No. 14-981

IN THE

Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, et al.,

Respondents.

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

BRIEF FOR *AMICUS CURIAE* ASSOCIATION OF AMERICAN LAW SCHOOLS IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS*[1]

Founded in 1900 to improve the legal profession through legal education, the Association of American Law Schools (AALS) is a non-profit association of 180 public and private law schools.[2] The AALS Bylaws identify a set of "core values" that the Association expects its members to share. AALS Bylaw § 6-1.b. Among these core values are "academic freedom, and diversity of viewpoints," and the "selection of students based upon intellectual ability and personal potential for success in the study and practice of law, through a fair and nondiscriminatory process designed to produce a diverse student body and a broadly representative legal profession." *Id.* § 6-1.b.(ii), (v). Thus, among other things, the AALS requires that member schools "seek to have a faculty, staff, and student body which are diverse with respect to race, color, and sex." *Id.* § 6-3.c. It recognizes that member schools may adopt a broad range of strategies for pursuing these goals. The AALS filed *amicus* briefs in *Fisher v. University of Texas at Austin* (*Fisher I*), 133 S. Ct. 2411 (2013), and *Grutter v. Bollinger*, 539 U.S. 306 (2003). Relying on the AALS's brief, *see id.* at 332, *Grutter* held that diversity in legal education "is a compelling state interest that can justify the use of

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[1] Pursuant to Rule 37.6, counsel for amicus states that no counsel for a party authored this brief in whole or in part, and that no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Petitioner and respondents have filed a letter of consent with the Clerk of the Court.

[2] The AALS is a voluntary association; it does not serve an accreditation function.

race" in law school admissions, *id.* at 325. This Court endorsed that view again in *Fisher I.* 133 S. Ct. at 2419.

Although this case concerns undergraduate admissions, the outcome may affect law schools in two ways. First, law schools draw their students from more than 2,000 colleges and universities across the United States, many of them highly selective. If this Court were to restrict these institutions' ability to enroll racially integrated student bodies, then law schools may lose the benefit of racially diverse applicant pools from which to admit their classes. Second, many law schools themselves take race into account in their admissions decisions. If this case were to foreclose consideration of race in higher education admissions generally, most law schools would become less racially integrated.[3]

SUMMARY OF ARGUMENT

This Court should not announce a general rule that would foreclose the use of race as one factor in a holistic admissions process in higher education. Such a rule would be counterproductive in many settings, especially in law school admissions. Law schools have followed this Court's guidance in *Grutter v. Bollinger*, 539 U.S. 306 (2003), left undisturbed by *Fisher v.*

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[3] Although the Equal Protection Clause binds only public institutions, this Court has long held that federal non-discrimination statutes such as Title VI of the Civil Rights Act of 1964 apply the same standards to all educational institutions that receive federal funds. *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 286-87 (1978) (Powell, J.). Thus, a decision here potentially would affect all members of the AALS, public and private.

University of Texas at Austin (*Fisher I*), 133 S. Ct. 2411 (2013). They do not reduce candidates to a number or percentage; they instead evaluate each applicant's record qualitatively, counting academic factors such as success in analytically demanding majors, intellectual curiosity, and improvement over time, as well as other factors such as work experience, prior public service, and hardships overcome.

In the law school context, a ruling that schools may pursue racial diversity only through facially neutral, mechanical admissions formulae based on class ranks, test scores, or GPAs would be impracticable, would prevent law schools from achieving meaningful racial diversity, and would hamper law schools from pursuing other important interests. Law schools' entering classes are typically far smaller than the freshman classes of large public universities. Guaranteeing admission to any percentage of college graduates based on their undergraduate class rank would require a massive expansion in the size of law schools. Moreover, a class rank-based admissions process would not produce racial diversity at the law school level.

Removing consideration of race from law schools' current holistic admissions processes is equally unworkable. If race-blind admissions really means that an applicant's file must be scrubbed of *any* indicators or discussions of race, then some highly qualified minority applicants will be denied the ability to discuss in detail particular volunteer work, community activities, leadership experiences, and reasons for attending law school. But if race-blind holistic admissions means that institutions cannot treat race as one factor among many even though they

can nonetheless deliberately aim for racially diverse entering classes, then some highly qualified minority applicants may feel pressured to foreground their racial identity over the parts of their application package they otherwise feel are most relevant.

Finally, class-based affirmative action is an inadequate substitute for the current use of holistic race-conscious affirmative action. The barriers to increasing the representation of economically disadvantaged students have nothing to do with the existence of race-conscious affirmative action. At the same time, adopting class-based affirmative action instead of the current holistic process would reduce both the overall number of minority law students and the diversity of viewpoints among them.

ARGUMENT

Law schools have distinctive and compelling interests in enrolling racially diverse classes. Because no race-neutral method currently exists for law schools to achieve this racial diversity while fulfilling other critical goals, this Court should forego a per se rule that would bar law schools from considering race as one factor within a holistic admissions process.

I. Racially Diverse Law Schools Are Critical To American Democracy And The Quality Of Legal Education.

In *Fisher v. University of Texas at Austin* (*Fisher I*), 133 S. Ct. 2411 (2013), this Court characterized as a "given" that "student body diversity is a compelling state interest that can justify the use of race in university admissions." *Id.* at 2417-18 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003)).

Schools have an established right to define their own missions and, by extension, decide "who may be admitted to study." *Id.* at 2418. As Justice Frankfurter long ago explained, in *Sweezy v. State of New Hampshire*, 354 U.S. 234 (1957), this is one of the "four essential freedoms of a university." *Id.* at 263 (concurring in the judgment) (internal quotation marks omitted). Nothing that has occurred in the two years since *Fisher I* should change that conclusion. It remains true today that law schools have compelling reasons to admit racially diverse entering classes.

