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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, CENTER FOR EQUAL OPPORTUNITY, AMERICAN CIVIL RIGHTS INSTITUTE, NATIONAL ASSOCIATION OF SCHOLARS, AND PROJECT 21 IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the University of Texas at Austin's race-based admissions policy violates the Equal Protection Clause of the Fourteenth Amendment.

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IDENTITY AND INTEREST OF AMICI CURIAE

Pacific Legal Foundation, the Center for Equal Opportunity, the American Civil Rights Institute, the National Association of Scholars, and Project 21 respectfully submit this brief amicus curiae in support of the Petitioner Abigail Noel Fisher.[1]

For nearly 40 years, Pacific Legal Foundation (PLF) has litigated in support of the rights of individuals to be free of racial discrimination and preferences. PLF participated as amicus curiae in nearly every major Supreme Court case involving racial classifications in the past three decades, including *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); and *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

The Center for Equal Opportunity (CEO) and the American Civil Rights Institute (ACRI) are nonprofit research, education, and public advocacy

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amici Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

organizations. CEO and ACRI devote significant time and resources studying racial, ethnic, and sex discrimination by the federal government, the states, and private entities, and educating Americans about the prevalence of such discrimination. CEO and ACRI publicly advocate for the cessation of racial, ethnic, and sex discrimination by the federal government, the several states, and private entities. Both CEO and ACRI have participated as amici curiae in numerous cases relevant to the analysis of this case, including *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009); *Parents Involved*, 551 U.S. 701; and *Grutter*, 539 U.S. 306.

The National Association of Scholars (NAS) is an independent membership association of academics working to foster intellectual freedom and to sustain the tradition of reasoned scholarship and civil debate in America's colleges and universities. NAS supports intellectual integrity in the curriculum, in the classroom, and across the campus. NAS is dedicated to the principle of individual merit and opposes race, sex, and other group preferences. As a group comprised of professors, graduate students, administrators, and trustees, NAS is intimately familiar with the issues relevant to the analysis of this case. NAS, CEO, ACRI, and PLF participated in this case in the court below. *Fisher v. Univ. of Texas at Austin*, 631 F.3d 213 (5th Cir. 2011).

Project 21 is an initiative of The National Center for Public Policy Research designed to promote the views of African-Americans whose entrepreneurial spirit, dedication to family, and commitment to individual responsibility has not traditionally been echoed by the nation's civil rights establishment. Project 21 participants seek to make America a better

place for African-Americans, and all Americans, to live and work. Project 21 has participated as amicus curiae in this Court numerous times, including *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 129 S. Ct. 2504 (2009); *Bartlett v. Strickland*, 556 U.S. 1 (2009); and *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008).

This case raises important issues of constitutional law. Amici consider this case to be of special significance in that it concerns the fundamental issue of whether racial diversity through racial balancing in undergraduate admissions at public universities may be deemed a compelling governmental interest sufficient to justify discriminatory policies based solely on the students' race. Amici believe that their public policy perspectives and litigation experience provide an additional viewpoint on the issues presented in this case, which will be of assistance to the Court in its deliberations.

INTRODUCTION AND SUMMARY OF ARGUMENT

The University of Texas at Austin (University) discriminated against Abigail Fisher because of the color of her skin when she applied for admission. *Fisher*, 631 F.3d at 216-17. In the decision below, the Fifth Circuit held that because the University was following the reasoning of this Court in *Grutter*, 539 U.S. 306, the race-based admissions program did not violate the Equal Protection Clause. *Fisher*, 631 F.3d at 247. By doing so, the Fifth Circuit has extended *Grutter*, sanctioning the allocation of educational opportunities at undergraduate institutions on the basis of race simply for the sake of racial balancing.

