

No. 11-345

IN THE
Supreme Court of the United States

ABIGAIL NOEL FISHER, *et al.*,
Petitioners,

v.

UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,
Respondents.

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

**BRIEF OF ABIGAIL THERNSTROM,
STEPHAN THERNSTROM, ALTHEA K. NAGAI,
AND RUSSELL NIELI AS *AMICI CURIAE*
IN SUPPORT OF PETITIONERS**

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INTEREST OF *AMICI CURIAE*¹

Amici curiae are Abigail Thernstrom,² Stephan Thernstrom,³ Althea K. Nagai,⁴ and Russell Nieli,⁵

¹This *amicus* brief is filed with the consent of the parties. Counsel for the Petitioners and Respondents have granted blanket consent for the filing of *amicus* briefs in this case, in accordance with this Court's Rule 37.3(a). Pursuant to Rule 37.6, the *amici* submitting this brief and their counsel hereby represent that no party to these cases or their counsel authored this brief in whole or in part, and that no person other than *amici* and their counsel paid for or made a monetary contribution toward the preparation and submission of this brief.

²Abigail Thernstrom is Adjunct Scholar at the American Enterprise Institute and the Vice-Chair of the United States Commission on Civil Rights. With her husband Stephan, she is the author of *America in Black and White: One Nation, Indivisible* and of *No Excuses: Closing the Racial Gap in Learning*, and editor of *Beyond the Color Line: New Perspectives on Race and Ethnicity in America*. Dr. Thernstrom is currently working on another joint volume on the concept of de facto segregation, particularly in K-12 education and in housing. Her other books include the prize-winning *Whose Votes Count? Affirmative Action and Minority Voting Rights* and *Voting Rights – and Wrongs: The Elusive Quest for Racially Fair Elections*. Dr. Thernstrom was a member of the Massachusetts State Board of Education from 1995-2006. In 2007, the Thernstroms were the recipients of a prestigious Bradley Foundation prize for Outstanding Intellectual Achievement.

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political and social scientists who have conducted research and written widely in the fields of race, education, school desegregation, and related civil rights issues.

In this brief, *amici curiae* present a critical examination of the social science research relevant to the Court's evaluation of whether the University of Texas at Austin's use of race in making admissions decisions passes the strict scrutiny analysis required when government actors engage in race-based decision making.⁶ The *amici curiae* question the proposi-

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⁵ Russell Nieli has written extensively on the issue of racial preferences in higher education and is the author of the forthcoming book, *Wounds That Will Not Heal: Affirmative Action and Our Continuing Racial Divide*, which will be published this summer. With Carol Swain, he co-authored *A Common Destiny*, a study of race relations in Bermuda, and *Contemporary Voices of White Nationalism in America*, a study of the increasing appeal of white racial fringe groups in America. For many years he has been a lecturer in Princeton University's Politics Department.

⁶ In *Grutter v. Bollinger*, the Court relied upon social science and other evidence of the benefits of diversity presented by *amici curiae*. *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (citing to briefs submitted by the American Educational Research Association *et al.*; 3M *et al.*; General Motors Corp.; Julius W. Becton, Jr., *et al.*). The Court also cited studies that were not introduced into evidence at trial. *See id.* at 330 ("In addition to the expert studies and reports entered into evidence

tion that racial diversity, when achieved through differential admission standards, is a sufficiently “compelling state interest” to justify racial discrimination in college and university admissions.

SUMMARY OF THE ARGUMENT

Although this Court held in *Grutter* that diversity in higher education is a compelling state interest sufficient to justify consideration of race in higher education admissions, 539 U.S. at 330, that holding can and should be revisited in light of the demonstrated negative impact of race-conscious admissions on minority students and on race relations within institutions of higher education as a whole. In fact, should the Court revisit the question of whether racial diversity justifies racial discrimination, its decision would simply place *Grutter* in its proper historical place, given that the Court has ultimately revisited nearly every decision it has issued justifying race-based decision making by government actors. See, e.g., *Brown v. Board of Education of Topeka*, 347 U.S. 483, 494-95 (1954) (overruling the “separate but equal” doctrine and overturning *Plessy v. Ferguson*, 163 U.S. 537 (1896)); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 202 (1995) (holding that strict scrutiny is the proper standard of analysis of all racial classifications and overturning *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990)).

The Court in *Grutter* found that diversity constituted a compelling state interest primarily because of certain purported benefits of diversity, such as

at trial, numerous studies show that student body diversity promotes learning out-comes, and better prepares students for an increasingly diverse workplace and society, and better prepares them as professionals.”) (internal citations omitted).

promotion of cross-racial understanding, breaking down racial stereotypes, enabling students to better understand persons of different races, and enhancement of classroom discussion. 539 U.S. at 330. In reality, however, research on race and diversity in the educational context indicates that diversity as generated by race-based admissions simply does not lead to those purported benefits. Quite the contrary, the evidence suggests that use of race-based admissions actually undermines race relations on college and university campuses by heightening stereotypes and creating greater separation and self-segregation between racial groups. In addition, the evidence indicates that race-based admissions negatively impact black and Latino students by increasing students' self-doubts about their abilities to succeed academically, by promoting the creation of social groups that encourage black and Latino students to put in minimal effort academically, and by creating disincentives for minority students to work hard due to students' expectations that they will receive favorable treatment on the basis of race in the future.