1. Racial diversity in law schools is essential to preserving the legitimacy of American government. Our Nation's "historic commitment to creating an integrated society," *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 797 (2007) (Kennedy, J., concurring in part and concurring in the judgment), requires that we "cultivate a set of leaders with legitimacy in the eyes of the citizenry," *Grutter*, 539 U.S. at 332. Thus, "the path to leadership [must] be visibly open to talented and qualified individuals of every race and ethnicity." *Id.*

Law school is the predominant gateway to leadership in American public life – "the training ground for a large number of our Nation's leaders." *Grutter*, 539 U.S. at 332. All federal judges and nearly all state judges are law school graduates. Four of the last eight U.S. Presidents, including the sitting President, graduated from law school. A majority of U.S. senators are lawyers, as are 151 members of the U.S. House of Representatives. Cong. Research Serv., *Membership of the 114th Congress: A Profile* 2 tbl.2 (2015). Half of all state governors are lawyers, as, of course, are all state attorneys general. Law school is

also the only path to the exercise of the state's coercive power through federal, state, and local prosecutors. Likewise, many governmental lawyers exercise great power within the Executive branch in other contexts, as administrative law judges, agency counsel, and the like.

While all law schools produce leaders in the profession and society, a small group of law schools produces a remarkable share of the federal judiciary and Congress. All nine members of this Court attended highly selective law schools, and 125 judges serving on the United States Courts of Appeals received an LL.B. or J.D. from a dozen of the most selective schools.[4] A half dozen law schools have produced fully one-fifth of the current United States Senate.[5]

Racially homogenous public bodies cannot maintain their legitimacy in an increasingly heterogeneous society. Members of the public – and members of minority groups in particular – will lose faith in organs of government that conspicuously fail to reflect our Nation's diversity. Just as all-white juries lacked legitimacy, *Batson v. Kentucky*, 476 U.S. 79, 87-88 (1986); *see also Powers v. Ohio*, 499 U.S. 400,

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[4] These schools are: Georgetown, Harvard, NYU, Penn, Stanford, Tulane, University of California, Los Angeles, University of Chicago, University of Michigan, University of Texas at Austin, University of Virginia, and Yale.

[5] These schools are: Boston College, Georgetown, Harvard, University of Texas at Austin, University of Virginia, and Yale. All information in this and the preceding footnote was obtained from internet biographies of current members of Congress and judges of the Courts of Appeals.

412-13 (1991), so too a nearly all-white judiciary or legislature would lack legitimacy.

2. Legal education "better prepares students for an increasingly diverse workforce and society" if it occurs in racially integrated classes. *Grutter*, 539 U.S. 306 at 330 (internal quotation marks omitted). All lawyers, not just those exercising public power, operate in a multi-racial society and confront issues with racial implications. Lawyers frequently must work with clients, opposing counsel, judges, and government officials of different races and backgrounds. Working effectively across racial lines is therefore critical to excelling as a lawyer in contemporary society.

For many students, college or law school represents their first meaningful opportunity to interact with members of other races. In a 1999 study on race relations within law schools, 50% of white law students reported having had very little or no interracial contact while growing up. Gary Orfield & Dean Whitla, *Diversity and Legal Education: Student Experiences in Leading Law Schools* 11 (1999). Black and Hispanic students are more isolated in their primary schooling today than at any time in the past forty years; two out of every five attend a school with 90% or more minorities. Gary Orfield, *Reviving the Goal of an Integrated Society: A 21st Century Challenge* 12 (2009). Without diverse student bodies, law schools would not perform their essential role of preparing graduates to interact with the diverse society in which they will practice.

3. Law school prepares students for legal practice by exposing them to "the interplay of ideas and the

exchange of views with which the law is concerned." *Sweatt v. Painter*, 339 U.S. 629, 634 (1950). Students learn best by interacting with peers who have different views, backgrounds, and life experiences. Educational pluralism encourages students to confront their preconceptions. Nancy E. Dowd et al., *Diversity Matters: Race, Gender, and Ethnicity in Legal Education*, 15 U. Fla. J.L. & Pub. Pol'y 11 (2003). It also helps foster critical thinking, as students become better problem-solvers when they bring different perspectives to bear. *See* P.L. McLeod, et al., *Ethnic Diversity and Creativity in Small Groups*, 27 Small Group Res. 248 (1996). Because law school classes are usually discussion-based, much of what students take from their courses depends on the contributions of their peers. "[C]lassroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds." *Grutter*, 539 U.S. at 330 (internal quotation marks omitted).

Law schools therefore seek diversity across a broad spectrum of characteristics, including racial diversity. It remains true that members of racial minorities often have perspectives not shared by their white peers. "Just 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. Although the effect of racial diversity may be subtle in any given classroom, a single-race (or nearly single-race) community, like a single-gender community, "is different from a community composed of both; the

subtle interplay of influence one on the other is among the imponderables." *Ballard v. United States*, 329 U.S. 187, 193-94 (1946). Just as geographic diversity may bring different perspectives on water rights, property law, and the value of federalism, diversity of racial and ethnic backgrounds may contribute to discussions of antidiscrimination law, zoning, immigration, and the criminal justice system.

Minuscule minority representation will not produce the kind of learning environment that fosters an excellent legal education. Diversity among minority students is itself important. Without it, minority students will face the burden of serving as standard-bearers for their race. True racial diversity will improve the classroom experience not because minorities "express some characteristic minority viewpoint," but because diversity will "diminish[] the force of such stereotypes" by demonstrating that all students, even students of the same race, have differing outlooks and experiences. *Grutter*, 539 U.S. at 333 (internal quotation marks omitted).

II. Law Schools' Current Holistic Admissions Processes Follow This Court's Precedent To Produce Outstanding Incoming Classes.

In *Grutter*,[6] *Parents Involved*,[7] and *Gratz*,[8] this Court set clear guidelines for how educational institutions may consider race in enrollment decisions. While *Fisher I* clarified that courts should not defer to

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[6] Grutter v. Bollinger, 539 U.S. 306 (2003).

