

No. 11-345

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In the  
**Supreme Court of the United States**

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ABIGAIL NOEL FISHER,

*Petitioner,*

v.

UNIVERSITY OF TEXAS AT AUSTIN ET AL.,

*Respondents.*

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

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**BRIEF *AMICUS CURIAE* OF GAIL HERIOT,  
PETER KIRSANOW & TODD GAZIANO,  
MEMBERS OF THE UNITED STATES  
COMMISSION ON CIVIL RIGHTS, IN  
SUPPORT OF THE PETITIONER**

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**QUESTION PRESENTED**

1. Did the Fifth Circuit err in upholding Respondents' race-preferential admissions policy against a Fourteenth Amendment challenge?

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**IDENTITY AND  
INTEREST OF AMICI CURIAE**

Amici<sup>1</sup> Gail Heriot, Peter Kirsanow, and Todd Gaziano (collectively “the Commissioner Amici”) are three members of the eight-member United States Commission on Civil Rights. Commission members are part-time appointees of the President and Congress. This brief is being filed in the Commissioner Amici’s individual capacities.

The Commission was established pursuant to the Civil Rights Act of 1957, P.L. 85-315, 71 Stat. 634 (1957)—the first civil rights law passed by Congress since Reconstruction. One of the Commission’s core duties is to gather evidence on civil rights issues and make recommendations to Congress, the President and the American people. As then-Senate Majority Leader Lyndon Johnson put it, the Commission’s task is to “gather facts instead of charges” “it can sift out the truth from the fancies; and it can return with

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

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



recommendations which will be of assistance to reasonable men.”<sup>2</sup>

In 2010, the Commission, with the support of the Commissioner Amici, released a report entitled *Encouraging Minority Students to Pursue Science, Technology, Engineering, and Math Careers*. This report examined the extensive empirical research indicating that students who attend schools where their entering academic credentials put them in the bottom of the class are less likely to follow through with an ambition to major in science or engineering than similarly-credentialed students who attend schools where their credentials put them in the middle or top of the class. Affirmative action thus works to the detriment of its supposed-beneficiaries, who are seldom informed of this risk. Three years earlier, the Commission, with the support of the Commissioner Amici then on the Commission, released a report entitled *Affirmative Action in American Law Schools*, in which it examined similar evidence in the legal education context. The research examined in that Report indicates that students, regardless of race, are less likely to graduate from law school and pass the bar if they are the beneficiaries of preferential treatment in admissions than if they attend a law school at which their entering academic credentials are like the average student’s. The Commissioner Amici believe that they are in a special position to inform the Court about this research. They believe that on account of this research there is a strong public

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<sup>2</sup> 103 CONG. RECORD 13,897 (1957) (statement of Sen. Lyndon Johnson).

interest in preventing the Court's decision in *Grutter v. Bollinger*, 539 U.S. 306 (2003), from being expanded.

### SUMMARY OF ARGUMENT<sup>3</sup>

This Court's ruling in *Grutter v. Bollinger* was unusual. Racial discrimination, when practiced by a State, is almost always a violation of the Fourteenth Amendment's Equal Protection Clause. But in *Grutter*, the Court ruled that an exception could be made when a state university gives preferential treatment to racial minority applicants for admission.

That limited exception, however, applied only to efforts to admit a "critical mass" of minority students when those efforts are aimed at capturing any educational benefits that a diverse student body might bring. While the Court did not specifically define "critical mass" in its opinion, it was clear that the concept was a crucial limiting factor to a state university's authority to discriminate.

In this case, the Fifth Circuit has given the concept of "critical mass" an expansive reading—one that is inconsistent with the letter and spirit of *Grutter* and with the Equal Protection Clause. Even if it could be said that *Grutter* left ambiguous the meaning of "critical mass," it is an important question of Constitutional law that should be settled by this Court and not the Fifth Circuit. The evidence discussed in this brief underlines that question's crucial importance. If *Grutter* is allowed to expand, the results will be unfortunate for the very persons

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<sup>3</sup> The argument in this brief is based on the writings of Professor Gail Heriot, one of the amici herein.

that affirmative action was originally designed to benefit.