In *Brown v. Board of Education*, this Court recognized that the concept of "separate but equal" was not only constitutionally suspect but resulted in real harm to black students. 347 U.S. at 494-95. Similarly, it is now time for the Court to recognize that the many purported "benefits" of race-based admissions in higher education upon which this Court relied for its decision in *Grutter* have not materialized that race-based admissions policies are in fact harmful to race relations among students and are particularly harmful to the very black and Latino students whom such policies are intended to benefit most, and that research has shown that black and Latino students do not catch up with their peers who

attended better schools before college as a result of affirmative action admissions but actually underperform relative to their own past grades and test scores. As such, the Court should reverse *Grutter* and hold that diversity in higher education is not a compelling state interest sufficient to justify racial discrimination in the admissions process.

ARGUMENT

I. The primary justifications for the use of race-based preferences in higher education admissions that the Court relied on in *Grutter* are flawed and fail to support the notion that there is a compelling state interest in diversity in higher education.

Proponents of race-based admissions use two primary arguments to support the claim that diversity in higher education is a compelling state interest: (1) that racial preferences in admissions increase diversity thereby enhancing the educational experience of students, an argument that is commonly known as the “diversity-enhancement rationale,” and (2) that race relations among students improve as a result of increased diversity by virtue of the fact that students come into greater contact with students of other races. The Court in *Grutter* relied on these justifications in finding a compelling state interest in diversity in higher education. 539 U.S. at 330. These justifications are fundamentally flawed, however, and are therefore insufficient to support a finding of a compelling state interest. The first of these justifications is flawed because it ignores the zero-sum nature of university admissions whereby the diversity gains of one school are necessarily the diversity losses of another. The second justification is similarly flawed

because researchers have disproven the theory that mere contact with individuals of other races enhances the educational experience for all students. Thus, the primary rationales upon which the Court relied in *Grutter* fail to support a finding of a compelling state interest sufficient to justify the use of race as a factor in admissions.

a. The diversity-enhancement rationale for granting racial preferences in admissions is fundamentally flawed because it ignores the zero-sum nature of university admissions as a whole.

Proponents of racial preferences in university admissions frequently argue that affirmative action increases diversity at institutions of higher learning, which, they argue, enhances the educational experience. This justification for the use of racial preferences in admissions is commonly known as the “diversity-enhancement rationale.” The Court in *Grutter* relied on the diversity-enhancement rationale to support its decision to affirm the use of racial preferences in admissions at the University of Michigan. 539 U.S. at 330. The diversity-enhancement rationale is fundamentally misleading and ultimately unpersuasive as a justification for the use of racial preferences in admissions, however, because it ignores the zero-sum nature of the student admissions process.

In the United States, virtually all individuals with a high school diploma or GED who wish to do so have the ability to gain admission to an institution of higher education after high school. See Stephan Thernstrom and Abigail Thernstrom, *America in Black and White: One Nation, Indivisible* 389-91 (Harvard University Press 1997) [hereinafter *Amer-*

ica in Black and White]. The question is thus not *whether* an applicant can gain acceptance to a college but into *which* college that applicant will be accepted and enroll. As such, every student who matriculates to one university will necessarily decline to matriculate to all other universities. Moreover, the college-eligible population of minority students is a fixed population. This construct shows why the diversity-enhancement rationale breaks down.

By offering preferential admission to black and Latino students, elite educational institutions engage in what has become known as the “upward-ratcheting” of students. That is to say, many black and Latino students are given admissions preferences that allow them to attend colleges and universities that are one, two, or three levels of selectivity above the competitive level at which they would likely have been admitted in the absence of such preferential admissions treatment. *See generally* Clyde W. Summers, *Preferential Admissions: An Unreal Solution to a Real Problem*, 2 U. Tol. L. Rev. 377, 395 (1970) (discussing the “pervasive shifting effect” caused by race-based admissions preferences). Thus, Tier-1 schools enroll many students who, in the absence of racial preferences, would have enrolled in Tier-2 schools; Tier-2 schools enroll students who would otherwise have enrolled in Tier-3 schools; and Tier-3 schools engage in the same process vis-à-vis the institutions immediately below them on the selectivity scale. This upward-ratcheting continues down the ladder of selectivity.

Due to upward-ratcheting, increased racial diversity at more elite institutions is purchased at the cost of decreased racial diversity at less elite institutions. *See* Stephan Thernstrom and Abigail Thernstrom,

Reflections on The Shape of the River, 46 UCLA L. Rev. 1583, 1625-28 (1999) [hereinafter *Reflections*]. As such, the diversity-enhancement rationale fails as a justification for the use of race-based preferences in admissions because such admissions practices do nothing to increase overall diversity in higher education but merely result in some institutions becoming more racially diverse while other institutions become less diverse. If the Court were to ignore this fact, it would in effect be ruling that increasing artificially manufactured diversity at a very small number of elite academic institutions is so compelling an interest, so essential to the public good, that it outweighs the costs of decreasing naturally occurring diversity at all other institutions and that it outweighs the many, well-documented societal harms that result from government approved, nationwide racial discrimination.⁷

⁷ As discussed fully below, research has clearly shown that the purported benefits of diversity on college and university campuses have not in fact materialized. Indeed, race-based admissions cause a host of harms to minority and non-minority students alike. Moreover, even if there was empirical evidence that the mere fact of increased racial diversity enhanced the educational experience and decreased racial separation among students, one could certainly question whether students at the country's most elite academic institutions are really the most appropriate targets for initiatives aimed at improving race relations. The students at elite institutions are among the most intelligent, highly educated, and globally diverse of any student populations. As such, they are already among the least likely students to internalize racial stereotypes or accept racial intolerance—at least in the absence of the negative impact on race relations created by affirmative action admissions policies—which further undermines the argument that exposing such students to a few more black or Latino students is sufficiently compelling to justify the harms created by racial discrimination in admissions throughout the entire higher education system. Indeed, it is arguably of greater importance to maintain a larger

See generally Roger Clegg, *Attacking "Diversity": A Review of Peter Wood's Diversity: The Invention of a Concept*, 31 J.C. & U.L. 417, 435-36 (2005) (summarizing the many harms of government approved racial discrimination). Even assuming for the sake of argument that diversity benefited college and university students of all races, which the research discussed below clearly indicates it does not, the costs of the bargain that the Court would strike by reaffirming the use of race-based admissions are simply too great to be justifiable.

b. The mere fact that racial diversity increases contact between students of different races does not improve race relations among students.