[7] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).

[8] *Gratz v. Bollinger*, 539 U.S. 244 (2003).

an institution's judgment that its race-conscious admissions process is narrowly tailored, that decision did not retreat in any way from the proposition that, consistent with *Grutter*, schools may consider race "as one of many 'plus factors' in an admissions program that consider[s] the overall individual contribution of each candidate." *Fisher v. Univ. of Tex. at Austin* (*Fisher I*), 133 S. Ct. 2411, 2416 (2013).

Law schools have tailored their admissions processes accordingly. Following this Court's direction, law schools use their educational judgment in constructing the best possible class. To do so, they often employ holistic admissions processes where an applicant's race is one among many factors considered in evaluating how candidates will contribute to the law school and to the legal profession.

A. Law Schools Use Holistic Admissions Processes To Enroll Highly Qualified And Racially Integrated Classes Whose Members Have A Broad Range Of Talents, Perspectives, And Interests.

To understand how race is taken into account in law school admissions, one must understand the admissions process more generally. Although American law schools vary in a number of important ways, their admissions procedures share important features. Rather than filling their classes solely in reliance on undergraduate GPAs and LSAT scores, law schools draw on a wealth of information about candidates' prior academic and work experience, backgrounds, professional goals, and personal qualities. Schools use this information to determine whether a student is prepared for law school, will

contribute to classmates' education, and will succeed in the legal profession. Law schools do not treat the admissions decision as a way to reward individual students for their past academic performance; rather, they make forward-looking judgments about how applicants will interact with each other and contribute to the school environment and the profession afterwards. The most promising class is diverse in many ways. Almost all law schools take an applicant's race into account in the context of this broader commitment to enrolling a diverse and excellent class.

1. The admissions process normally begins by determining whether an applicant is able to succeed at the particular law school. Even here, law schools look beyond a candidate's undergraduate GPA, class rank, and test scores. Most schools have concluded that, standing alone, GPAs and test scores, while relevant, are too crude a measure of the intellectual capacities they seek. Law schools often therefore consider many other factors to gauge candidates' academic abilities.[9]

Law schools consider applicants' undergraduate majors and, where relevant, their graduate training. Some courses of study are especially likely to provide students with important skills: for example, fields that require analytic or persuasive writing provide a good foundation for law school. Conversely, students who chose less demanding majors may be ill prepared academically and averse to hard work.

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[9] *See How Law Schools Determine Whom to Admit*, Law Sch. Admissions Council, http://www.lsac.org/jd/apply/whom-to-admit.asp. (All websites in brief last visited Oct. 16, 2015.)

Law schools also consider the courses on an applicant's transcript. A transcript with a broad range of courses may indicate an intellectually curious mind, or a dilettante who flits from introductory class to introductory class. A student who focuses only on a particular area of study may be indicating intellectual passion or narrow-mindedness and risk aversion. Only careful consideration of the transcript in light of other admissions materials enables law schools to determine whether a student will excel or founder.

The trajectory of a candidate's performance may also matter. A candidate whose grades improved considerably over time has indicated a capacity for intellectual growth and perseverance. That applicant may therefore be more impressive than a candidate who showed no academic improvement but had a higher cumulative GPA. And excellence in graduate study may compensate for a less impressive undergraduate record.

Finally, law schools look at the quality of applicants' undergraduate institutions. A rigorous college will better prepare its students for the analytic challenges of law school. Moreover, a student who succeeds among high-achieving peers has demonstrated exceptional academic merit. Law schools accordingly have a vital interest in the admissions decisions of selective undergraduate institutions. If those institutions are not open to a wide variety of students, then law schools will face a constricted pool of competitive applicants.

2. Even after narrowing their applicant pools to include only academically qualified students, schools often have many more applicants than available seats.

In choosing among these students, law schools recognize that success in the law requires more than book smarts. Schools therefore use their educational judgment to look at a variety of non-academic factors that bear on the kind of lawyer an applicant will become and how his or her background, interests, and future plans will enrich other classmates' education.[10]

Law schools look for qualities that suggest that students will become outstanding future attorneys – for example, evidence that a candidate has good judgment, potential for leadership, a commitment to public service, and integrity. A candidate's prior work experience, extracurricular activities, personal statement, and letters of recommendation may all be relevant. Further, law schools with academic specialties may seek students with skills or interests that relate to that area. For example, Southwestern Law School in Los Angeles bills itself as "*the* place for entertainment law"; the University of Houston Law Center has a distinctive focus on health law; and Vermont Law School claims the "largest and deepest environmental program of any law school."[11] These schools may assess a student's potential for excellence

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[10] *See Additional Admission Decision Factors*, Law Sch. Admissions Council, http://www.lsac.org/jd/applying-to-law-school/additional-decision-factors.

[11] Sw. Law Sch., Brochure for Biederman Entertainment and Media Law Institute (2013), http://www.swlaw.edu/pdfs/institute/institute_brochure.pdf; *Health Law and Policy Institute*, Univ. of Hous. Law Ctr., http://www.law.uh.edu/healthlaw/; *Environmental Law Center*, Vt. Law Sch., http://www.vermontlaw.edu/ELC.

in the profession differently from peer institutions with a different focus.

Among academically qualified applicants, no single factor is dispositive. Rigid quantification cannot capture intellectual passion, wisdom attained through a prior career, or a history of adversity overcome. Moreover, because law schools aim to construct an excellent class – not reward individual applicants – a particular skill or background may make an applicant especially attractive one year and not the next year.

3. Within this multi-factored admissions process, law schools consider race as one aspect of the diversity they seek. Law schools never make race dispositive of a candidate's admission, nor are quantitative weights attached to a candidate's race. Candidates, not schools, choose whether and how to provide racially identifying information. When a candidate identifies herself as a racial minority, schools consider whether that fact – in conjunction with other information in her application such as her community service, her extracurricular activities, and her personal statement – may give her distinct perspectives that would deepen the school's classroom interactions or suggest her potential to advance the law as an attorney. As this Court acknowledged in *Grutter*, law schools seek "to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university." 539 U.S. at 340.