## ARGUMENT

### THE COURT SHOULD GRANT THE PETITION FOR CERTIORARI TO PREVENT ITS DECISION IN *GRUTTER v. BOLLINGER* FROM BEING EXPANDED BEYOND ITS INTENDED LIMITS

**A. Race-Preferential Admissions Were Intended to Facilitate the Entry of Minorities Into Higher Education and Eventually into High-Prestige Careers. There Is Considerable Evidence, However, That They Have the Opposite Effect.**

Over forty years ago, universities with selective admissions policies began to adopt affirmative action policies. By lowering admissions standards for African-American and Hispanic students, well-meaning administrators hoped to increase the number of minority students on campus and ultimately to promote their integration into high-prestige careers and mainstream society.

While nearly all Americans saw those goals as laudable, reasonable minds differed on the wisdom of this approach. No less a liberal icon than Justice Stanley Mosk warned of the risks associated with such temporary compromises with the principle of color-blindness, when, writing for the California Supreme Court in *Bakke v. Regents of the University of California*, 18 Cal. 3d 34, 62-63 (1976), *aff'd in part, rev'd in part*, 438 U.S. 265 (1978), he held

racially discriminatory admissions to be unconstitutional:

To uphold the University would call for the sacrifice of principle for the sake of dubious expediency and would represent a retreat in the struggle to assure that each man and woman shall be judged on the basis of individual merit alone, a struggle which has only lately achieved success in removing legal barriers to racial equality.

For good or ill, Mosk's vision of civil rights did not prevail. His opinion in *Bakke* was superseded by this Court's decisions in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), and *Grutter v. Bollinger*. Race-preferential policies mushroomed, and thriving diversity bureaucracies were established to administer them.

If Mosk was right, it will take effort to correct the mistake at this late date. It isn't just the iron rule of bureaucracy at work today—that first and foremost, bureaucracies work to preserve themselves. Many distinguished citizens—university presidents, philanthropists, and legislators—have built their reputations on their support for race-preferential admissions. Their jobs are not at stake, but their sense of accomplishment may be. Overcoming that is not easy.

But if anything should cause thoughtful supporters of race-preferential admissions policies to reverse course—or at least refrain from proceeding further—it is the mounting empirical evidence showing these policies are doing more harm than good for their intended beneficiaries. If this research

is right, we now have fewer minority science and engineering graduates than we would have under race neutral admissions policies. See *infra* Part B. We have fewer minority college professors, see *infra* Part C., and fewer minority lawyers too. See *infra* Part D. Preferential treatment has made it more difficult for talented minority students to enter high-prestige careers.<sup>4</sup>

How can it be that affirmative action reduces the number of minority professionals? One of the consequences of widespread race-preferential policies is that minority students end up distributed among colleges and universities in very different patterns from their white and Asian counterparts. When the highest schools on the academic ladder relax their admissions policies in order to admit more under-represented minority students, schools one rung down must do likewise if they are to have minority students too. The problem is thus passed on to the schools another rung down, which respond similarly. As a result, under-represented minority students are overwhelmingly at the bottom of the distribution of entering academic credentials at most selective schools.

The problem is not that there are no academically gifted minority students. But there are

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<sup>4</sup> After *Regents of the University of California v. Bakke*, 438 U.S. 265, colleges often purported to engage in preferences to confer the benefits of diversity on all students, since that was the only purpose approved in that case. The notion that affirmative action benefits minority students in particular was downplayed rhetorically. But it is doubtful any school willing to acknowledge that minority students were thereby made worse off would continue the practice. Minority students are not public utilities.

simply not enough at the very top tiers to satisfy the demand, and efforts to change that have created a credentials gap up and down the academic pecking order.