Much of the support for racial preferences in higher education admissions stems from the theory that a more racially diverse college or university campus will increase the probability of cross-racial interactions, which in turn is likely to lead to greater tolerance and understanding between people of different racial groups. This theory assumes that ignorance, prejudice, and the negative stereotyping of other racial groups are the result of social isolation and the lack of person-to-person contact between people of different races and ethnicities. The hypothesis is thus that simple contact between people of different races and ethnicities helps to further "cross racial understandings," breaks down "racial stereotypes," and enables people "to better understand persons of

degree of naturally occurring diversity at less selective academic institutions, where students may be more susceptible to acceptance of racial stereotypes or racial intolerance as compared to their peers at more elite institutions.

different races.” 539 U.S. at 330. But this “contact hypothesis” has been discredited by more than half a century of research and is no longer accepted by any reputable social scientist. Only under very specific conditions, ones which are unlikely to be met when racial preferences are used, does mere contact with diverse people have the positive effects attributed to it of breaking down stigmas and stereotypes while furthering intergroup harmony and understanding. Therefore, although everyone can agree that improving race relations in our country is a desirable goal, the research suggests that the increased contact between races created by the use of race-based preferences in admissions is simply not an effective way to achieve that goal. Instead, organically occurring racial diversity that comports with core American values such as merit-selection is a far better means of breaking down racial barriers.

Whether in the former Yugoslavia or Central Africa, in Hapsburg, Vienna or modern Lebanon, in Sri Lanka or the Far East, contact between people of different racial and ethnic groups is more likely than not to lead to tension, ethnic conflict, and a tendency to self-segregate and harbor deep suspicions of outsider groups than it is to further intergroup cooperation and trust. Human beings are tribal, as observers often say, and simply bringing people who identify with different groups together in the same location can lead to tension and conflict at least as often as to harmony and mutual respect. *See generally* Thomas Sowell, *Preferential Policies: An International Perspective* (William Morrow 1990).

Even in the United States, where ethnic relations have rarely led to the kinds of strife so common in much of the rest of the world, current research indi-

cates that the more ethnically diverse a community is, the more people distrust one another and the more difficulties they have in coming together to engage in mutually beneficial civic undertakings. Harvard political scientist Robert Putnam is the author of an important study of “social trust” among Americans—called the Community Benchmark Survey—that looked at approximately 30,000 residents in 41 different communities across the United States. Robert Putnam, *E Pluribus Unum: Diversity and Community in the Twenty-first Century*, Scandinavian Political Studies, vol. 30, 2007, at 144. The communities ranged from large urban centers with a population of a million or more to much smaller cities, suburban areas, and rural towns. Four whole states—Delaware, Indiana, Montana, and New Hampshire—were also among the 41 communities included in the study. *Id.*

What Putnam found certainly contradicted the more naive forms of contact theory. The degrees to which blacks, whites, Asians, and Latinos in the study said they trusted members of the three ethno-racial groups to which they did not belong varied, but were inversely related to the ethno-racial diversity of a given community. *Id.* at 147-49. That is, the more racially and ethnically diverse a community was, the more people distrusted members of the groups different from their own. Putnam interpreted this to mean that the less contact people have with members of other ethno-racial groups, the more likely they are to trust them. The more contact they have with other groups, however, the more suspicious they are of them. In fact, it was the increased contact of living in the same community that helped to *further* distrust between racial groups. According to Putnam, “[i]nter-racial trust is relatively high in

homogeneous South Dakota and relatively low in heterogeneous San Francisco or Los Angeles.” *Id.* at 147. Thus, “[t]he more ethnically diverse the people we live around the less we trust them.” *Id.*

Those who told researchers that they trusted members of other races “a lot” were much more common in places like Lewiston, Maine, Bismarck, New Hampshire, and the state of Montana, where whites constitute the great majority of the population—and non-whites are not frequently encountered in most community settings—than in places like East Bay, California, North Minneapolis, San Francisco, California, or Los Angeles, California, where the populations are much more racially and ethnically intertwined. *Id.* at 142-43. This finding, fundamentally, is inconsistent with simple contact theory. The study was all the more remarkable in light of the fact that lower levels of interracial trust were often expressed by people living in some of the more politically liberal areas of the country where norms of political correctness and socially-acceptable response patterns might be expected to dampen substantially the level of ethnic distrust to which respondents (especially whites) would freely admit. The social pressures to affirm publically one’s trust in members of other racial and ethnic groups is almost certainly greater in places like San Francisco and Los Angeles than in places like Montana or rural South Dakota, suggesting that the real trust-gap is even greater than that indicated in the Community Benchmark Survey data.