Within the Fifth Circuit, the panel decision met with harsh criticism. Judge Garza, concurring specially in the panel opinion, found the policy indistinguishable from racial quota systems long held unconstitutional by this Court. *Id.* at 252 (Garza, J., concurring specially) ("If two applicants, one a preferred minority and one nonminority, with application packets identical in all respects save race would be assigned the same score under a holistic scoring system, but one gets a higher score when race is factored in, how is that different from *Gratz*?"). Then, by a narrow 9-7 margin, the Fifth Circuit voted not to rehear the case *en banc*. Dissenting, Chief Judge Jones criticized the panel decision for its disregard of strict scrutiny: "This panel decision essentially abdicates judicial review of a race-conscious admissions program that favors two groups, African-Americans and Hispanics, in one of the most ethnically diverse states in the United States." *Fisher v. Univ. of Texas at Austin*, 644 F.3d 301, 303 (5th Cir. 2011) (Jones, C.J., dissenting from denial of rehearing *en banc*). This wholesale abdication of judicial review "gives a green light to all public higher education institutions in this circuit, and perhaps beyond, to administer racially conscious admissions programs without following the narrow tailoring that *Grutter* requires." *Id.* (Jones, C.J., dissenting from denial of rehearing *en banc*).

This Court should grant review of the Fifth Circuit's decision. The decision conflicts with decisions of this Court in two important ways. First, the panel decision guts the first prong of strict scrutiny analysis by holding that all government-run universities automatically have a compelling interest in "racial diversity" at all times. *Fisher*, 631 F.3d at 220.

Second, the decision undermines the second prong of strict scrutiny by allowing government to adopt race-conscious measures without giving serious, good faith consideration to less restrictive race-neutral policies. *Fisher*, 631 F.3d at 242. This is especially problematic with new evidence demonstrating that public universities have excelled in generating increased minority enrollment under wholly race-neutral criteria.

Additionally, this Court should grant review because universities nationwide have used *Grutter* as a blueprint for employing racial criteria in university admission policies, instead of treating it as a warning to scale back reliance on race. Review is crucial to restore meaningful limits on government's authority to discriminate based on race.

REASONS FOR GRANTING THE PETITION

I

THE PANEL'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT

The Equal Protection Clause mandates that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, cl. 1. This rule admits no exception for purportedly beneficial discrimination. "[A]ll governmental action based on race—a group classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry." *Grutter*, 539 U.S. at 326 (citations omitted). The language of Title VI of the 1964 Civil Rights Act and 42 U.S.C. § 1981 is even more explicit.

A. The Court Should Grant Review Because the Panel Decision Conflicts With This Court's Decisions Prohibiting a Generalized Compelling Interest

The panel decision waters down strict scrutiny analysis by holding that under *Grutter*, universities have an abstract compelling interest to pursue racial diversity which justifies the use of racially discriminatory admissions policies. *Fisher*, 631 F.3d at 220. But the existence of a compelling interest at the University of Michigan's law school cannot satisfy the requirement to demonstrate a compelling interest at a different public university involving different parties and different circumstances. *Cf. San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) ("The undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a State's social and economic legislation."). As this Court's precedents have shown, the finding of a compelling interest in race-conscious state action requires a *particularized* showing of specific circumstances to support the use of racial criteria in government decisionmaking.

Prior to *Grutter*, this Court had never sanctioned a race-based governmental program that was not predicated on remedying intentional discrimination. Even *Bakke*, 438 U.S. 265, did not accept the diversity rationale as a compelling state interest. In *Bakke*, only two points commanded a majority of the Court: (1) Alan Bakke was entitled to admission, and (2) some indefinite consideration of race is allowable under the Constitution. *Bakke*, 438 U.S. at 271-72. Dr. Peter W.

Wood, President of the National Association of Scholars, agrees:

> Powell's *Bakke* opinion, however, lifted diversity out of obscurity and gave it the respectability of seeming law . . . The happenstance that none of his Supreme Court colleagues joined Powell in extolling diversity tends to be overlooked, and those who are now committed to promoting the idea are perhaps reluctant to remember that the widely cited legal foundation for pursuing diversity in schools and colleges rests on one man's unsupported opinion.

Peter Wood, *Diversity: The Invention of a Concept* 113 (2003).

In *Bakke*, Justice Powell decided the case on narrow tailoring grounds, and acknowledged that even under his theory, the asserted diversity interest must be particular to the institution in question to be found compelling. Justice Powell's opinion discusses such factors as the type of institution, the homogeneity of the student body, the necessity of the preference, etc. *Bakke*, 438 U.S. at 313-15 (Powell, J., op.).