B. Law Schools Have Narrowly Tailored Their Race-Conscious Holistic Review In Compliance With *Grutter*.

Law school admissions plans involve exactly the kind of "nuanced, individual evaluation" within which this Court permits race to be used "as a component." *Parents Involved*, 551 U.S. at 790 (Kennedy, J., concurring in part and concurring in the judgment). First, rather than evaluating race superficially, law schools consider how an applicant's race may "contribute to the life and diversity of the Law School." *Grutter*, 539 U.S. at 315. Because a student's race is never by itself a proxy for his perspective, law schools focus "on each applicant as an individual, and not simply as a member of a particular racial group." *Parents Involved*, 551 U.S. at 722.[12]

The role of race in a law school's admissions evaluation rests on context. For example, schools may be particularly interested in an applicant who has suffered discrimination because her experience overcoming racial hostility may bring a distinctive perspective about antidiscrimination law to classroom and lunchroom discussions, and not merely because schools simply want another minority student. Similarly, a law school may admit a student who

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[12] *See, e.g.*, *Racial/Ethnic Minority Applicants*, Law Sch. Admissions Council, http://www.lsac.org/jd/diversity-in-law-school/racial-ethnic-minority-applicants ("[Y]ou must show how your race or ethnicity will contribute to the richness of the law school education of every student. It is not enough to simply state your ethnicity or even to describe your personal history as it has been affected by your ethnicity. . . . Do not assume that your ethnicity is the only way in which you can add to the diversity of the student body; consider your entire life experience.").

writes a compelling essay describing how his Hawaiian heritage has influenced his intellectual development. While his race may play a role in his admission, it is his race in conjunction with his writing skill and his self-reflection that make him an outstanding applicant. Because all aspects of students' applications are considered – including the nuances of their racial identities – the holistic process employed by law schools fully complies with *Grutter*.

Additionally, law schools eschew the rigid racial quotas of the kind objected to in *Grutter* and *Fisher I*. The proof is in the statistics. The percentage of African Americans, Native Americans, and Latinos in Stanford Law School's 1L class grew from 19.4% in 2012 to 28.4% in 2013 – an increase of 46% – before returning in 2014 to 20.6%. At the University of Virginia Law School, the proportion of African Americans, Native Americans, and Latinos in the first-year class fell by nearly one-half between 2008 and 2009 – from 13.4% to 7.4%. That number spiked in 2012 – reaching 16.1% – before falling in 2014 to 8.7%.[13] And at the City University of New York Law School, the proportion of African-American, Native-American, and Latino students dipped from 21.1% in 2006 to 12.1% in 2008, and then increased nearly two-fold to 23.6% in 2011. This fluctuation is exactly what should be expected from a process in which race is only one among many factors considered, as Justice

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[13] Enrollment data from every accredited law school from 2006 through 2014 is available at *Official Guide to ABA-Approved Law Schools Archives*, Law Sch. Admissions Council, http://www.lsac.org/lsacresources/publications/official-guide-archives.

Kennedy implied in his dissent in *Grutter*. 539 U.S. at 391 (noting a comparable variation in enrollment numbers at Amherst College). These numbers undercut any inference that law schools have "compromise[d] individual review," *id.* at 389 (Kennedy, J., dissenting), in pursuing diversity. Instead, this evidence proves that law schools "consider[] race as one modest factor among many others" in an individualized assessment of each applicant. *Id.* at 392-93 (Kennedy, J., dissenting).

III. No Practicable Alternative To Race-Conscious Holistic Review Exists At The Law School Level.

While an admissions plan that relies solely on students' class rank, like the Texas Top Ten Percent Plan, may achieve some level of racial diversity at some large public undergraduate universities, this success could not be replicated for law schools. Law schools that admitted students based solely on class rank would fail to achieve racial integration and would sacrifice many of the interests holistic admissions processes serve along the way. Nor can simply omitting consideration of race from current admissions processes maintain a fair system for applicants or ensure that law school classes reflect a range of perspectives. And replacing consideration of race with consideration of socioeconomic status would fail to produce the diversity law schools seek.

A. Mechanical Admissions Formulae Cannot Work At The Law School Level.

The Texas Top Ten Percent Plan – the mechanical admissions formula involved in this case – originated as a solution to the "nearly intractable problem" facing

the university prior to this Court's decision in *Grutter*: "achieving diversity – including racial diversity – essential to its educational mission, while not facially considering race even as one of many components of that diversity." *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633, 645 (5th Cir. 2014). While this plan – in conjunction with a holistic review process for some class seats – achieves some level of racial integration for the University of Texas, the same would not be true for law schools.

1. It would be logistically impossible for virtually any law schools to use a plan like Texas's. Law schools almost never matriculate classes with more than 600 students, and many law schools, including those at flagship state universities, enroll far smaller cohorts. To fill these classes, law schools draw their applicants from a nationwide pool of more than 2000 degree-granting undergraduate institutions. For example, at the University of Texas Law School, where state law mandates that 65% of students be Texas residents, 114 undergraduate institutions are represented in a class of approximately 265 students.[14] The 2015 entering class at the University of Nebraska's law school consisted of 104 students from 44 different undergraduate institutions.[15] No law school enrolls a class large enough to guarantee admission even to the

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[14] *Texas Law Admissions and Financial Aid: Quick Facts*, Univ. of Tex., https://law.utexas.edu/admissions/quick-facts/.

[15] *Fall 2015 Entering Class Profile*, Neb. College of Law, http://law.unl.edu/prospective/class-profiles/.

top student graduating from each undergraduate university that might send an applicant.[16]

A top ten percent plan would be even less feasible. The U.S. Department of Education estimated that more than 1.8 million bachelor's degrees will be awarded in 2016.[17] If Texas's law school were to adopt a plan similar to its undergraduate admissions policy, it would be required to guarantee admission to approximately 181,000 candidates, including students whose undergraduate studies have left them completely ill-suited for law school. Even a top one percent plan would guarantee admission to 18,100 candidates. To be sure, not all those students would apply, but law schools *would* be faced with impossibly large entering classes.