Having surveyed much of the literature from around the globe on these issues, Putnam was not entirely surprised by these findings. *Id.* at 142-43. They were consistent with many other studies, using

many different methodologies, carried out in many different places around the world. *Id.* These studies show that people of different racial and ethnic groups have a harder time getting along with one another—and trusting one another—than do people of the same race or same ethnic group. *Id.* The more numerous the members of the outsider group present, and the more contact people have with them, the greater the level of inter-group distrust. *Id.* at 145-49.

Besides the trust question, respondents in Putnam's study were asked a battery of other questions designed to assess the relationship between ethnic diversity and various correlates of social capital such as participation in community projects, registering to vote, doing volunteer work, etc. *Id.* at 147-51. As with the trust question, these other measures of social cooperation and community engagement were found to negatively correlate with ethnic heterogeneity—that is to say that the greater the ethnic heterogeneity, the less social cooperation was present. *Id.* at 149. In racially and ethnically diverse communities, there is a decline in social solidarity, community activities, and general neighborliness as people tend to withdraw into themselves and become more isolated and alienated from others nearby. In Putnam's words, people under such circumstances “hunker down” and “pull in like a turtle.” *Id.* Although Putnam believes that in the long run racial and ethnic diversity can have beneficial effects, his study shows that in the short run its effects are overwhelmingly negative. *Id.* at 164. Social isolation, alienation, and anomie are its immediate results. *Id.* at 147-51. “Diversity,” he says, “at least in the short run, seems to bring out the turtle in all of us.” *Id.* at 151.

The contact hypothesis gained some credibility in the immediate post-WWII era because of certain high-profile success stories in a number of areas of American life where contact clearly did forge cross-racial bonds of cooperation and trust. Perhaps the greatest success along these lines was the racial integration of baseball and, following baseball, basketball, football, and other professional sports. Despite initial resistance, when Jackie Robinson broke the color barrier in professional baseball in 1947, his white teammates and white fans came to accept him for the outstanding athlete he was, helping to dispel the prejudices of countless white New Yorkers.

Robinson's case—and the integration of professional sports more generally—showed that the contact hypothesis was sometimes quite valid. Under certain circumstances, contact clearly can reduce prejudice and further cooperation and understanding between members of different racial and ethnic groups. Beginning in the 1950s, social scientists began to tease out the factors that distinguished prejudice-reducing contact from contact which did not have this effect. Harvard psychologist Gordon Allport's influential book, *The Nature of Prejudice*, was the first systematic attempt along these lines. See generally Gordon Allport, *The Nature of Prejudice* (Addison-Wesley 1979). Allport was most concerned with black/white cooperation, and he realized that simple contact did not dispel prejudice. No group of whites in America, he realized, had more daily contact with blacks than those in places like Mississippi, Alabama, and other areas of the Deep South, yet none held stronger prejudices against blacks. *Id.* at 273-76. One of the key ingredients to prejudice-dispelling contact, Allport came to realize, was what he called "equality of status." *Id.* at 273.

Whites knew blacks in the Deep South primarily as uneducated maids, janitors, field hands, and prison-release laborers but generally knew few blacks of higher status. “The jobs that most Negroes and members of certain other minority groups hold are at or near the bottom of the occupational ladder,” Allport wrote. *Id.* at 273-76. “They carry with them poor pay and low status. Negroes are usually servants, not masters; doormen, not executives; laborers, not foremen.” *Id.* at 273. Allport went on to explain that “evidence is now accumulating that this differential status in occupation is an active factor in creating and maintaining prejudice.” *Id.* “[O]ccupational contacts with Negroes of equal status,” he said, “tend to make for lessened prejudice. It helps also if one knows Negroes of higher occupational status than one’s own.” *Id.* at 276. Allport also suggested that the pursuit of common goals requiring intergroup cooperation, coupled with the outside support of custom, authorities, and reigning social values, could be important factors in enabling contact situations to reduce intergroup prejudice. *Id.*

Since Allport’s pioneering work, researchers have isolated other prejudice-reducing factors. Social psychologists today generally agree that most of the following six factors must be present for contact to have a strong positive effect in reducing negative stereotyping and furthering greater harmony among diverse ethno-racial groups: (1) equality of status between those making the contact; (2) the opportunity to encounter sufficient numbers of people who counter the negative stereotype one group may hold of the other; (3) a non-competitive environment in which one ethnic group’s gain is not seen to be at the expense of another group’s loss; (4) the challenge of a common goal or common task that requires some

collective or cooperative effort to achieve; (5) the lack of artificiality to the interaction; and (6) the support of wider community norms and of those in authority. See Miles Hewstone and Rupert Brown, eds., *Contact and Conflict in Intergroup Encounters* (Basil Blackwell 1986); Thomas Pettigrew, *Intergroup Contact Theory*, *Annual Review of Psychology*, vol. 49, 1998, at 65-85; John Dovidio, Samuel Gaertner, and Kerry Kawakami, *Intergroup Contact: The Past, Present, and Future*, *Group Processes and Intergroup Relations*, vol. 6, 2003, at 5-21. Subsequent research has thus shown that cross-racial interactions do have the ability to break down racial barriers, but only when they occur in ways that satisfy these factors.

Given this list, it is easy to see why contact with a high-performing black infielder like Jackie Robinson might greatly enhance prejudice-reduction among his white teammates and fans. All six factors were present when Dodger owner Branch Rickey tapped Robinson to play for Brooklyn. It is equally easy to see why the upward-ratcheting of under-qualified black or Latino students into competitive colleges and universities in contravention of the widely shared norm of academic merit might not have such prejudice-reducing effects. Almost none of the listed prerequisites and facilitators are present in the context of race-preferences for higher education admissions.