Writing for a plurality of the Court in *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986), Justice Powell ended any speculation that his *Bakke* opinion endorsed a blanket compelling interest in diversity for all educational institutions, by emphasizing that racial classifications must be justified by a need specific to that *particular governmental body* adopting such measures: "[T]he Court has insisted upon some showing of prior discrimination *by the governmental unit involved* before allowing limited use of racial

classifications in order to remedy such discrimination." *Id.* at 274 (emphasis added). The *Wygant* Court held that "societal discrimination" and the "role model theory" were "too amorphous" with "no logical stopping point" and do "not necessarily bear a relationship to the harm caused by prior [discrimination]." *Id.* at 274-76.

Grutter did not change this requirement. "[S]trict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race *in that particular context*." *Grutter*, 539 U.S. at 328 (emphasis added). The Court did not simply permit the University of Michigan's law school to invoke "diversity" without scrutiny; it required the law school to prove a specific need for diversity based upon specific circumstances and for its specific purposes.[2] Indeed, the Court emphasized that "'it is *not* an interest in simple ethnic

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[2] This is especially important today, since the rationale and evidence underlying the educational benefits that flow from a diverse student body have been significantly undercut in the wake of *Grutter*. *See*, *e.g.*, Roger Clegg, *Attacking "Diversity": A Review of Peter Wood's Diversity: The Invention of a Concept*, 31 J.C. & U.L. 417, 425-30 (2005) (collecting studies that the social science evidence purporting to tout diversity's educational benefits was and is seriously flawed); Roger Clegg, *The Educational Benefits of 'Diversity'*, National Review Online, Feb. 1, 2011, *available at* http://www.nationalreview.com/phi-beta-cons/39876/educational-benefits-diversity?page=1 (last visited Oct. 13, 2011) (describing new studies confirming that the evidence touting diversity is "marginal" and "uncertain"); John Rosenberg, *"Diversity" Research Advances Progresses Accumulates*, Discriminations, Feb. 6, 2010, *available at* http://www.discriminations.us/2010/02/%e2%80%9cdiversity%e2%80%9d-research-advances-progresses-accumulates/ (last visited Oct. 13, 2011) (analyzing new data on the educational benefits of diversity).

diversity' . . . that can justify the use of race." *Id.* at 324-25 (quoting *Bakke*, 438 U.S. at 314-15) (emphasis added).

Many of the particular factual circumstances present in *Grutter* are not present in *Fisher*. Central to the finding of diversity as a compelling interest in *Grutter* was the fact that a law school was asserting the interest. The Court noted that "highly selective law schools" (including the University of Michigan) are unique in that they account for "25 of the 100 United States Senators, 74 United States Courts of Appeals judges, and nearly 200 of the more than 600 United States District Court judges." *Grutter*, 539 U.S. at 332. This emphasis placed on highly selective law schools was central to the finding of a compelling interest. "Access to *legal* education (and thus the *legal* profession) must be inclusive." *Id.* at 332-33 (emphasis added). Obviously, the role of diversity will be different in law than in, say, chemical engineering or Farsi.

This Court clarified the narrow, fact-specific nature of *Grutter*'s compelling interest finding in *Parents Involved*, 551 U.S. 701. There, the Court recognized that the facts in *Grutter* gave rise to a unique compelling interest. *See id.* at 725 ("The Court in *Grutter* expressly articulated key limitations . . . noting the unique context of higher education—but these limitations were largely disregarded by the lower courts in extending *Grutter*."). Thus, the *Parents Involved* Court provides a clear warning to lower courts that try to extend *Grutter* into a general, free-floating "diversity" exception to strict scrutiny. *Grutter*'s holding was narrow, and all race-based

classifications in support of diversity must be justified through a specific heightened factual showing.

This Court has required the same specificity in cases where the asserted compelling interest is remedial. Where the government is using racial classifications to remedy past intentional discrimination, there must also be a particularized showing tying that interest to a specific factual context. *See*, *e.g.*, *Cooper v. Aaron*, 358 U.S. 1, 8 (1958) (finding state authorities "actively pursuing a program designed to perpetuate in Arkansas the system of racial segregation"); *Green v. County Sch. Bd. of New Kent County*, 391 U.S. 430, 432 (1968) (finding compulsory segregation mandated by the Virginia constitution and statutory provisions); *Croson*, 488 U.S. at 499 (requiring a finding of actual discrimination in the *local contracting industry* before preferences would be allowed) (emphasis added).