2. Besides being logistically impossible, any plan that automatically admits students based on only quantitative measures would undermine the academic quality of law school classes. These measures capture only one aspect of an applicant's potential. *See supra* at 11-15.

Moreover, variation across not only academic institutions, but also majors within a school, means that undergraduate class rank cannot serve as a consistent measure of relative academic achievement.

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[16] For example, Yale Law School normally accepts around 250 applicants every year to fill a class of approximately 200 students. If it were to automatically admit any valedictorian who applied, it would have to increase its class size dramatically and would have to reject many of the students it now accepts.

[17] *Table 279: Degrees Conferred By Degree-Granting Institutions*, Nat'l Ctr. for Educ. Stat., http://nces.ed.gov/programs/digest/d10/tables/dt10_279.asp.

Kevin Rask, *Attrition in STEM Fields at a Liberal Arts College: The Importance of Grades and Pre-Collegiate Preferences*, 29 Econ. of Educ. Rev. 892 (2010) (showing a gap of up to .58 points in GPA between majors at a single college). A chemistry major with a 3.3 GPA, for example, likely has a far lower class rank than a recreation major with a 3.8, but the chemist may be a far more promising law student. And rote reliance on class rank, GPA, or test scores fails to capture positive grade trajectory, a willingness to take challenging classes, and breadth and depth in class selection.

A mechanical admissions process would also ignore other experiences that law schools often rely on in crafting their entering classes. Law schools could be precluded from admitting whole categories of students who may be strong candidates despite having somewhat less impressive academic records.

Financially Disadvantaged and First-Generation College Students: Mechanical admissions plans based solely on grades, class rank, or LSAT scores handicap financially disadvantaged and first-generation college students. Students who can afford to attend college only by working part-time or putting in extra hours to keep athletic or ROTC scholarships may struggle to match the GPAs of more affluent classmates without these time commitments. Furthermore, students without a family history of college often struggle in the first few years. So plans that focus on class rank or GPA would make it far harder to overcome this early adversity, regardless of success the student afterwards achieved. *See* Ernest T. Pascarella et al., *First-Generation College Students: Additional*

Evidence on College Experiences and Outcomes, 75 J. Higher Educ. 249 (2004).

Military Veterans: Many law schools value military experience. First, military experience can signal traits important for success in law schools and as lawyers: professionalism, discipline, and character. Veterans, particularly those who have served in combat zones, bring a unique perspective to the classroom when discussing legal issues such as detainee rights or the rule of law in Afghanistan or Iraq.[18]

But despite being exceptionally well qualified along a number of relevant dimensions, some military veterans may be disadvantaged by a mechanical admissions process. Those who attended service academies will have had to endure strict grading regimes that take into account physical fitness and leadership. Enlisted military men and women often balance obtaining undergraduate degrees with jobs and families. Furthermore, many military members study for or take the LSAT while deployed, often to combat zones. These difficulties mean that numbers may underrepresent a veteran's academic potential, and the process itself would ignore the unique perspective and experience that veterans can bring to a law school.

Mavericks: Mechanical admissions plans also tend to overlook applicants with extraordinary abilities that may have divided their attention during

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[18] *See* Tim Hsia, *An Ex-Soldier Writes*, N.Y. Times At War Blog (Jan. 10, 2011), http://nyti.ms/1Lpqss2 (discussing his experience as a veteran 1L).

college. For example, looking strictly to class rank could dramatically diminish the number of aspiring novelists or dorm room entrepreneurs that law schools justifiably may want to enroll. These achievements might be relevant in two ways. First, some deficiencies on a transcript may be excusable if the applicant was pursuing her other talent at the time. Second, some achievements show hard work, dedication, or other qualities relevant to a law school classroom and to performance in the profession. For example, a student who built his own business may have shown initiative, imagination, and persistence and might also have experiences that would enrich a classroom discussion of venture capital.

Academically Adventurous Students: Mechanical admissions plans punish students who have taken intellectual risks – for example, by enrolling in demanding classes or classes outside their areas of expertise. The practice of law values understanding or experience in multiple fields and the ability to engage and struggle with difficult material. However, learning these skills often comes at the cost of lower grades in unfamiliar fields. Mechanical admissions plans do not reward students for this engagement, but rather put these students at a disadvantage.

3. Perhaps worst of all, mechanical admissions plans actually would reduce racial diversity.

Whatever racial diversity the Texas Top Ten Percent Plan produces comes from a distinctive and unfortunate characteristic of primary and secondary education in Texas: its high level of de facto racial segregation. Marta Tienda & Sunny Xinchun Niu, *Capitalizing on Segregation, Pretending Neutrality:*

College Admissions and the Texas Top 10% Law, 8 Am. Law Econ. Rev. 312 (2006); *see also Fisher*, 758 F.3d at 650-53, 650 n.98. The Top Ten Percent Plan produces diversity at the university level because the top ten percent of students from an all-Latino high school will all be Latino. By contrast, the vast majority of universities and colleges from which law schools draw their students are integrated. It would be impossible to ensure racial diversity among the group of top graduates from these schools. Therefore, even if it were feasible to accept law school applicants based on class rank, adopting such a plan would do little to promote racial diversity in law schools.