As discussed more fully below, researchers in major studies of race on college and university campuses have found that white and Asian students report a significant “social distance” regarding black and Latino “beneficiaries of affirmative action.” Douglas S. Massey, Camille Z. Charles, Garvey F. Lundy, & Mary J. Fischer, *The Source of the River: The Social Origins of Freshmen at America’s Selective Colleges*

and Universities 138-45 (Princeton University Press 2006) [hereinafter *The Source of the River*]. In his many years of teaching at the University of California, Berkeley, John McWhorter similarly saw the black/white and black/Asian difference in entering academic credentials brought on by affirmative action as a major impediment to successful racial integration. See John McWhorter, *Losing the Race: Self-Sabotage in Black America* 89, 229-30, 236 (The Free Press 2000) [hereinafter *Losing the Race*]. Blacks tended to self-segregate, McWhorter observed, in part because they felt that whites and Asians might be looking down on them because of their inferior academic accomplishments. *Id.* In Allport's terminology, the black affirmative action students lacked an equivalent "social status" to many whites and Asians on competitive college campuses where social status is often measured by academic achievement and brain power.

Besides its violation of the principle of "status equality," the use of racial preferences in college admissions also violates two other principles of prejudice reduction, namely, respect for widespread community norms and avoidance of group-against-group competitive antagonisms. The widespread community norm in this case, of course, is the principle of merit-selection, a principle with considerable resonance across the American demographic spectrum. And the principle of avoiding group-against-group antagonisms is surely breached in the very process of allocating burdens and benefits according to ethnic and racial group membership.

Thus, contrary to both the arguments of proponents of affirmative action and the Court's apparent belief in *Grutter*, research suggests that increased

contact between racial groups on college and university campuses as a result of race-based admissions preferences does not enhance race relations and, as discussed more fully below, arguably undermines such relations.

II. Race-based preferences in admissions are harmful to race relations on college and university campuses and negatively impact black and Latino students.

Although few college and university administrators will openly acknowledge the fact, administrators commonly equate “diversity” in higher education with having a percentage of black and Latino students in a student body that reflects the percentage of such races in the larger population. Thus, colleges and universities like the University of Texas at Austin use race-based admissions criteria in an unspoken attempt to achieve a “population-proportional quota system.”

As noted above, proponents of affirmative action and the courts frequently attempt to justify these attempts to manufacture increased racial diversity by arguing that increased diversity benefits all students by improving race relations and eliminating racial stereotypes among students, while noting that diversity particularly benefits black and Latino students by giving them greater educational opportunities. Subsequent sociological research has shown, however, that use of race-based preferences in admissions often undermines race relations at colleges and universities and negatively impacts black and Latino students.

a. Use of racial preferences in admissions undermines race relations on college and university campuses.

Scholars and the courts have long-recognized that discrimination on the basis of race is anathema to the core principles of our society and negatively impacts race relations as a whole. Indeed, this is the very reason that the courts require a “compelling state interest” in order to allow overt discrimination on the basis of race. Despite the obvious harms to our society that are associated with government actors favoring one race over another in distributing benefits, the use of race in admissions in higher education lingers as one of the few clear instances of overt racial discrimination by government actors in our country. Although all Americans can appreciate the value of diversity as an ideal, as one scholar has noted, Americans value diversity “when it is achieved in ways that are consistent with deeply held moral values like merit.” Peter H. Schuck, *Diversity in America* 190, 321-22 (Harvard University Press 2003). Thus, research suggests that, while Americans support the notion of naturally occurring diversity, when efforts to manufacture diversity fail to comport with widely shared American ideals such as merit and fairness, such efforts actually harm race-relations.

This phenomenon is evident in a series of studies focusing on race-based preferences and academic diversity.⁸ In a study titled *The Shape of the River*,

⁸ Significantly, these studies are among the largest and best funded studies ever conducted on race-relation issues on college and university campuses. Moreover, the studies were funded by the Andrew W. Mellon Foundation, an organization strongly committed to preserving the use of racial preferences in aca-

researchers found widespread support among students on 28 competitive college campuses for their college's or university's emphasis on "diversity." William G. Bowen & Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* 241-47 (Princeton University Press 1998) [hereinafter *The Shape of the River*]. This was true of white students as well as black students. *Id.*

But in a second study titled *The Source of the River* carried out by Princeton sociologist Douglas Massey and his colleagues, a question was asked of students on the same 28 campuses regarding how close the respondents felt to various demographic groups, including students who had "benefited from affirmative action." *The Source of the River* at 138-45. Both whites and Asians expressed considerable "social distance" from blacks and Latinos who "benefited from affirmative action." *Id.* As the authors of this second study acknowledged, this evidence of increased "social distance" suggested a stereotype among students that "without affirmative action most black and Latino students would not be admitted." *Id.* at 143, 145.

Moreover, the authors of *The Source of the River* noted that there was a widely shared rank order of racial groups in terms of perceived traits favorable to academic success, with Asians being perceived most favorably, followed by whites, followed by Latinos, and finally followed by blacks. *Id.* at 145. The study noted that Latinos and blacks were perceived as being particularly "academically underqualified." *Id.*

demic admissions, which largely eliminates any possible concern that the studies were biased in a way that would overstate the negative impacts of race-based preferences on such campuses.

Although the authors of the study did not offer an explanation of the different perceptions of the academic qualifications of the various racial groups, the fact that Asian and white students were in fact significantly better qualified academically than their Latino and black peers certainly suggests that racial preferences in admissions may have played a significant role in such perceptions. What the authors considered unfortunate “stereotypes” were in fact simply accurate perceptions of group differences in academic skill.