As *Grutter* rightly observed, "[c]ontext matters when reviewing race-based governmental action." 539 U.S. at 327. The circumstances that led the Court to find a compelling interest in "attaining a diverse student body" were unique. *Id.* at 328. But the *Fisher* panel glosses over the particularized nature of the compelling interest inquiry, and concludes that higher education institutions have a permanent compelling interest in expanding racial diversity through race-conscious measures. *Fisher*, 631 F.3d at 220. This Court should grant review to clarify that merely reciting a generalized interest in "diversity" does not satisfy the requirement for a particularized showing of why racial diversity is a compelling interest under the facts of a specific case.

B. The Court Should Grant Review to Affirm That Race-Neutral Alternatives Must Be Exhausted Before Resorting to Racial Classifications

American institutions "tolerate no retreat from the principle that government may treat people differently because of their race only for the most compelling reasons." *Adarand*, 515 U.S. at 227. This intolerance is necessary because racial characteristics are almost never an appropriate consideration for the government. *Id.* at 216. Accordingly, the Equal Protection Clause requires "serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks." *Grutter*, 539 U.S. at 339.

"Universities . . . have received little or no judicial guidance as to the requirements for race-neutral alternatives, and, as a result, appear to be floundering." George La Noue & Kenneth L. Marcus, *"Serious Consideration" of Race-Neutral Alternatives in Higher Education*, 57 Cath. U. L. Rev. 991, 994 (2008). Unfortunately, the panel's decision below only exacerbates this problem. Following the Fifth Circuit's decision in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), the University of Texas adopted a wholly race-neutral admissions plan. *Fisher*, 631 F.3d at 223. In order to maintain a significant presence of minority students at the university, the university altered its admissions criteria in a race-neutral manner. *Id.* This change in policy, coupled with the Texas legislature's decision to adopt the Top Ten Percent Law, saw a dramatic increase in the number of minorities gaining admission to the university. *Id.* at 223-24. The

numbers and percentages of minorities enrolling at the university exceeded the previous race-conscious plan in place at the university before *Hopwood*. *Id.* at 224. Despite the unquestioned success of this race-neutral plan, the university announced its intention to revert to a race-conscious admissions plan on the day *Grutter* was decided.[3]

Instead of viewing *Grutter* as a warning to exhaust race-neutral alternatives before adopting a race-conscious admissions plan, the University of Texas viewed *Grutter* as the go-ahead for creating race-conscious measures as a first option. Unfortunately, the court of appeals, rather than viewing this action with constitutionally required skepticism, embarked on a lengthy discussion of perceived faults with the Top Ten Percent Law. *See Fisher*, 631 F.3d at 238-42. Indeed, the *Fisher* panel went so far as to say that race-neutral policies have a "talismanic ring in the law, but can be . . . misleading." *Id.* at 242.

Yet the panel's decision to ignore the requirement that race-conscious measures be a last resort finds no support in the law. Narrow tailoring requires determining whether "lawful and less restrictive means could have been used." *Wygant*, 476 U.S. at 280 n.6 (Powell, J., op.) (plurality opinion); *see also Parents Involved*, 551 U.S. at 796 (Kennedy, J., concurring) ("The State must seek alternatives to the classification and different treatment of individuals by race, at least absent some extraordinary showing not present here."); *Croson*, 488 U.S. at 507 ("In determining whether

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[3] University of Texas at Austin website, *The University of Texas at Austin Reacts to the Supreme Court's Affirmative Action Decisions*, June 23, 2003, *available at* http://www.utexas.edu/news/2003/06/23/nr_affirmativeaction (last visited Oct. 13, 2011).

race-conscious remedies are appropriate, we look to several factors, including the efficacy of alternative remedies.") (citations omitted); *Rothe Dev. Corp. v. U.S. Dep't of Def.*, 545 F.3d 1023, 1036 (Fed. Cir. 2008) ("[E]ven where there is a compelling interest supported by a strong basis in evidence, [the court must consider] the efficacy of alternative, race-neutral remedies.") Further, this Court in *Adarand* specifically remanded the case because the lower court had failed to consider the availability of race-neutral alternatives. 515 U.S. at 237-38.