B. Race-Blind Holistic Admissions Processes Cannot Provide A Realistic Alternative At The Law School Level.

A truly holistic, completely race-blind admissions process is not a "workable race-neutral alternative" for law schools. *See Fisher v. Univ. of Tex. at Austin* (*Fisher I*), 133 S. Ct. 2411, 2420 (2013). The overriding disadvantage of such a system is that racial diversity will decrease. The University of Texas itself presents a troubling example: its race-neutral admissions plan caused a serious drop in minority student enrollment when first adopted, with numbers remaining "largely stagnant" until it began considering race in admissions in 2004. *See Fisher*, 758 F.3d at 649.[19] In

[19] As the Fifth Circuit recognized, a "truncate[d] . . . inquiry" that compares the University's enrollment numbers only beginning the year before it adopted a race-conscious admissions policy is inappropriate. 758 F.3d at 644-45. That narrow focus – which one *amicus* adopts here (Kahlenberg Br. 17-18) – does not provide a complete narrative.

2003, eighty percent of classes at the University of Texas "contained only one black student, or none at all." Sherrilyn A. Ifill, Opinion, *Race vs. Class: The False Dichotomy*, N.Y. Times (June 13, 2013), http://nyti.ms/11cQpHV. This undermines the goal of "lessening of racial isolation and stereotypes" that this Court has recognized. *Fisher I*, 133 S. Ct. at 2418.

Moreover, such a system would be impossible to administer. In the United States today, an individualized admission process will by its very nature often convey racial information to law school decisionmakers. A student's name or her alma mater may, by itself, clearly indicate her likely race or ethnicity. In addition, a student may write an essay about his desire to attend law school due to his history confronting racial discrimination, list his participation in his college's Latino Students Association on his resume, or discuss his experience growing up in an immigrant household in a personal statement. Law schools cannot meaningfully evaluate this information as part of a holistic admissions process while ignoring its relationship to the applicant's race.

Under a strictly race-blind system, law schools would thus be left with two unworkable options. First, schools could essentially erase any information that would signify a candidate's race before reviewing an application. Applicants would have to eschew personal statement topics that touched on race, including stories of overcoming adversity or how their background influenced their decision to go to law school. Discussions of leadership experiences or community service might have to be bowdlerized to avoid "giving away" a candidate's race. Such a system likely would disadvantage the very students law

schools are trying to recruit. At the very least, such a system could not be considered a "holistic" review process: stripping away detail from resumes, recommendations, and essays is anathema to an equitable, holistic process, and to the goal of producing excellent lawyers who can function effectively in our society.

Alternatively, schools could allow applicants to include whatever personal information they choose but instruct admissions personnel to ignore race when evaluating the candidate. But this Court has held that diversity – including racial diversity – can be a compelling interest for law schools. *See supra* at 4-5, 7-9. As a result, expecting admissions officers to ignore completely a candidate's signals about his or her race blinks reality. One pernicious consequence of a rule that tells schools they can deliberately aim for racially diverse classes, but *they* cannot take race into account is that this may lead a highly qualified minority candidate to feel that *he or she* must make race a "defining feature of his or her application," *Fisher I*, 133 S. Ct. at 2418 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 337 (2003)), regardless of what characteristics and experiences he or she would prefer an admissions office consider.

As this Court has recognized in the electoral redistricting context, the most that can be realistically achieved is that race will not "predominate[]" in complex, holistic decisionmaking. *See Miller v. Johnson*, 515 U.S. 900, 916 (1995); *see also Shaw v. Reno*, 509 U.S. 630, 646 (1993). And, as with redistricting cases – where race is one consideration along with "age, economic status, religious and political persuasion, and a variety of other

demographic factors," *id.* at 646 – the use of race as one factor among many in law school admissions should remain constitutionally permissible.

C. At The Law School Level, Class-Based Affirmative Action Is Not Currently An Adequate Substitute For Considering Race In A Holistic Admissions Process.

The idea that schools can achieve racial diversity by abandoning any consideration of race and focusing on class-based affirmative action instead, *see, e.g.*, Kahlenberg Br. 7, is misplaced. To be sure, students from economically disadvantaged socioeconomic backgrounds may be seriously underrepresented in law schools. But this underrepresentation has nothing to do with the fact that schools' current holistic admissions practices take race into account. And a race-blind class-based admissions policy would fail to produce racially diverse entering classes.

1. Law schools already seek both socioeconomic and racial diversity and should not be forced to choose between them.[20] Many law schools expressly take socioeconomic status into account. *See, e.g.*, *Frequently Asked Questions – J.D. Admissions*, Univ. of Va. Sch. of Law[21] (noting that the school considers "economic" diversity as well as experiences showing "constructive response to adversity"); *Applying to*

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[20] Of course, law schools are not alone in this regard. As Petitioner recognizes, the University of Texas "has incorporated socioeconomic factors into its [admissions] calculus" for undergraduates. Petr. Br. 40.

[21] http://www.law.virginia.edu/html/prospectives/faqs.htm.

Texas Law, Univ. of Tex.[22] ("We consider as well an applicant's socioeconomic background, including any forms of disadvantage or limited opportunity that may shed light on the applicant's record."). Schools encourage low-income applicants in a number of ways, from waiving application fees, to considering that status as part of their holistic review, to providing need-based financial aid.

A relatively low number of economically disadvantaged students does not indicate a lack of effort on the part of law schools. The intractable and cumulative effects of poverty on students' opportunities throughout their lives, not lack of interest from law schools, is the primary barrier to enrolling more low-income students. *See* Deborah C. Malamud, *Assessing Class-Based Affirmative Action*, 47 J. Legal Educ. 452, 459-61 (1997). And the supposition that consideration of socioeconomic status could somehow substitute for consideration of race is undermined at the law school level by the difficulty in deciding how to determine an applicant's socioeconomic status. Should a school provide an admissions preference to a student who grew up receiving public assistance but who has spent the years between college and law school working as an analyst at an investment bank? If it does not, then it may end up excluding qualified minority applicants precisely because they have overcome obstacles. But if a school focuses instead on an applicant's current income, it may end up preferring a white applicant with a lower GPA or LSAT score over a minority

[22] https://law.utexas.edu/admissions/apply/.

candidate because that applicant, although she comes from an upper middle-class family, has spent a decade at a minimum-wage job while being a ski bum.

