No. 11-345

In The Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS, ET AL.

Respondents.

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

BRIEF AMICUS CURIAE FOR RICHARD SANDER AND STUART TAYLOR, JR. IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

The past decade has witnessed a profusion of careful research on the subject of racial preferences, much of it stimulated by this Court's decisions in *Grutter v. Bollinger*, 549 U.S. 306 (2003), and *Gratz v. Bollinger*, 549 U.S. 244 (2003). *Amici curiae* have written this brief to bring to the Court's attention the portions of this research that seem most relevant to the issues under consideration in *Fisher v. University of Texas, et al.*

Richard Sander is an economist and law professor at UCLA, and a leading scholar in the field of affirmative action. Stuart Taylor, Jr. is a lawyer and journalist who has written many articles and a book on various civil rights issues and episodes. They are collaborating on a book about the social science research on, and policy dilemmas involving, racial preferences in higher education admissions.

INTRODUCTION AND SUMMARY OF ARGUMENT

Many of the issues involved in judicial oversight of racial affirmative action in university admis-

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[1] No counsel for a party wrote this brief in whole or in part, and no counsel for a party or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than the *amici curiae* made a monetary contribution to this brief's preparation or submission. Counsel of record for both petitioner and respondents received timely notice of *amicis*' intent to file the brief and consented to it, except that *amici* have not succeeded in giving timely notice to Rachel Multer Michalewicz, co-plaintiff in the courts below. We believe she is no longer represented by counsel or participating in this case. To the extent this situation my require *amici* to move for leave to file this brief, we respectfully so move.

sions turn on empirical questions that can be better understood through social science research. This brief identifies important findings in recent research that suggest that the Court's decision in *Grutter,* and indeed affirmative action practices in general, are not having their intended effects.

ARGUMENT

I. Social Science Research Has Undermined The Central Assumption Underlying All Racial Preference Programs In University Admissions: That They Are Good For The Intended Beneficiaries

Affirmative action is an intensely controversial policy, and the social science work done in this field is far from immune to politics. But a growing volume of very careful research, some of it completely unrebutted by dissenting work, suggests that racial preferences in higher education often undermine minority achievement.

This Court's decisions make clear that racial preferences in higher education are tolerated under constitutional law — to the extent that they are tolerated — only on the assumption that they are benefits conferred upon relatively powerless minorities.[2] If preferences turn out to have mostly harmful effects — or even if the effects are often harmful and on balance ambiguous — then the fundamental legal premise for permitting this type of racial classification is gone.

Admissions preferences are often described by universities as essentially tie-breaking exercises or

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[2] This has always been implicit and often explicit in the Court's opinions. *E.g., Grutter,* 549 U.S. 309, 313-14, 316, 331-33 (2003); *Regents of University of California v. Bakke*, 438 U.S. 265, 325 (1978) (joint opinion of Brennan, White, Marshall and Blackmun, JJ).

as efforts to create a "level playing field." If this were true it would be hard to imagine any harmful effect on the intended beneficiaries. But in fact the racial preferences used by the University of Texas, and those used by most flagship state universities, elite colleges, and graduate professional schools are very large indeed.[3] Those blacks and Hispanics who are admitted due to preferences typically enter with markedly less academic preparation (as measured by test scores and high school/college records) than nearly all of their white and Asian classmates.

For example, among freshmen entering the University of Texas at Austin in 2009 who were admitted outside the top-ten-percent system, the mean SAT score (on a scale of 2400) of Asians was a staggering 467 points and the mean score of whites was 390 points above the mean black score. In percentile terms, these Asians scored at the 93rd percentile of 2009 SAT takers nationwide, whites at the 89th percentile, Hispanics at the 80th percentile, and blacks at the 52nd percentile.[4]

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[3] T.J. Espenshade, C.Y. Chung, and J.L. Walling, *Admission Preferences for Minority Students, Athletes, and Legacies at Elite Universities*, 85 Social Science Quarterly 1422 (2004); Richard Sander, *A Systemic Analysis of Affirmative Action in American Law Schools,* 57 Stan. L. Rev.367 (2004).