The requirement to exhaust race-neutral measures before resorting to race-conscious ones extends to university admissions. In fact, the race-conscious plan adopted by the law school in *Grutter* was deemed constitutional only because the Court found that it had engaged in a "serious, good faith consideration of workable race-neutral alternatives." *Grutter*, 539 U.S. at 339. Moreover, this Court in *Parents Involved* rejected a race-conscious assignment plan because "several alternative assignment plans—many of which would not have used express racial classifications—were rejected with little or no consideration." *Parents Involved*, 551 U.S. at 735. As Justice Kennedy recognized, "measures other than differential treatment based on racial typing of individuals first must be exhausted." *Id.* at 798 (Kennedy, J., concurring).

The *Fisher* panel abandoned narrow tailoring when it ignored the need for the University to seek out race-neutral alternatives before resorting to a race-conscious admissions policy. This Court should grant review to clarify that *Grutter* does not sanction this race-first attitude in university admissions.

1. Race-Neutral Remedies Are Available and Successful at Achieving a Diverse Student Body Where Minorities Can Excel

In *Grutter*, this Court recognized California's race-neutral admission policy. *Grutter*, 539 U.S. at 342. Indeed, the Court recommended that, "Universities in other States can and should draw on the most promising aspects of these race-neutral alternatives as they develop." *Id.* California's experiment shows that minority students do not need racial preferences to succeed.

In 1996, the people of California passed Proposition 209, banning the use of racial, ethnic, or sex-based preferences in admissions to public universities. By looking at a broad range of educational outcome measures, it is clear that following adoption of Proposition 209, California's K-12 public schools began focusing their attention on improving minority students' preparation for college rather than relying on racial preferences.

a. Offers of Admission to Minority Students Have Risen for University of California Freshmen

The University of California (UC) system consists of nine undergraduate campuses.[4] The UC schools tracked the offers for admission by race and/or ethnicity to the University of California from 1997 through 2011. These data show:

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[4] Due to the newness of the Merced campus, it is not included in much of the data set forth in this brief. Campuses dedicated solely to graduate level courses are also not included.

- University-wide, underrepresented minorities (defined as American Indian, African American, and Chicano/Latino students) constituted 19.6% of the students (7,385 total offers) to whom admission was offered as freshmen in 1997.[5] By 2010, underrepresented minorities received 28.3% of the freshmen offers of admission (16,635 total offers), an increase of 9,250 offers of admission to under-represented minority students. Meanwhile, offers of admission to white students declined from 42.6% in 1997 to 30.6% in 2010.[6]

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[5] While Proposition 209 was passed in 1996, an injunction delayed its effective date until August of 1997. *See* Eva Paterson & Oren Sellstrom, *Equal Opportunity in a Post-Proposition 209 World*, 26 Hum. Rts. 9 (Summer 1999). It should also be noted that the UC initially stopped considering race in its undergraduate admissions decisions pursuant to Regents Resolution SP-1, that went into effect January 1, 1995. UC Irvine website, Office of Equal Opportunity and Diversity, *A Brief History of Affirmative Action*, *available at* http://www.eod.uci.edu/aa.html (last visited Oct. 13, 2011).

[6] Univ. of Cal., Office of the President, California Freshman Admissions for Fall 2008 (UC 2008 Admissions), Table 4, *available at* http://www.ucop.edu/news/factsheets/fall2008adm.html (last visited Oct. 13, 2011); Univ. of Cal., Office of the President, California Freshman Admissions for Fall 2010 (UC 2010 Admissions), Table 3, *available at* http://www.ucop.edu/news/factsheets/fall2010adm.html (last visited Oct. 13, 2011); Univ. of Cal., Office of the President, New California Freshman Admits Fall 1997, 1998, 1999, and 2000, Table A, *available at* http://www.ucop.edu/ucophome/commserv/preadm_a0400.pdf (last visited Oct. 13, 2011). Preliminary data for 2011 show that these trends have continued (for 2011, underrepresented minorities received 30.8% of the freshman offers of admission, while offers to white students fell to 30.6% of offers), but, for reliability, this brief uses the finalized 2010 data. Univ. of Cal., Office of the President, California Freshman Admissions for Fall 2011 (UC 2011 (continued...)