Entering credentials matter. Students whose academic credentials are well below those of the average student in a particular school usually earn grades to match. While some students will outperform their academic credentials, just as some students will under-perform theirs, most students perform in the range that their entering credentials suggest. Anyone who thinks differently is engaging in wishful thinking at student expense.

No serious supporter of race-preferential admissions denies this. For example, former Ivy League university presidents William G. Bowen and Derek Bok, leading affirmative action advocates, candidly admit that the problem is serious: “College grades [for affirmative action beneficiaries] present a ... sobering picture,” they wrote. “The grades earned by African-American students at the [elite schools we studied] often reflect their struggles to succeed academically in highly competitive academic settings.” William G. Bowen & Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* 72 (1998) (“*Shape of the River*”).

These so-called affirmative action beneficiaries are not bad students. Many would be honor students elsewhere. But they are subtly being made to feel as if they are less talented than they really are. Many may actually be learning less. Everyone knows that a good student can get in over his head if placed in a classroom with more academically prepared

students. (The Commissioner Amici, who are all lawyers, have little doubt, for example, that they would learn less in a physics class at Cal Tech, which specializes in training the best-prepared science students, than they would at a university with less formidable competition.)

Divorced from the affirmative action context, this phenomenon would seem ordinary and unobjectionable. It is only when it becomes associated with this politically-charged issue that it becomes controversial.<sup>5</sup>

**B. Extensive Research Indicates that Race-Preferential Admissions Have the Effect of Discouraging Preference Beneficiaries from Pursuing Science and Engineering Careers.**

Majoring in science and engineering can be difficult. Many students who start out doing so switch to something easier. Others drop out or even

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<sup>5</sup> See James Davis, *The Campus as a Frog Pond: An Application of the Theory of Relative Deprivation to Career Decisions of College Men*, 72 *Am. J. Socio.* 17 (1966). Writing outside the affirmative action context, Davis found that college grades were more strongly correlated with the decision to enter a high-prestige career than was the selectivity of the institution. In some cases at least, the added self-confidence one enjoys as a result of being the big frog in the small frog pond appeared to outweigh whatever advantages an elite education in a larger, more glamorous frog pond can offer. Davis therefore offered the following advice: “Counselors and parents might well consider the drawbacks as well as the advantages of sending a boy to a ‘fine’ college, if, when doing so, it is fairly certain he will end up in the bottom ranks of his graduating class.” *Id.* at 30-31. As a result of race-preferential admissions policies, two generations of under-represented minority students have now disproportionately had the experience of being the small frog in a highly competitive pond.

flunk out. It should surprise no one that those who fail to attain their goal of a science or engineering degree are disproportionately students whose entering academic credentials put them in the bottom of their college class. Not all stereotypes about science and engineering students are accurate. But the notion that they tend to be highly-credentialed and hardworking is largely on target.

What some do find surprising is this: Three impressive empirical studies have now demonstrated that *part of the effect is relative*. An aspiring science or engineering major who attends a school where her entering academic credentials put her in the middle or the top of her class is more likely to persevere and ultimately succeed than an otherwise identical student attending a more elite school where those same credentials place her in the bottom of the class. Put differently, an aspiring science or engineering major increases her chance of success not just if her entering credentials are high, but also if those credentials compare favorably with her classmates'. See Rogers Elliott, A. Christopher Strenta, Russell Adair, Michael Matier & Jannah Scott, *The Role of Ethnicity in Choosing and Leaving Science in Highly Selective Institutions*, 37 Res. Higher Ed. 681 (1996) ("Elliott"); Frederick Smyth & John McArdle, *Ethnic and Gender Differences in Science Graduation at Selective Colleges with Implications for Admission Policy and College Choice*, 45 Res. Higher Ed. 353 (2004) ("Smyth-McArdle"); Richard Sander & Roger Bolus, *Do Credentials Gaps in College Reduce the Number of Minority Science Graduates?*, Working Paper (Draft July 2009) ("Sander-Bolus").