[4] The mean SAT scores were 1991 for Asians, 1914 for whites, 1794 for Hispanics, 1524 for blacks. The mean GPA's were 3.07, 3.04, 2.83, and 2.57. Univ. of Tex. Off. of Admissions, Implement. and Results of Tex. Aut. Admissions Law, (HB 588) at Univ. of Texas, Sec. 1: Demographic Analysis of Entering Freshmen, Fall 2010, at 14 (hereafter "Demographic Analysis") http://www.utexas.edu/student/admissions/research/HB588-Report13.pdf. Data on distribution of 2009 SAT takers is from College Board, SAT Percentile Ranks for Males, Females, and Total Group http://professionals.collegeboard.com/profdownload/sat_percentile_ranks_composite_cr_m_w.pdf

For decades, it was unclear whether very large preferences generally benefited the preferred students (through the positive peer effects of very able classmates) or, on balance, harmed them by subjecting them to academic "mismatch" (because teachers would aim instruction at the median student, and those with weaker preparation would fall behind and learn less).[5] A growing array of evidence suggests that mismatch effects predominate.

A. Studies Of Preferred Minorities' Low Grades, Abandonment Of Initial Aspirations By Shunning Hard Courses, Low Graduation Rates, And Bar Exam Failure Rates Show Academic "Mismatch" To Be A Costly Side-Effect Of Racial Preferences

1. It is now generally conceded that large admissions preferences — regardless of whether these are based on race, "legacy" considerations, or other factors — cause students to receive lower grades. The median black receiving a large admissions preference to an elite law school, for example, ends up with grades that put her at the 6th percentile of the white grade distribution — an effect that is almost entirely due to the preference itself.[6] (Data made available to researchers *after* the *Grutter* decision revealed that 60% of blacks admitted to the University of Michigan Law School had GPAs in

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[5] See Esther Duflo, Pascaline Dupas, and Michael Kremer, *Peer Effects, Teaching Incentives, and the Impact of Tracking: Evidence from a Randomized Evaluation in Kenya*, 101 American Economic Review 1739 (2011) for an outstanding overview of the learning tradeoffs between separating -- and placing in a single classroom -- students with very different levels of academic preparation.

[6] Sander, *supra* note 3, 57 Stan. L. Rev. at 425-36.

bottom tenth of their class.)[7] Low grades interconect with other preference-related problems, as discussed below.

2. Dartmouth psychologist Rogers Elliott and several colleagues published a study in 1996 that found very high attrition rates from the sciences in four Ivy League schools for students admitted with large preferences.[8] Students who had weaker academic preparation than their peers were particularly vulnerable in science and engineering classes, where grading is on a rigid curve, professors often teach at a challenging pace and material builds sequentially from one course to the next. Students with significantly weaker preparation than the median student can become overwhelmed, and consequently transfer to less rigorous majors at a high rate. This phenomenon came to be known as "science mismatch," because similar students attending less elite colleges appeared to have higher persistence rates in science. The cumulative effect is that even though black entering freshmen have levels of interest and aspiration in science comparable to (or higher than) whites,

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[7] See Richard Sander, *Do Elite Schools Avoid the Mismatch Effect?*
http://www.elsblog.org/the_empirical_legal_studi/2006/09/do_elite_school.html (September 2006) ("In the 5-year [Michigan] Alumni dataset, the mean final (standardized) GPA of black respondents is -1.48; in the 15-year [Michigan] Alumni dataset, it's the same. Interestingly, in the PDS dataset [another survey of Michigan graduates], the mean final GPA of black respondents is even lower, -1.75. These are very low figures – translated, they imply that over 60% of Michigan's black students are in the bottom tenth of their classes.")