- The percentage of offers of freshmen admission that were extended to underrepresented minorities was higher or the same in 2010 than 1997 on six of the eight UC campuses that had data for 1997 through 2010.[7] Preliminary data for 2011 show that this is the same for seven of the eight campuses.[8]

Thus, the university-wide rise in the number of underrepresented minorities who are offered admission as freshmen to the University of California and the rise in the percentage of freshmen who are underrepresented minorities conclusively refute any claim that, under Proposition 209, minorities have suffered devastating decreases in admissions from which they have yet to recover.

b. In 2003, Incoming University of California Freshmen Constituted a Higher Percentage of Underrepresented Minority California High School Graduates Than in 1995

The University of California's Eligibility and Admissions Study Group prepared a report under the direction of UC President Robert C. Dynes entitled *Analysis of Undergraduate Admissions to University of California Campuses by Race and Ethnicity* (Mar.

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[6] (...continued)
Admissions), Table 3, *available at* http://www.ucop.edu/news/factsheets/fall2011adm.html (last visited Oct. 13, 2011).

[7] UC 2008 Admissions, Table 4 and UC 2010 Admissions, Table 3.

[8] UC 2011 Admissions, Table 3.

2004) (UC Undergraduate Race Analysis Report).[9] Additionally, the California Postsecondary Education Commission (CPEC) produced "Ethnicity Snapshot Tables" regarding High School Graduates and First Time Freshmen at UC.[10] The UC Undergraduate Race Analysis Report shows the gap between the percentage of minorities graduating from high school and the percentage of minorities as new UC freshmen was increasing in the years immediately preceding the adoption of Proposition 209. Between 1995 and 1998 the gap increased from 17.3% to 23.9%. In contrast, the CPEC report shows that after Proposition 209, the gap between the percentage of minorities graduating from high school and the percentage of minorities as new UC freshmen decreased (or, in the case of Latinos, remained approximately the same):

- In 1999, the gap between percentage of African American as high school graduates and percentage of African Americans as first time freshmen in the UC system was 4.5%. In 2009, that gap was 3.1%.

- In 1999, the gap between percentage of Latinos as high school graduates and percentage of Latinos as first time freshmen in the UC system was 19.8%. In 2009, that gap was 21.6%.

- In 1997, the gap between percentage of Native Americans as high school graduates and percentage of

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[9] *Available at* http://www.universityofcalifornia.edu/news/compreview/0308_meeting/Data_release_summary_FINAL_Mar_8_20041_with_data.pdf (last visited Oct. 13, 2011).

[10] Ethnicity Snapshots Table—High School Graduates; and First Time Freshman at UC, *available at* http://www.cpec.ca.gov/StudentData/EthSnapshotMenu.asp (last visited Oct. 13, 2011).

Native Americans as first time freshmen in the UC system was 0.4%. In 2009, that gap was 0.1%.

Since Proposition 209 became effective in 1997, minorities continue to seek and be offered admission to the University of California in greater numbers without resorting to racial preferences. Accordingly, the University of Texas's argument that a race-conscious admissions policy is necessary to ensure a diverse student body rings hollow.

The California experience also shows that racial and ethnic preferences are generally unpopular with the general public. The list of states that have rejected racial admission preferences by ballot initiatives (a process not available in all states, of course) continues to grow: not only California, but also Michigan, Washington, Arizona, and Nebraska, with Oklahoma slated to consider the issue next year. Florida has ended preferential admissions, too, by order of the governor. To this list can be added two other states that, for a period of time in recent years, were limited in their use of racial admissions discrimination because of federal court decisions: Texas, of course, and Georgia. In light of this list, representing about 37% of the U.S. population, it is simply not plausible that successful higher education demands the use of such discrimination. And this does not even include less selective schools, which usually do not consider race or ethnicity; *see also* Clegg, *supra*, *Attacking "Diversity"*, at 431 (listing other schools that have indicated they do not use racial and ethnic preferences).