Part of the reason may be that science and engineering are ruthlessly cumulative. A student who has difficulty with the calculus textbook's first chapter is apt to have difficulty with later chapters and subsequent courses. Since switching majors is easy, the attrition rate is very high.

In the first of these studies—the article by Dartmouth psychologist Rogers Elliott and his co-authors—the single most important cause for minority attrition from science at the eleven selective institutions they studied was the “*relatively* low preparation of black aspirants to science in these schools.” Elliott at 700. The authors were careful to put the emphasis on “relatively.” It wasn't just entering credentials demonstrating highly developed ability at science that mattered, but comparatively high credentials. A student who attended a school at which his Math SAT score was in the top third of his class was more likely to follow through with an ambition to earn a degree in science or engineering than was a student with the same score who attended a school at which his score was in the bottom third.

According to Elliott, a student with an SAT Math score of 580 “who wants to be in science will be three or four times more likely to persist at [the two least competitive schools of the eleven prestigious schools studied] ... than at [the two most competitive schools]...” *Id.* at 702.<sup>6</sup>

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<sup>6</sup> Numerous studies have found that there is no problem with minority students' initial interest in science and engineering, which tends to exceed whites'. *E.g.*, Alexander Astin & Helen Astin, *Undergraduate Science Education: The Impact of*

The extraordinary record of Historically Black Colleges and Universities was a second source of evidence cited in Elliott. With only 20% of total black enrollment, these schools were producing 40% of the black students graduating with natural science degrees, according to the National Science Foundation. Those same students were frequently going on to earn Ph.D.s from non-HBCUs. The National Science Foundation reported, for example, that 36% of the blacks who earned an engineering doctorate between 1986 and 1988 received their undergraduate degree from an HBCU. *Id.* at 700. See Elizabeth Culotta, Black Colleges Cultivate Scientists, 258 Science 1216 (Nov. 13, 1992).

Why have HBCUs been so successful? The Elliott team believed that unlike at mainstream institutions, African-American students at HBCUs are not grouped at the bottom of the class. Roughly half of black students will be in the top half of the class. Academic mismatch is not an issue at these colleges.<sup>7</sup>

Eight years later, University of Virginia psychologists Frederick Smyth and John McArdle used a different methodology and database. But they reported findings consistent with Elliott's conclusion

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Different College Environments on the Educational Pipeline in the Sciences 3-9, Table 3.5 (1993).

<sup>7</sup> One HBCU faculty member—North Carolina Central University's Dr. Walter Patillo, Jr.—vented his frustrations in 1992: "The way we see it, the majority schools are wasting large numbers of good students. They have black students with admissions statistics [that are] very high, tops. But these students wind up majoring in sociology or recreation or get wiped out altogether." Elizabeth Culotta, Black Colleges Cultivate Scientists, 258 Science 1216, 1218 (Nov. 13, 1992).

that “race-sensitive admission, while increasing access to elite colleges, was inadvertently causing disproportionate loss of talented underrepresented minority students from science majors.” Smyth-McArdle at 373.

Smyth-McArdle developed a model that attempts to measure how many more minority students would have succeeded in their goal of a science or engineering degree if colleges had employed race-neutral admissions criteria. It states

According to our model ..., if all the [Science-Mathematics-Engineering]-intending underrepresented minority students had enrolled in similarly functioning colleges where their high school grades and math test scores averaged at the institutional means among [Science-Mathematics-Engineering] intenders, 72 more of the women and 62 more of the men would be predicted to persist in [Science-Mathematics-Engineering] (45% and 35% increases, respectively).

*Id.*

Smyth and McArdle’s recommendation was clear: “Admission officials are advised to carefully consider the relative academic preparedness of science-interested students, and such students choosing among colleges are advised to compare their academic qualifications to those of successful science students at each institution.” *Id.* at 353.