[8] Rogers Elliott, A. Christopher Strenta, Russell Adair, Michael Matier and Jannah Scott, *The Role of Ethnicity in Choosing and Leaving Science in Highly Selective Institutions*, 37 Research in Higher Education 681 (1996).

they make up only a small proportion of those with degrees in science and engineering.[9]

This tendency for students admitted based on large preferences to transfer out of difficult majors at high rates was recently confirmed by a study at Duke University.[10] A direct test of the "science mismatch" hypothesis, using data from the University of California, also found strong evidence of the effect.[11] In 2008, the U.S. Civil Rights Commission held hearings on the problem, and issued a report that expressed great concern about the role of racial preferences in undermining minority graduation from science and engineering programs.[12] So far as we are aware, no scholar has shown any of these findings to be in error.

3. In 2003, sociologists Stephen Cole and Elinor Barber (by then deceased) published *Increasing Faculty Diversity,*[13] a study of the minority "pipeline" problem in academia. Drawing on questionnaires and other detailed data from 7,612 graduating seniors at 34 colleges, Cole and Barber found significant evidence that large racial preferences were hurting the minority pipeline to academia. Such

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[9] *Id.* at 681-82, 699-702.

[10] Peter Arcidiacono, Esteban M. Acejo, and Ken Spenner, *What Happens After Enrollment? An Analysis of the Time Path of Racial Differences in GPA and Major Choice* (2011 working paper, available at http://www.seaphe.org/working-papers/)

[11] See Richard Sander and Roger Bolus, *Do Credential Gaps in College Reduce the Number of Minority Science Graduates?* (2009 working paper, available at http://www.seaphe.org/working-papers/).

[12] U.S. Commission on Civil Rights, *Encouraging Minority Students to Pursue Science, Technology, Engineering and Math Careers*, Briefing Report, October 2010.

[13] Stephen Cole and Elinor Barber, *Increasing Faculty Diversity*: *The Occupational Choices of High-Achieving Minority Students* (Harvard University Press 2003).

students tended to get significantly lower grades and struggle academically, hurting their self-confidence. The idea of pursuing a doctorate to enter academia became less appealing, even among those who had started college with that ambition.[14] Similar students at colleges with smaller or no racial preferences were far more likely to do well, develop self-confidence, and pursue their original goals.[15]

The Cole and Barber finding was striking in part because it was emphatically contrary to the assumptions of the authors' funders and sponsors — Ivy League presidents and foundations that passionately supported racial preferences in admissions. Yet we are unaware of any comparable research that contradicts their conclusion.[16]

4. In 2005, one of the authors of this brief (Sander) published in the Stanford Law Review an analysis suggesting that large racial preferences seriously damaged the academic performance of black law students, contributing to lower graduation rates and much lower success rates on bar exams.[17] The law school setting is uniquely appropriate for studying the mismatch effect, because – unlike in college and many graduate programs – there are more or less uniform tests taken by graduates to measure their legal learning. There are also huge racial disparities in outcomes: blacks entering law school are only half as likely as their white peers ever to become lawyers.[18]

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[14] *Id*. at 116-21.

[15] *Id*. at 208.

[16] See i*d*. at xi-xii; Robin Wilson, *The Unintended Consequences of Affirmative Action*, Chronicle of Higher Education, January 31, 2003 at 10.

[17] Sander, *supra* note 3, 57 Stan. L. Rev. at 440-48.

[18] For a discussion of recent trends in black bar passage, see Richard Sander, *Are Black/White Disparities in Graduation*

Unlike the "science mismatch" and "academic mismatch" research discussed above, Sander's "law school mismatch" research generated extensive public discussion, and many critiques have been published.[19] Although Sander's data and calculations have been confirmed by replication,[20] several of the critics have advanced alternate empirical models to test whether the mismatch effect is large enough to actually reduce the number of black lawyers produced each year. As economist Doug Williams has pointed out, almost none of these social science critiques have disputed the central contention of the law school mismatch hypothesis: that large preferences undermine learning in law school.[21] Indeed, using some of the same models employed by critics, Williams has demonstrated that the basic finding – that large preferences substantially reduce the rate at which a given student will graduate and pass the bar on his first attempt — holds up robustly under a wide variety of tests.[22]

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and Passing the Bar Getting Worse, or Better? http://www.elsblog.org/the_empirical_legal_studi/2006/09/sander_2_black_.html

[19] http://www2.law.ucla.edu/sander/Systemic/Critics.htm catalogs a number of the critiques.