II

REVIEW IS REQUIRED BECAUSE UNIVERSITIES AND COLLEGES THROUGHOUT THE COUNTRY VIEW *GRUTTER* AS AN UNQUALIFIED ENDORSEMENT OF RACE-BASED ADMISSION STANDARDS

Too many public university admissions officers across this country assume that under *Grutter* the use of race is always permissible. They read *Grutter* not as a narrowly tailored exception to the general prohibition of racially motived decisionmaking, but as a blueprint for creating a student body with their preferred racial composition.[11] Amicus Center for Equal Opportunity (CEO) has produced many studies examining the admission practices of dozens of institutions of higher education. Each study has resulted in the same conclusion—public universities are using racial criteria to favor preferred minorities and then turn away applicants for admission of disfavored races. This brief will focus on CEO's studies of post-*Grutter* admissions.

CEO's studies assessed the degree of racial and ethnic admission preferences in admissions by using a statistical model that predicts the probability of

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[11] The extent of racial preferences is generally conceded even by those who advocate in favor of them. *See*, *e.g.*, William G. Bowen & Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* 26-27 (1998) ("[A]lmost all academically selective institutions [share] a commitment to enrolling a diverse student population—and, as one way of achieving this objective, to paying attention to race in the admissions process."); Thomas J. Espenshade & Alexandria Walton Radford, *A New Manhattan Project*, Inside Higher Ed., Nov. 12, 2009, *available at* http://www.insidehighered.com/views/2009/11/12/radford (last visited Oct. 13, 2011).

admission at a university for members of different ethnic and racial groups, holding their other qualifications constant. A multiple logistic regression equation, and its corresponding odds ratio, allowed CEO's statisticians to present admissions data in terms of the relative odds of members of Group A being admitted as compared with members of Group B, while controlling for other important variables like test scores, grades, and residency status.

The following chart shows the admissions practices at the University of Wisconsin Law School for the 2005 and 2006 applicant pools.[12]

University of Wisconsin Law School

Univ. of WI - Law	Odds Ratio[13]
Black over White	61.4 to 1
Hispanic over White	14.2 to 1

Accordingly, at the University of Wisconsin Law School, blacks and Hispanics were strongly preferred to whites.

The odds ratio measured the magnitude of the preference given relative to the baseline group (in these studies, whites). As the study explained, an odds

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[12] Althea K. Nagai, Ph.D., *Racial and Ethnic Preferences in Admission at the University of Wisconsin Law School*, Center for Equal Opportunity, at 12-13, *available at* http://www.ceousa.org/component/option,com_docman/task,doc_view/gid,275/ (last visited Oct. 13, 2011).

[13] The odds ratio here, and in all subsequent tables, is arrived at after controlling for both academic (LSAT/SAT, GPA, class rank) and non-academic factors (year of admission, gender, residency, etc.).

ratio equal to or greater than 3.0 to 1 is commonly accepted to reflect a strong association; an odds ratio less than 3.0 to 1, but greater than 1.5 to 1, reflects a moderate association; an odds ratio of 1.5 or less to 1 indicates a weak association. A very strong association might be taken to be the rough equivalent of the relative odds of smokers versus non-smokers dying from lung cancer, which in one-well known study is calculated as 14 to 1. Nagai, *supra*, *University of Wisconsin Law School*, at 13-14.

According to CEO's study, these numbers, however, are not nearly as extreme as those found in even more recent years in the University of Wisconsin-Madison undergraduate admissions.[14]

University of Wisconsin-Madison
(2007 and 2008 applicant pools)

Univ. of WI-Madison (2007 and 2008)	Odds Ratio (with SAT)	Odds Ratio (with ACT)
Black over White	576 to 1	1330 to 1
Hispanic over White	504 to 1	1494 to 1
Asian over white	1 to 1	1 to 1

The above table shows that Blacks and Hispanics were preferred at ratios of between 500 and 1500 to 1 over both Asian and white students. Other reports confirm that it is increasingly the case that Asians are discriminated against in addition to, and sometimes

[14] Althea K. Nagai, Ph.D., *Racial and Ethnic Preferences in Undergraduate Admissions at the University of Wisconsin-Madison*, Center for Equal Opportunity, at 16, *available at* http://www.ceousa.org/component/option,com_docman/task,doc_view/gid,274/ (last visited Oct. 13, 2011).

even more than, whites. *See* Russell K. Nieli, *How Diversity Punishes Asians, Poor Whites and Lots of Others*, Minding The Campus, July 12, 2010.[15]

CEO's studies also found that the law schools at the University of Nebraska, Arizona State University, and the University of Arizona have granted very strong preferences for preferred minorities (blacks and Hispanics), and comparatively small (but still significant) preferences for non-preferred minorities (Asians).