The latest contribution to this literature is from UCLA law professor Richard Sander and UCLA senior statistician Roger Bolus. Using data from the nine-campus University of California, they conclude,

“Minority attrition in science is a very real problem, and the evidence in this paper suggests that ‘negative mismatch’ probably plays a role in it.” The multiple approaches to their data yielded consistent results: “[S]tudents with credentials more than one standard deviation below their science peers at college are about half as likely to end up with science bachelor degrees, compared with similar students attending schools where their credentials are much closer to, or above, the mean credentials of their peers.” Sander-Bolus at 23-24.

The Commissioner Amici are aware of no empirical research that challenges these findings. Nevertheless, as far as they are aware, the Commission’s recommendations that students be made aware of these risks have been ignored.<sup>8</sup>

The decision below bemoans the concentration of minorities in soft subjects. Its solution, however, is

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<sup>8</sup> Perhaps part of the reason that institutions have ignored these findings is that in the aftermath of *Grutter*, some federally-designated accrediting agencies and state regulators have ramped up their diversity requirements. Even the most resolute faculties crumble in the face of threats to their accreditation and funding and hence fail to exercise their best academic judgment. The Commissioner Amici regard this as contrary to *Grutter*, which defers only to the *independent, academic* judgment of college faculties, not to policies that are products of non-academic factors. See, e.g., David Bernstein, Affirmative Blackmail, Wall Street Journal (Feb. 11, 2006); Gail Heriot, The ABA’s “Diversity” Diktat, Wall Street Journal (April 28, 2008). See also Susan Welch & John Gruhl, Affirmative Action and Minority Enrollments in Medical and Law Schools 80 (1998) (empirical study reporting that many schools admit being pressured by accreditors, state government and other groups to engage in race preferences).

more preferential treatment, which will likely worsen the problem.

**C. Race-Preferential Admissions Appear to Have the Effect of Discouraging Minority Students from Becoming College Professors.**

In 2003, Drs. Stephen Cole and Elinor Barber published *Increasing Faculty Diversity: The Occupational Choices of High-Achieving Minority Students*—a project funded in part by the Mellon Foundation, an institution that is generally considered a strong supporter of affirmative action. The authors' mission was to determine why more minority members are not attracted to academic careers. Their conclusions, reached after extensively questioning 7,612 high-achieving undergraduates at 34 colleges and universities, pointed to mismatch as the culprit:

The best-prepared African Americans, those with the highest SAT scores, are most likely to attend elite schools .... Because of affirmative action, these African Americans ... are admitted to schools where, on average, white students' scores are substantially higher, exceeding those of African Americans by about 200 points or more. Not surprisingly, in this kind of competitive situation, African Americans get relatively low grades. It is a fact that in virtually all selective schools ... where racial preferences in admission is practiced, the majority of African American students end up in the lower quarter of their class.

...

African American students at the elite schools ... get lower grades than students with similar levels of academic preparation (as measured by SAT scores) than African American students at the nonelite schools .... Lower grades lead to lower levels of academic self-confidence, which in turn influence the extent to which African American students will persist with a freshman interest in academia as a career. African American students at elite schools are significantly less likely to persist with an interest in academia than are their counterparts at nonelite schools.

Stephen Cole and Elinor Barber, *Increasing Faculty Diversity: The Occupational Choices of High-Achieving Minority Students* 124, 212 (2003)(citations omitted).

Soon after publication, the *Chronicle of Higher Education* reported that the Mellon Foundation was “trying to distance itself” from the book’s findings. Unlike similar projects with Mellon funding, this one did not receive a publicity push from the foundation. Dr. Cole told the *Chronicle* that there was “no chance” that he would receive money again from Mellon. “And I don’t care,” he said. “I was trained at a time before social science became so politicized.” “I believe that social science should be objective and value-free, and you should design a study to answer a question and whatever the answer is, that’s what it is.” Robin Wilson, *The Unintended Consequences of Affirmative Action*, *The Chronicle of Higher Education* 10 (Jan. 31, 2003).