Regardless of why economically disadvantaged students are underrepresented, telling schools to consider socioeconomic diversity *instead of* racial diversity, *see* Kahlenberg Br. 2-4, 7, creates an unnecessary tension between two groups who both contribute significantly to diversity within law schools. Schools are entitled, as a matter of academic freedom, to conclude that *both* racial and socioeconomic diversity are important to their educational mission. The experiences and perspectives of individuals who are members of visible and historically disadvantaged groups – whether those individuals are members of racial minorities or, to take a different example, have certain kinds of physical disabilities – are likely to be different than the experiences of individuals who face less evident barriers. Both groups have valuable contributions to make in law school classrooms and in legal practice. But constitutional law provides no basis for requiring schools to substitute a commitment to one for a commitment to the other.

2. Replacing the current regime with class-based affirmative action alone will reduce the diversity of viewpoints represented in law schools. Socioeconomic diversity in a law school class is not a substitute for racial diversity. This Court has repeatedly explained that a state's compelling interest in diversity "is not an interest in simple ethnic diversity," *Fisher I*, 133 S. Ct. at 2418 (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 315 (1978) (Powell, J.)), but rather in a diversity of viewpoints – formed by students'

backgrounds and life experiences – that "contribute[s] the most to the 'robust exchange of ideas," *Grutter*, 539 U.S. at 329 (quoting *Bakke*, 438 U.S. at 313 (Powell, J.)). Proponents of replacing the current system ignore this complex idea when they assert, for example, that schools can "match or exceed the levels of both African American and Hispanic representation" produced by race-conscious admissions through using class-based approaches. Kahlenberg Br. 17.

Class-based affirmative action would reduce diversity within the cohort of minority students. There is expert consensus that color-blind, class-based affirmative action would lower acceptance rates for middle-class students of color.[23] Indeed, middle-class students of color are slightly underrepresented in higher education even with racially conscious admissions. Rothstein, *supra*. Under a race-blind policy, their numbers would shrink substantially.

Middle-class minority students can differ from both their middle-class non-minority classmates and their non-middle-class minority classmates in ways that are relevant to legal education. Because middle-class black students are more likely than poorer students of color to have grown up in racially integrated neighborhoods, they may have different attitudes than less affluent minority students about a range of issues. *See* Karyn R. Lacy, *Blue-Chip Black: Race, Class, and Status in the New Black Middle Class*

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[23] *See, e.g.*, Malamud, *supra*, at 467-71; Richard Rothstein, *The Colorblind Bind*, American Prospect: Longform (July-Aug. 2014), http://prospect.org/article/race-or-class-future-affirmative-action-college-campus.

151-54 (2007). Black middle-class families often sharply differ from poorer families in their views on government services, public housing, and neighborhood "gentrification." *See* Mary Pattillo, *Black on the Block: The Politics of Race and Class in the City* 81-110 (2007). Within racially heterogeneous schools, black children are likely to experience tracking or negative teacher expectations that their white peers do not, creating different viewpoints on education among students of otherwise similar socioeconomic status.[24] Furthermore, because different races have historically experienced different levels of class mobility, "being the black child of a black lawyer *means something different* in the American social world from being the white child of a white lawyer." Malamud, *supra*, at 469. In law school classrooms, where issues of zoning, property, education, tax policy, and the like are the stuff of important debate, a categorical prohibition on taking race into account in the admissions process may exclude an important perspective from the discussion.

In addition, a class-based admissions system that admits primarily low-income minority students at the expense of middle-class minority students risks bolstering stereotypes that associate minorities and poverty.[25] By contrast, an admissions process that produces cross-cutting class-based and racial diversity can help to "lessen[]" those damaging stereotypes. *See Fisher I*, 133 S. Ct. at 2418.

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[24] *See* Felicia R. Lee, *Why Are Black Students Lagging?*, N.Y. Times (Nov. 30, 2002), http://nyti.ms/1kZSTX5.

[25] Sherrilyn A. Ifill, Opinion, *Race vs. Class: The False Dichotomy*, N.Y. Times (June 13, 2013), http://nyti.ms/11cQpHV.

3. Class-based affirmative action will fail to produce anything like the level of racial diversity that race-conscious holistic admissions has achieved.

Demographics dictate this outcome. Put simply, even if members of racial minority groups are more likely to be poor than their white counterparts, the largest group of poor people in the United States is white. In 2014, there were almost 20 million non-Hispanic white people living below the poverty line, in contrast to 10.7 million black Americans, 1 million American Indian or Native Alaskans, and 13 million Hispanic individuals (of any race) living in poverty.[26] The pool of potential beneficiaries for class-based affirmative action is thus likely to be nearly half white.

But even that prediction may be overoptimistic. All students do not have comparable test scores: it remains an unfortunate fact that there are substantial gaps between the LSAT scores and GPAs of African-American and Latino students and those of their peers. *See* Sarah E. Redfield, *Diversity Realized: Putting the Walk With the Talk for Diversity in the Legal Profession* 49 (2009). The reasons for such disparities are complex and may include differential access to educational opportunities and "stereotype threat."[27] Thus white students will be

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[26] Table 24: Number in Poverty and Poverty Rate by Race and Hispanic Origin Using 3-Year Averages: 1987 to 2014, U.S. Census Bureau, https://www.census.gov/hhes/www/poverty/data/historical/people.html.

[27] *See* Wayne J. Camara & Amy Elizabeth Schmidt, *Group Differences in Standardized Testing and Social Stratification*, College Board Report No. 99-5 (1999),

disproportionately represented among the disadvantaged students with the highest GPAs and test scores and therefore more likely than disadvantaged minority applicants to be admitted if race is ignored. *See* Jessica A. Howell, *Assessing the Impact of Eliminating Affirmative Action in Higher Education*, 28 J. Lab. Econ. 113, 156 (2010) (simulation predicting a 10% decrease in minority representation at the most selective schools under a race-blind program); Mark C. Long, *Affirmative Action and Its Alternative in Public Universities: What Do We Know?*, 67 Pub. Admin. Rev. 315, 325-26 (2007) ("[A]ll of the available studies that have simulated the effects found that the principal beneficiaries of class-based affirmative action would be white students.").