[20] See, e.g., Ian Ayres and Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?* 57 Stan. L. Rev. 1807, 1808 n. 4 (2005); Richard Sander, *A Reply to Critics*, 57 Stan. L. Rev..1963, 1984-86 (2005).

[21] Doug Williams, *Does Affirmative Action Create Educational Mismatches in Law Schools*? (2009 working paper, available at http://www.seaphe.org/working-papers/).

[22] Doug Williams, *Do Racial Preferences Reduce Minority Learning in Law Schools?* (2011 working paper, available at http://www.seaphe.org/working-papers/).

Some of the critics have not themselves stood up to scrutiny. For example, in 2007 law professor Katherine Barnes published a widely-discussed critique of Sander that turned out to be based on erroneous calculations. In her corrected version, published this year, Barnes found that, if eliminating racial preferences in law schools reduced the number of black matriculants by 21%, the number of blacks to graduate and pass the bar exam (including those passing after multiple attempts) would nonetheless remain the same.[23] This implies that the success rate of black law students would rise sharply, with the number who never become lawyers falling by more than half.[24]

5. The social science literature arguing that racial preferences do not hurt the intended beneficiaries has overwhelmingly focused on graduation rates from college. Some studies find that graduation rates are undermined by large preferences, and some find that they are not.[25] But the controversy may be more apparent than real. Graduation rates are under the control of college administrators, who can adjust

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[23] Katherine Barnes, *Is Affirmative Action Responsible for the Achievement Gap Between Black and White Law Students?: A Correction, A Lesson, and an Update*, 105 Northwestern L. Rev. 791 (2011).

[24] Doug Williams, Richard Sander, Marc Luppino, and Roger Bolus, *Revisiting Law School Mismatch: A Comment on Barnes (2007, 2011)*, 105 Northwestern L. Rev. 813 (2011).

[25] *Compare* William G. Bowen and Derek Bok, *The Shape of the River* (Princeton University Press 1998) 59-70 (high graduation rates for racial-preference recipients at more selective institutions) *with* Linda Loury and David Garman, *College Selectivity and Earnings*, 13 Journal of Labor Economics 289 (1995) *and* Audrey Light and Wayne Strayer, *Determinants of College Completion: School Quality or Student Ability?* 35 Journal of Human Resources 299 (2000).

policies or inflate grades to minimize academic "failures." This is common at elite private colleges.[26] But a student can graduate and still be harmed by science mismatch, academic mismatch, and lower grades, aspirations, and academic self-confidence.

B. Experience at the University Of California Provides a Uniquely Valuable Perspective on Racial Preferences' Effects

1. In 1996, California voters passed Proposition 209, which banned the use of racial preferences in state programs, including in university admissions. The University of California implemented this ban starting with freshmen matriculating in the fall of 1998. The aftermath is a uniquely valuable but understudied "real-world" experiment in what happens when racial preferences are eliminated.

The University in 1998 had eight undergraduate campuses (a ninth was added in 2005); all are considered excellent colleges, but they span a wide range of academic competitiveness. For example, the median SAT at UC Berkeley is a couple hundred points higher than the median SAT at the least "elite" of the eight campuses.[27] Proposition 209, by eliminating racial preferences, reduced the number of blacks and Hispanics admitted to UC's most elite campuses. But most of those "displaced" students ended up at other UC campuses.[28]

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[26] Stuart Rojstaczer and Christopher Healy, *Grading in American Colleges and Universities*, Teachers College Record (March 2010).

[27] Richard Sander, *An Analysis of the Effects of Proposition 209 Upon the University of California* (2011 working paper, available at http://www.seaphe.org/working-papers/).