**D. Race-Preferential Admissions Appear to Have the Effect of Decreasing the Number of Minority Law Students Who Graduate and Pass the Bar.**

UCLA law professor Richard Sander published his attempt to gauge academic mismatch in law schools in 2003. He found that when elite law schools lower their academic standards in order to admit a more racially diverse class, the ultimate result is a gap in academic credentials between minority and non-minority law students at law schools generally. Up and down the law school hierarchy, the average black student has an academic index that is more than two standard deviations below that of his average white classmate. Only HBCUs are immune to this effect. Richard Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 *Stan. L. Rev.* 367, 416 (2004).<sup>9</sup>

This affects student performance. Sander's research demonstrated that in elite law schools, 51.6% of African-American law students had first-year GPAs in the bottom 10% of their class as opposed to only 5.6% of white students. Nearly

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<sup>9</sup> Large credential gaps also were found in *Gratz v. Bollinger*, 539 U.S. 244 (2003), where the University of Michigan's undergraduate college added 20 points to the academic index of all African-American applicants for admission—the equivalent of an entire letter grade in the applicant's high school GPA. See also Althea Nagai, *Racial and Ethnic Preferences in Undergraduate Admission at the University of Michigan*, Center for Equal Opportunity (October 17, 2006), available at <http://www.ceousa.org/content/blogcategory/78/100>(finding that the University of Michigan actually increased the average preference level for African Americans after *Gratz*).

identical performance gaps existed at law schools at all levels. At mid-range public schools, the median African-American student's first-year grades corresponded to the 5<sup>th</sup> percentile among white students. For mid-range private schools, the corresponding percentile was 8<sup>th</sup>, and for lower-range private schools it was 7<sup>th</sup>. With disappointingly few exceptions, African-American students were grouped towards the bottom of their class. Moreover, the performance gap widened as students continued through law school. Sander at 427-36.<sup>10</sup>

The Commissioner Amici are not aware of anyone who disputes these figures. Even Sander's most passionate critics—and there are some—have to concede that the relative performance of African-American law students is very discouraging. *See, e.g.*, Ian Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 *Stan. L. Rev.* 1807, 1807 (2005) (“Richard Sander’s study of affirmative action at U.S. law schools highlights a real and serious problem: the average black law student’s grades are startlingly low.”).

Only slightly more controversial is Sander’s finding that all this was almost entirely the result of affirmative action. When African-American and white law students with similar entering credentials competed against each other, they performed very close to the same. Sander at 428. Race-based admissions were creating the illusion that African-

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<sup>10</sup> The “low black performance is not the result of test anxiety (the gap is similar or greater in legal writing classes) or some special difficulty that blacks in general have with law school.” Sander at 427.



American law students are somehow destined to do poorly. The real problem is less daunting. There are fewer African-American students than anyone would prefer with the entering credentials necessary for admission on a color-blind basis to the most elite law schools. But there are many more who would do well at mid-tier schools—if they were only attending those schools.

Sander demonstrated that law students at the bottom of their class were worse off than students with the same credentials who attend less competitive law schools. It did so by noting two important effects of race-based admissions policies. First, African-American students attending law schools failed or dropped out at much higher rates than white students (19.3% vs. 8.2%). Sander at 437. Overwhelmingly, this phenomenon was associated with poor performance and not financial hardship, which mattered only very slightly. *Id.* at 439. Since many of these students who left law school would likely have performed better at a less competitive law school, they appear to have been, in a very real sense, victims of affirmative action.

Second, among African Americans who graduated and took the bar, the proportion who passed on their first attempt was not just lower than that for whites, it was lower even when one controls for academic index (LSAT and college GPA). For example, 71% of African Americans with a 400-460 index failed the bar on their first effort, while only 52% of whites did. Similarly, 26% of African Americans with an index between 640 and 700 failed their first time, while only 13% of whites did. *Id.* at 446.