Schools therefore face an untenable choice: (1) achieve socioeconomic diversity but forgo achieving significant racial diversity; (2) admit such a high percentage of their class through socioeconomic affirmative action that even though a majority of the students admitted through that process are white, the process also admits a substantial number of minority applicants, which means the school will have to drastically reduce the number of highly qualified but not economically disadvantaged students it admits; or (3) accept a significantly greater number of students

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http://research.collegeboard.org/sites/default/files/publications/2012/7/researchreport-1999-5-group-differences-standardized-testing-social-stratification.pdf; Joshua Aronson et al., *The Effects of Stereotype Threat on the Standardized Test Performance of College Students*, *in* Readings About the Social Animal 400-11 (Elliot Aronson ed., 2004).

overall.[28] Selective undergraduate universities in Texas chose the third tack, admitting 10-20% more students after race-conscious admissions were banned in the state. *See* Howell, *supra*, at 152. Increasing entering class size imposes a number of costs on educational institutions. Admitting more students, especially low-income students, requires increased financial aid expenditures. This money comes at the expense of dedicating resources to hiring additional instructors, providing funding for student research, or keeping libraries and educational materials up-to-date. At some point, the tradeoff becomes untenable. Such a system cannot be considered a "*workable* race-neutral alternative[]" to a race-conscious admissions policy. *See Fisher I*, 133 S. Ct. at 2420 (emphasis added) (internal quotation marks omitted).

Law schools face the additional problem that they require a bachelor's degree for admission. Yet only ten percent of students at selective colleges and universities come from low-income backgrounds. *See* Kahlenberg Br. 8-9.[29] And the increasing cost of law school, coupled with uncertain job prospects in the legal market, may well deter low-income college graduates from applying. *See* Eli Wald, *The Visibility of Socioeconomic Status and Class-Based Affirmative*

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[28] While the latter two approaches may be facially race-neutral, the use of class-based preferences to achieve certain levels of racial representation can hardly be said to be "race unconscious." *See Fisher I*, 133 S. Ct. at 2433 (Ginsburg, J., dissenting).

[29] While some colleges and universities may increase their efforts to enroll low-income students, many will not or will have only minor success, for the reasons stated above.

Action: A Reply to Professor Sander, 88 Denver Univ. L. Rev. 861, 878-79 & n.91 (2011).

Nor can outreach to economically disadvantaged potential applicants produce racial diversity at the law school level. Law schools do not have the option to form "partnerships with disadvantaged [K-12] schools" in some local community, Kahlenberg Br. 13; geographic dispersion combined with the intervening time between secondary and professional education makes that approach a non-starter. And increased recruitment is unlikely to be effective: while significant numbers of highly qualified minority students either do not apply to college or apply only to institutions for which they are overqualified, no evidence suggests the same is true of potential law school applicants. Law schools receive the LSAT score of every test taker and already directly reach out to students who would be qualified for admission.[30]

These limitations of class-based affirmative action are confirmed by the very research on which its proponents rely. Selective schools suffer the greatest loss of diversity when relying on class-based affirmative action. *See* Kahlenberg Br. 19-21. And because law schools are often even more selective than undergraduate institutions, their fate may be even worse than selective universities. The University of California at Berkeley, the University of California at Los Angeles, and the University of Michigan at Ann Arbor have all instituted race-blind admissions policies that include consideration of socioeconomic

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[30] *See, e.g.*, *Application Fee Waiver*, Univ. of Notre Dame Law Sch., http://law.nd.edu/admissions/information/application-fee-waiver/.

status. *Id.* All have failed to achieve the levels of racial diversity they obtained under race-conscious admissions policies. *Id.* At Berkeley, the number of admitted black students has fallen by roughly half, from nearly 7% to approximately 3% of the total student body absent consideration of race.[31] Latino representation is also 3 to 4 percentage points below the freshman admissions rate achieved by race-conscious admissions,[32] even as the Latino portion of California's high school graduates has grown 13 percent.[33] Contrary to Kahlenberg's assertion, these schools are not "outliers." Kahlenberg Br. 19. Instead, these schools show why, whatever its other benefits, class-based affirmative action cannot, under current conditions, produce racial diversity.

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[31] *See Percentage Distribution of New Freshman Admits by Ethnicity Fall 1996 through Fall 2000*, U.C. Berkeley News Ctr., http://www.berkeley.edu/news/media/releases/2008/04/admits_archival.shtml; *New Freshman Enrollment by Ethnicity*, U.C. Berkeley Off. of Plan. & Analysis, http://opa.berkeley.edu/uc-berkeley-fall-enrollment-data.

[32] Compare Percentage Distribution, supra (15.8% in 1996 and 15.4% in 1997), with New Freshman Enrollment by Ethnicity, supra (11.4% in 2013 and 13.6% in 2014).

[33] *Compare* U.S. Dep't of Educ., Nat'l Ctr. for Educ. Statistics, Table 106: 1996-1997 Table of High School Graduates by Race (2000), http://nces.ed.gov/programs/digest/d99/d99t106.asp (Hispanic graduates equal 30% of California high school graduates), *with* U.S. Dep't of Educ., Nat'l Ctr. for Educ. Statistics, Table 219.40: 2009-2010 High School Graduates by Race (2012), http://nces.ed.gov/programs/digest/d14/tables/dt14_219.40.asp?current=yes (Hispanic graduates equal 43% of California high school graduates).

In short, if law schools are to perform their critical functions in our Nation's life, they can do so only by remaining diverse. And they can remain diverse only if they are permitted to engage in a holistic admissions process in which race can play some role.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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