University of Nebraska College of Law
(2006 and 2007 applicant pools)[16]

Univ. of NE - Law	Odds Ratio
Black over White	442 to 1
Hispanic over White	90 to 1
Asian over white	6 to 1

[15] *Available at* http://www.mindingthecampus.com/originals/2010/07/how_diversity_punishes_asians.html (last visited Oct. 13, 2011).

[16] Althea K. Nagai, Ph.D., *Racial and Ethnic Preferences in Admission at the University of Nebraska College of Law*, Center for Equal Opportunity, at 15, *available at* http://www.ceousa.org/content/view/628/100/ (last visited Oct. 13, 2011).

Arizona State University College of Law
(2006 and 2007 applicant pools)[17]

ASU - Law	Odds Ratio
Black over White	1,115 to 1
Hispanic over White	85 to 1
Asian over white	2 to 1

University of Arizona College of Law
(2006 and 2007 applicant pools)[18]

Univ. of Ariz. - Law	Odds Ratio
Black over White	250 to 1
Hispanic over White	18 to 1
Asian over white	3 to 1

CEO studies on undergraduate admissions at universities in Ohio demonstrated strong preferences for certain preferred minorities.

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[17] Althea K. Nagai, Ph.D., *Racial and Ethnic Admission Preferences at Arizona State University College of Law*, Center for Equal Opportunity, at 15, *available at* http://www.ceousa.org/content/view/623/119/ (last visited Oct. 13, 2011).

[18] Althea K. Nagai, Ph.D., *Racial and Ethnic Preferences in Admission at the University of Arizona College of Law*, Center for Equal Opportunity, at 15, *available at* http://www.ceousa.org/content/view/623/119/ (last visited Oct. 13, 2011).

Ohio State University and Miami University

Miami University	Odds Ratio (with SAT)	Odds Ratio (with ACT)
Black over White	8.0 to 1	10.2 to 1
Hispanic over White	2.2 to 1	2.2 to 1
Asian over white	2.1 to 1	1.6 to 1
OH State University	Odds Ratio (with SAT)	Odds Ratio (with ACT)
Black over White	3.3 to 1	7.9 to 1
Hispanic over White	4.3 to 1	6.5 to 1
Asian over white	1.5 to 1	2.1 to 1

Even at the University of Michigan itself, CEO's studies showed severe undergraduate, law, and medical school admission preferences after *Grutter*.[19]

These odds ratios indicate the extent of racial and ethnic preferences at the different schools. Because the statistical analysis holds all factors constant except for race, the ratios demonstrate the strength of preferences given to preferred minority students over

[19] *See*, *e.g.*, Althea K. Nagai, Ph.D., *Racial and Ethnic Preferences in Undergraduate Admission at the University of Michigan*, Center for Equal Opportunity, *available at* http://www.ceousa.org/content/view/521/100/ (last visited Oct. 14, 2011); Althea K. Nagai, Ph.D., *Racial and Ethnic Admission Preferences at the University of Michigan Medical School*, Center for Equal Opportunity, *available at* http://www.ceousa.org/content/view/523/100/ (last visited Oct. 14, 2011); Althea K. Nagai, Ph.D., *Racial and Ethnic Admission Preferences at the University of Michigan Law School*, Center for Equal Opportunity, *available at* http://www.ceousa.org/content/view/522/100/ (last visited Oct. 14, 2011).

white students. The schools grant very strong preferences to blacks, and generally to Hispanics as well. Very little preference, if any, is given to Asian students. In other words, blacks and Hispanics are preferred minorities who are given significant admission preferences *solely because of their race*, while Asians are non-preferred minorities who fare no better than similarly situated white applicants. There can be no other conclusion than that admission preferences are pervasive among institutions of higher education.

CONCLUSION

The latest Census numbers demonstrate dramatically that our nation is increasingly multiethnic and multiracial, and that individual Americans are more and more likely to be multiethnic and multiracial. In such a nation, it is dangerous to allow the inevitably divisive racial and ethnic discrimination by public institutions to become wider and more entrenched. For the foregoing reasons, Amici

respectfully request that this Court grant the writ of certiorari.

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Respectfully submitted,

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