Ultimately, only 45% of African Americans who entered law school passed the bar on their first attempt as opposed to over 78% of whites. Even after multiple attempts, only 57% of African Americans succeeded. The gap was thus never closed. *Id.* at 454.

Something was clearly wrong. When African-American and white law students with similar credentials competed against each other at the same school, they earned about the same grades. And when African-American and white students with the same grades from the same tier school took the bar examination, they passed at the same rate. Yet African-American students as a group had dramatically lower bar passage rates than white students with similar credentials.

As Sander pointed out, the most plausible explanation is that on the whole they were not attending the same law schools. The black and Hispanic students were more likely to be attending an elite school that spends little time on subjects covered on the bar exam and delves instead into more abstract and esoteric legal issues. *Id.* at 449. Affirmative action beneficiaries were struggling while their similarly-credentialed white and Asian peers were learning at a more appropriate pace at less elite schools.

Sander estimated that if law schools were to use race-neutral admissions policies, fewer African-American law students would be admitted to law schools. But since those who were admitted would be attending schools where they had a substantial likelihood of doing well, fewer would fail or drop out. In the end, more would pass the bar on their first try

(1859 vs. 1567) and more would eventually pass the bar (2150 vs. 1981) than under current admissions practices. *Id.* at 473.

In response to this research, the Commission urged grant-making agencies to fund research into this issue and requested state bar associations to “cooperate with this research.”<sup>11</sup> Unfortunately, something closer to the opposite has happened. When Dr. Sander and his ideologically-diverse team of investigators attempted to obtain the data necessary to verify his initial findings, they were met with strong resistance from affirmative-action partisans and have had to institute litigation to obtain public data. *See Sander v. State Bar of California*, Civil Action A128647 (Cal. App. June 10, 2011), rev. granted (August 25, 2011) (holding that defendant’s records are subject to disclosure under the common-law presumption of access to public documents)

**E. *Shape of the River’s Conclusion that Affirmative Action Benefits Minority Students Is Flawed; If Anything, that Book’s Data More Closely Support the Opposite Conclusion.***

Race-preferential admissions supporters sometimes assert that, despite the likelihood of poor grades, minority students are better off accepting a preference from a prestigious school. When an effort is made to support this argument, the citation is inevitably to *Shape of the River*. In that book, the authors calculate that the mean earnings of black men with SAT scores of less than 1000 who attend a

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<sup>11</sup> U.S. Comm’n on Civil Rights, *Affirmative Action in American Law Schools* 143 (2007).

Tier-1 school (e.g. Princeton) are higher than their counterparts at a Tier-2 (e.g. Vanderbilt) or Tier-3 school (e.g. Pennsylvania State). On this basis, they conclude:

Black students admitted to the most selective of [the schools we studied] did not pay a penalty in life ... for having attended such competitive institutions. On the contrary, the black ... matriculants with academic credentials that were modest by the standards of these schools appear to have been well-advised to go to the most selective schools in which they were admitted.

If that was what the authors intended to show, however, their methodology was seriously flawed.

For example, they took account only of SAT scores and not of other academic credentials—like high school rank. One cannot assume that a student with a combined SAT score of 1200 at Princeton is the equivalent of a student with the same score at Pennsylvania State. There is an excellent chance that the first student has a substantially better high school GPA or other distinctions in his favor. That is why he is at Princeton, not Pennsylvania State. Comparing students with the same SAT scores and finding that the student at the more elite school has higher post-graduation earnings, even though he appears to be mismatched at the more elite school, is a false comparison. It is overwhelmingly likely that the student attending the more elite school has a more elite high school record too.<sup>12</sup>

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<sup>12</sup> This is not the kind of error that former Ivy League presidents should make. Much of their schools' publicity is

Given that and other methodological flaws, one would have to expect the data to come out as it did.<sup>13</sup> But even given these flaws, evidence of mismatch comes peeking out coyly from behind the charts. Their own figures show that black men with SAT scores between 1000 and 1099 earn more if they avoid Tier-1 schools. Similarly, black women with SAT scores between 1100 and 1199 earned more if they stayed away from Tier-1.