[28] *Id.*

2. In the immediate aftermath of 209's implementation, black enrollment fell by about half at the UC's most elite campuses and fell systemwide (for all eight campuses) by almost 20%.[29] Strikingly, with the elite campuses not able to achieve their usual levels of minority enrollment through simple racial preferences, both Berkeley and UCLA launched significant efforts to improve K-12 education in their communities and to increase the number of strong minority candidates.[30] Most UC schools also introduced socioeconomic preferences. Although much smaller than the racial preferences had been, these made Berkeley and UCLA by far the most socioeconomically diverse elite college campuses in the nation. They also added some racial diversity.[31]

At present, by a wide range of metrics — including relative to state population share and changes in total UC enrollment — black and Hispanic enrollments at UC are higher than before Proposition 209.[32] UC black enrollment had returned to pre-209 levels by 2002 and averaged some 40% above pre-209 levels by 2007-1010.[33] The various post-209 changes in campus policies had even more positive effects on Hispanic enrollments. By 2000, Hispanic enrollment UC-wide had reached a new record, and by 2008 Hispanic enrollment UC-wide was double its pre-209 levels.[34]

3. If blacks and Hispanics were often "mismatched" before Proposition 209, we would expect their academic performance and graduation rates to have risen after 209. Exactly this happened, though

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[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

just how large the increase has been depends on the actual periods compared.

From 1992-94 to 1998-2005, black four-year graduation rates UC-wide improved by more than half and black six-year graduation rates improved by a fifth. Similar improvements occurred for Hispanics. Black and Hispanic GPAs also increased post-209, even though more minority students were sticking with less-generously-graded science and engineering studies.[35] Transfers of minority students increased sharply too — once again, as predicted by mismatch theory.

All of this helps explain why by the time the early post-209 cohorts had worked their way through the UC system, the University of California was graduating dramatically more blacks and Hispanics than at any time in its history.[36]

4. A common argument for engineering diversity through racial preferences is the perceived need for a "critical mass" of members of each minority group at each school — or even in every classroom. This notion helped spur complaints that Proposition 209 had "resegregated" the UC system. The ironic truth is that blacks were significantly more integrated across UC campuses after 209 than before.[37] Pre-209, Berkeley and UCLA had used very large racial preferences to compete aggressively with the less elite campuses for black freshmen; as a result, about half of all blacks enrolling at UC in the early 1990s went to the two elite campuses. After Proposition 209, blacks became more evenly distributed across all eight campuses.[38]

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[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] Id. The "index of dissimilarity" for blacks and non-blacks across UC campuses was 0.21 in 1996 and 0.18 in 2001. *Id.*

Research suggests a similar pattern nationally; scholars have found that the use of large racial preferences by elite colleges has the effect of reducing diversity at second-tier schools.[39]

5. Another important question about racial preferences is whether they help motivate minority high school students or, to the contrary, make it easier for them to coast into selective colleges. Careful research on 209's effect upon minority high school students is still underway, but the one central fact supports the second hypothesis: The proportion of black California high school students whose academic performance put them in the top tenth of all students jumped by more a third in the first cohort affected by Proposition 209, and continued to rise in subsequent years.[40] This suggests that strong black high school students may have raised their games as UC preferences disappeared.

II. Other Research Suggests That *Grutter* And *Gratz* Have Not Had Their Intended Effects Of Preventing Racial Balancing, Fostering Diversity Without Undue Reliance On Race, And Preparing For An End To Preferences By 2028

Gratz and *Grutter* expressed strong misgivings about racial preferences in admissions. They sought to ban particularly heavy-handed uses of race and to set higher education on a course towards phasing out such preferences altogether. The available quantitative evidence suggests that these decisions have had the opposite of their intended effects.

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[39] Peter Arcidiacono, Shakeeb Khan, and Jacob Vigdor, *Representation versus Assimilation: How Do Preferences in College Admissions Affect Social Interactions?* (forthcoming in J. of Pub. Ec. 2011) (available at http://www.seaphe.org/working-papers/).

[40] Sander, *supra* note 27.