The “social distance” and stigma harm uncovered in *The Source of the River* was highlighted in a third study of students at the same colleges titled *Taming the River*. Camille Z. Charles, Mary J. Fischer, Margarita A. Mooney, & Douglas S. Massey, *Taming the River: Negotiating the Academic, Financial, and Social Currents in Selective Colleges and Universities* 189, 206 (Princeton University Press 2009) [hereinafter *Taming the River*]. On the stigma-harm of racial preferences, the study noted that “[i]f white students believe that many of their black peers would not be there were it not for ‘lowering’ of standards under affirmative action and, more important, if black students *perceive whites* to believe this, then affirmative action may indeed undermine minorities’ academic performance by heightening the social stigma they already experience because of race or ethnicity.” *Id.* (emphasis in original).

The newest research bearing on this question examined a large sample of students enrolled in one of six liberal arts colleges and seven universities. See Jesse D. Rude, Gregory C. Wolniak, & Ernest T. Pascarella, *Racial Attitude Change During the College Years*, 2012 Annual Meeting of the American Educa-

tional Research Association, Apr. 6, 2012 [hereinafter *Racial Attitude Change*]. It is novel in compiling data that reveals how student attitudes about race change over the course of four years of education in an environment that has been shaped by preferential admissions policies. Students in the sample were asked about their view of “the importance of helping to promote racial understanding.” *Id.* at 7. If racial preferences worked as they were supposed to, over the years students would be expected to become increasingly convinced of the benefits of having a highly diverse student body. The researchers found, to their surprise and dismay, that over their four years in school students in each demographic category came to feel less and less committed to the goal of “helping racial understanding.” *Id.* at 17-19. What is more, the sharpest drops in support of this aim came from black and Hispanic students. *Id.* at 26-29.

Although these studies are certainly among the largest and most recent documenting the problems of “social distance” and stigma related to the use of race-based preferences, these problems have long been recognized by opponents of the use of race-based preferences. Justice Douglas once noted that “a segregated admissions process creates suggestions of stigma and caste no less than a segregated classroom, and in the end it may produce that result despite its contrary intentions.” *DeFunis v. Odegaard*, 416 U.S. 312, 343 (1974) (Douglas, J., dissenting). Many scholars have reiterated this concern. In particular, Thomas Sowell’s classic study, *Black Education Myths and Tragedies*, was prescient, advancing criticisms of preferential policies that remain just as pertinent four decades later. See Thomas Sowell, *Black Education: Myths and Tragedies* 242 (David McKay Co. 1972).

The use of racial preferences has also been thought by some of America's most perceptive observers of race relations on college campuses to encourage a kind of protective self-segregation, especially among black students. Harvard sociologist Orlando Patterson, who has said that his original vision of affirmative action was one that encouraged hope of promoting an integrationist ideal of an "ecumenical America," found his hope dashed by the actual situation on leading American college campuses. Orlando Patterson, *The Ordeal of Integration* 157 (Counterpoint 1997). "[B]oth on and off our campuses," he wrote, "affirmative action seems to have been distorted by its beneficiaries into the goal of balkanizing America both intellectually and culturally. One has only to walk for a few minutes on any of the nation's great campuses to witness the extent of ethnic separatism, alternating with periodic outbursts of ethnic, gender, and other chauvinistic hostilities. The thought that repeatedly haunts me as I travel the nation's campuses is that the South did indeed finally win the moral battle over integration, for no group of people now seems more committed to segregation than Afro-American students and young professionals." *Id.*

Patterson goes on to suggest that there is an even more harmful spill-over effect in which black students who have self-segregated on affirmative action campuses carry this segregationist trend with them when they leave college. "To a lesser extent," he writes, "the tendency of the new Afro-American middle class to segregate itself residentially and to scoff at the norms and values of the ecumenical mainstream are simply the off-campus versions of this lamentable betrayal and abandonment of the once cherished goal of integration." *Id.*

b. Use of racial preferences in admissions negatively impacts black and Latino students.

In addition to increasing racial self-separation and fostering stereotypes among students at colleges and universities, thereby negatively impacting all students, black and Latino students in particular suffer various negative impacts as a result of the use of race-based preferences in admissions. Chief among these negative impacts are: (1) the increased risk that such students will underperform in college relative to their past academic achievements, which may result in disidentification with academic excellence; (2) a reduction in effort by black and Latino students, known as “low effort syndrome;” and (3) the creation of motivational disincentives based on the expectation of the benefits of future racial preferences.

1. Use of racial preferences in admissions increases the risk that minority students will underperform in college relative to their past academic achievement, which may result in disidentification with academic excellence.

Research has long shown that black students “underperform” relative to their entering SAT scores and high school grade-point-averages after matriculating to a college or university. See, e.g., Robert Klitgaard, *Choosing Elites* 160-65 (Basic Books 1984). “Underperformance” is a technical term in the educational research literature and refers to the fact that if blacks are matched with whites attending the same college who have the same entering academic credentials in terms of high school grades and standardized test scores, the blacks on average will get substan-

tially lower grades and wind up with a lower class ranking than the whites. Studies of Latinos in this regard are much more limited, though they too appear to “underperform.”