Meanwhile, buried in Appendices D.5.4 and D.5.5 is a more sophisticated analysis that is barely mentioned in the text. It attempts to tease out how various factors influence the subsequent earnings of blacks who attended one of the 28 colleges or universities. Included among the factors considered are several pre-college considerations: the student's family's socio-economic status, SAT scores, and whether the student was in the top 10% of his high school class. Also included are several factors from his college experience: the selectivity of his college or university; his major; whether his grades put him in the top, middle or bottom third of the class; and whether he went on to earn an advanced degree. Each such factor's effect was measured.

The authors purport to show that attending a Tier-1 school rather than a Tier-3 school on average

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built around the theme that they routinely reject applicants (continued) with perfect SATs who do not otherwise measure up to their standards.

<sup>13</sup> The study compares students within broad bands of SAT scores, rather than students with identical SAT scores. Since Tier-1 schools will tend to have more students towards the top of each band and Tier-3 schools have more towards the bottom, the comparison is biased against mismatch.

contributes to the income of both black men and women. They appear oblivious, however, to the bombshell contained in the figures just a few rows down: *College grades generally contribute more.* Again and again through the different permutations of their analysis, their own figures show it.

Imagine two black males with identical SAT scores; both were in the top 10% of their high school class and both come from middle-class families. Only their colleges are different. The authors convincingly demonstrate that if the two have the same college major and similar grades, the one who attended a Tier-1 school will earn about \$17,365 more than the one who attended a Tier-3 school.

But what if they don't have similar grades? The authors also show that if one student is in the top third of his college class and the other is in the bottom third of his, the former will earn an average of \$34,089 more. By the authors' own calculations, therefore it is better to be a black male at Pennsylvania State in the top third of the class than in the bottom third at Princeton. The increased earnings he gets from high grades are worth almost twice the increased earnings from attending a Tier-1 school. And the boost in earnings he would get for majoring in natural science rather than the humanities would be \$49,537.

If one's class rank and major were unrelated to the selectivity level of one's college, then it would be perfectly sensible for the authors to celebrate the finding that, on average, black males get an earnings boost from attending a Tier-1 school over a Tier-3 school. But they are not unrelated. For students who would not have been admitted but for racial

preferences, the chances of earning grades in the top third of the class are exceedingly remote.

The only question is whether a black student who attends a Tier-1 school and winds up in the bottom third of the class would have likely been in the top third of a Tier-3 school. And the answer to that question, at least in many cases, is yes. Consider, for example, a black male with SAT scores of 1300 who just missed being in the top 10% of his high school class. If he attends Pennsylvania State, his SAT scores will put him exactly at the 75<sup>th</sup> percentile in the entering class of 2011. That would give him an excellent shot at earning grades in the top third and/or graduating with a natural science degree. If he enrolls at Princeton instead, his SAT scores would put him ninety points *below* the 25<sup>th</sup> percentile for that school, making it much more likely his grades will be in the bottom third.<sup>14</sup>

Shape of the River was cited by this Court in *Grutter* as supporting the argument for race-preferential admissions policies. *Grutter*, 539 U.S. at 333. Its actual data supports their opposition.

### CONCLUSION

A generation ago, Justice Mosk opposed deviating from the usual strict prohibition on race discrimination for the sake of a “dubious expediency.” 18 Cal. 3d at 62. The expediency has turned out to be dubious indeed. Taken together, the evidence is quite devastating.

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<sup>14</sup> See US News College Rankings (2011)(reporting the 25<sup>th</sup> and 75<sup>th</sup> percentile SAT score for various schools, including Pennsylvania State and Princeton).

The Commissioner Amici therefore request that the petition for a writ of certiorari be granted.

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Respectfully submitted,

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