different world views and cultural perspectives and free of judgments and stereotypes. Ensuring exposure, during the formative college years, to students of diverse racial backgrounds will have a profound impact on their ability to succeed in today's global workforce.

* * * *

Amicus curiae is convinced, and compelling evidence demonstrates, that a diverse student body imparts invaluable educational, social and professional benefits, both for its student members and for the country as a whole.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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