This underperformance phenomenon has been observed with black students since the very beginning of the affirmative action era in the early 1970s and persists to this day. Black students with comparable SAT scores and high school academic backgrounds to white students do not do as well as the white students in terms of their grades in college and by other college academic measures. See *America in Black and White* at 401-05; *Reflections* at 1605-08; Stephen Cole and Elinor Barber, *Increasing Faculty Diversity: The Occupational Choices of High-Achieving Minority Students* 121-23 (Harvard University Press 2003). Indeed, as noted in *The Shape of the River*, “[a]t almost every college in our sample, black students are not only performing less well academically than whites but also performing below the levels predicted by their SAT scores.” *The Shape of the River* at 77, 88. This underperformance in turn has been shown to cause black students to “disidentify” with the realm of academic excellence and focus their energies in areas like social life and extracurricular activities where they do not feel inferior.

Studies suggest that colleges and universities that give very significant affirmative action boosts to black students over white students and Asian students enhance the risk of disidentification with academic excellence among minority students. Some of the best documentation of these effects is found in *Taming the River*, in which the authors acknowledge that the greater disparity between academic creden-

tials of black students and others at the same university, the greater the degree of underperformance by the black students. *Taming the River* at 174, 186, 199-200, 208. These acknowledgments of the detrimental impacts of affirmative action admissions on black students are particularly significant given that the authors of the study and those funding the research are firmly in favor of race-based preferences.

2. Use of racial preferences increases the risk that black and Latino students will suffer “low effort syndrome.”

Disidentification with academic excellence will often produce what anthropologist John Ogbu called “low effort syndrome.” See John Ogbu, *Black American Students in an Affluent Suburb: A Study of Academic Disengagement* (Lawrence Erlbaum Associates 2003). By this Ogbu meant the tendency for many students to do just enough work to pass their courses and avoid academic trouble without actually working to do as well in school as their talents suggest they might. See generally *id.* Individuals who disidentify with academic excellence will often adopt such a low effort syndrome on their own, but the phenomenon becomes more prevalent when subcultures develop in which low effort postures are cultivated and reinforced by subcultural norms. Even more than most people, teenagers and young adults like to spend time with people like themselves, and their peer group norms can often be enormously powerful in influencing behavior beyond individual inclinations.

The clearest example of a college subculture of this kind that researchers have explored is the “jock subculture” of recruited athletes, consisting of students who have often been accepted to highly competitive

colleges on the basis of their athletic prowess without meeting their institution's normal academic standards. In *The Game of Life*, James Shulman and William Bowen explain how subcultures of athletes often form around their team sport and how such athletes usually put little effort into academic striving. See James Shulman and William Bowen, *The Game of Life: College Sports and Educational Values* (Princeton University Press 2001). Like many black students admitted under affirmative action programs, athletes often "underperform" their entering academic credentials and, even in the off-season, get lower grades than their SAT scores and high school grades would predict. *Id.* at 59-86. Shulman and Bowen see a clear parallel between the causes of underperformance among recruited athletes and affirmative action black students, with the culprit in both cases being the lowered standards of admission applied to both of the underperforming groups. *Id.* at 83-86.

Much has been written about the taunting of hard working black elementary and secondary school students by their peers for "acting white." See Roland Freyer, "Acting White": *The Social Price Paid by the Best and Brightest Minority Students*, *Education Next*, vol. 6, Winter, 2006, at 53-59; Roland Freyer and Paul Torelli, *An Empirical Analysis of "Acting White"*, National Bureau of Economic Research, Working Paper 11334 (May 2005); Stuart Buck, *Acting White: The Ironic Legacy of Desegregation* (Yale University Press 2010). Presumably, those blacks who make it to the more competitive colleges and universities have avoided the corrupting effects of the more extreme versions of this anti-intellectualism. But what little research has been done on black work ethic in college is not encourag-

ing. In *The Source of the River*, the college students in their sample consistently rated blacks the laziest of the four ethno-racial groups, while Asians were seen as the hardest working. Most revealing, “the group that rated blacks as laziest . . . was blacks themselves.” *The Source of the River* at 147. Not surprisingly, in *The Shape of the River*, black graduates of the schools surveyed were much more likely than whites to say that they wished they had studied more when they were in college. *The Shape of the River* at 208. “These retrospective expressions of regret by African American respondents,” the authors concluded, “need to be thought about in the context of the debate over factors affecting their academic performance . . . and especially the suggestion that peer group pressures discourage studying.” *Id.*

3. Use of racial preferences at the undergraduate and graduate levels create disincentives for black and Latino students to work hard by creating expectations among such students that they will benefit from preferential treatment on the basis of race in the future.

Arguably the greatest harm to the academic performance of black and Latino students in college comes not from the upward-ratcheting system that exists at the undergraduate level but from the similarly structured preference regime that they know awaits them once they get out of college. This is the same disincentive to hard work that critics have long charged works to diminish the need for college-bound black and Latino high school youth to work as diligently as their white and Asian classmates. Since almost all highly selective professional schools and

graduate programs, as well as many businesses, demand less of black and Latino college graduates than of whites and Asians, those in the preferred groups, it is claimed, need not compete head-to-head with those in the non-preferred groups. Enormous racial preferences are given in admissions to graduate and professional schools. *See Reflections* at 1609-14; Abigail Thernstrom and Stephan Thernstrom, *Secrecy and Dishonesty: The Supreme Court, Racial Preferences, and Higher Education*, Constitutional Commentary, Spring 2004, at 229-32. Regrettably, Justice O'Connor's faith that the racial gap in achievement in higher education would disappear within 25 years, and was indeed already closing, was not based on any close inspection of the available empirical data. *See Grutter*, 539 U.S. at 343.

Unfortunately there is little survey data relevant to evaluating this claim, though it has great commonsense appeal, and there are certainly strong personal testimonies that confirm it. For instance, John McWhorter explained how knowledge of preferential admissions at the undergraduate level adversely affected his own work ethic in the Philadelphia prep school he attended. "I can attest that in secondary school I quite deliberately refrained from working to my highest potential because I knew that I would be accepted to even top universities without doing so. Almost any black child knows from an early age that there is something called affirmative action which means that black students are admitted to schools under lower standards than white; I was aware of this at at least the age of ten. And so I was quite satisfied to make B+'s and A-'s rather than the A's and A+'s I could have made with a little extra time and effort." *Losing the Race* at 233.

McWhorter found a similar attitude among many of his black students at Berkeley, and he was scathing in his indictment of affirmative action policy. “In general,” he wrote, “one could think of few better ways to depress a race’s propensity for pushing itself to do its best in school than a policy ensuring that less-than-best efforts will have a disproportionately high yield If every black student in the country knows that not even the most selective schools in the country require the very top grades or test scores of black students, that fine universities just below this level will readily admit them with even a B+/B dossier by virtue of their ‘leadership qualities’ or ‘spark,’ and that even just a better-than-decent application file will grant them admission to solid second-tier selective schools, then what incentive is there for any but the occasional highly driven student to devote his most deeply committed effort to school?” *Id.*

Many other observers with extensive experience with black college students have had similar experiences as McWhorter. Vanderbilt Law School professor Carol Swain, for instance, found a similar harm to the on-campus work ethic of black students in the undergraduate college she attended. “As an older undergraduate student in the 1980s,” Swain wrote, “I often encountered other black college students struggling with grade point averages at or below a 2.00 on a 4.00 scale who voiced aspirations of wanting to become lawyers and doctors. If I challenged them directly by responding, ‘But I thought you needed a 3.0 to get into law or medical school’—almost invariably the student would respond, ‘Oh, they have to let us in. They have to let us in, because of affirmative action.’ Now, I don’t believe that many of those students were actually admitted to profes-

sional schools, but the misinformation led some genuinely to believe that traditionally white professional schools were obligated to take them, regardless of their less-than-stellar performance. This perception, I believe, affected how hard these students trained. The knowledge of affirmative action's double standards no doubt caused some to neglect burning the midnight oil Could such beliefs be a factor in the well-documented fact that black students in college underperform their SAT scores—that is, black students with the same SAT scores as whites exhibit a considerably lower performance in college than white students?" Carol Swain, *An Inside Look at Education and Poverty*, Academic Questions, Spring, 2006, at 48-49.

A final observation is provided by Shelby Steele, who notes the distressing fact that so many black students from privileged backgrounds do worse academically in secondary school and college than whites and Asians from more modest backgrounds. "The top quartile of black American students," Steele writes, who often come "from two-parent families with six-figure incomes and private school educations, is frequently not competitive with whites and Asians even from lower quartiles. But it is precisely this top quartile of black students that has been most aggressively pursued for the last thirty years with affirmative-action preferences. Infusing the atmosphere of their education from early childhood is not the idea that they will have to steel themselves to face stiff competition but that they will receive a racial preference, that mediocrity will win for them what only excellence wins for others." Shelby Steele, *A Dream Deferred* 226-27 (Harper and Row 1998).

Mediocrity winning for some "what only excellence wins for others" is perhaps the best description of the

incentive harm done by current affirmative action programs. By granting huge racial preferences, both at the undergraduate and postgraduate levels, the institutions of higher learning in America have offered a license to underperforming minorities to stay underperforming and not to compete with others. Such policies serve as a “pernicious palliative” that help to maintain the status quo in the performance profiles of the higher- and lowering-achieving groups. Far from constituting a “compelling state interest,” their maintenance constitutes no positive interest at all but a great social harm. They deserve the same opprobrium as segregated classrooms and Jim Crow railway cars.

CONCLUSION

For all the reasons discussed above, the “diversity” that is typically established through racial preferences in admissions cannot be celebrated. It has far greater costs than benefits. By heightening racial consciousness on campus, encouraging students to think of themselves in terms of intellectually superior and intellectually inferior racial groups, undermining self-confidence and reinforcing paralyzing doubts about the abilities of those preferentially treated, telegraphing to black and Latino students that their race or ethnicity can make up for substandard performance in high school and college, and encouraging the growth of protective, self-segregating groups on campus that are inhibited from reaching out in openness and friendship across color lines, racial preference policies have caused and continue to cause great harm to students of all races.

On balance, these policies have been a disaster for race relations on campuses and in other areas of American life, and they should be struck down as a

clear violation of the Equal Protection Clause. As Justice Douglas and Justice Thomas warned in their dissents in *Defunis*, 416 U.S. at 331-45 (Douglas, J., dissenting), and *Grutter*, 539 U.S. at 349-87 (Thomas, J., concurring in part and dissenting in part), respectively, what is touted as benign discrimination can often be more insidious and reek more havoc than more overtly malicious discrimination. Given the research discussed herein, it is clear that there is no compelling state interest in educational diversity when it is achieved through racial preferences. Indeed, there is substantial evidence that such preferences cause great harm to those that the preferences are intended to benefit and to all others on college campuses. Experience should have taught us that, in the educational sphere as elsewhere, there is no such thing as benign racial discrimination.

For the foregoing reasons, the Court should reverse the ruling of the Fifth Circuit, should overrule its decision in *Grutter*, and should hold that the use of race as a factor in college and university admissions is constitutionally impermissible.

Respectfully submitted,

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