A. *Grutter*'s Holding Was Largely Derived From A Simple Empirical Error

1. In determining that the University of Michigan Law School's racial preferences were constitutional and the undergraduate College's were not, the Court placed great importance on the fact that the Law School used a "highly individualized, holistic review of . . . all the ways an applicant might contribute to a diverse educational environment." *Grutter,* 539 U.S at 337. The Court said that the College's "point" system, on the other hand, gave far more weight to the "mechanical, predetermined diversity 'bonuses' based on race or ethnicity," *id*., than to "the differing backgrounds, experiences, and characteristics" of students from non-preferred groups, *Gratz*, 539 U.S. at 273 (2003). The Court inferred that the Law School gave less weight to race and more to multiple other "diversity" factors.

2. Two major analyses after *Grutter* and *Gratz* by legal empiricists of diverse views and methodologies reached the same definitive conclusion: Contrary to the Court's inference, the racial preferences used by the University of Michigan Law School before *Grutter* and *Gratz* were larger and more mechanical than those used by the College.[41] Race was more often the deciding factor in an application at the Law School than at the College. And the Law School gave less weight to other diversity factors. "Holistic" admissions did not produce the outcomes that the Court said it desired; they simply made it harder for students, parents, and other non-experts to deduce

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[41] Ian Ayres and Sydney Foster, *Don't Tell, Don't Ask: Narrow Tailoring After Grutter and Gratz*, 85 Tex L. Rev. 517 (2007); Sander, *supra* note 3, 57 Stan. L. Rev. at 400-410. Ayres strongly supports racial prefrerences; Sander is a skeptic.

how the Law School's admissions system actually worked.[42]

3. The data on practices since *Grutter* and *Gratz* confirms this point. For example, the University of Michigan undergraduate College had fully shifted, by the 2005-06 admissions year, to the kind of "holistic" system mandated by the Court. Analysis of the College's admissions data shows that, in 2005-06, it gave substantially greater weight to race, more often making it the decisive factor in individual admissions decisions, than it had under the pre-*Gratz* point system.[43]

The new system also pursued proportionate racial prepresentation — the essence of the "racial balancing" that Justice O'Connor held to be "patently unconstitutional" — by systematically preferring blacks over better-prepared Hispanics. The same is true at the University of Texas, whose data for enrolled freshmen admitted outside the Top-Ten-Percent system show very large preferences for blacks not only over whites and Asians but also over Hispanics. The mean Hispanic SAT score and high school GPA were 1794 and 2.83; the corresponding numbers for blacks were 1524 and 2.57. The data also show substantial preferences for whites over Asians, who could be seen as objects of systematic discrimination.[44]

4. Admissions data from a sample of six state law schools (including the University of Michigan Law School) from 2002-03 and 2005-07 shows that,

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[42] See also *Gratz*, 349 U.S. at 305 (Ginsburg, J., dissenting), 297-98 (Souter, J., dissenting).

[43] Richard Sander, *Why Strict Scrutiny Requires Transparency: The Practical Effects of Bakke, Gratz, and Grutter*, forthcoming in Kevin McGuire, ed., New Directions in Judicial Politics (2012) (available at http://www.seaphe.org/working-papers/).

[44] See Demographic Analysis, *supra* note 4.

on average, their racial preferences became both larger and more mechanical after *Grutter* and *Gratz*.[45] There is no evidence that these schools give substantial weight to any other diversity factor than race -- and, as we discuss below, students admitted from all racial groups at such schools are overwhelmingly from relatively privileged backgrounds.[46] Analysis of a much larger sample of public law schools (over forty) shows that the patterns at the six law schools in the smaller sample are representative of national patterns.[47]

B. Contrary To The Court's Expectation In *Grutter* That Racial Preferences Would Be Phased Out Over 25 Years, There Is Little Evidence After Eight Years That Respondent Or Any Other University Has Any Such Intent

In *Grutter*, Justice O'Connor held that "race-conscious admissions policies must be limited in time [and] must have a logical end-point," and specified that "[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary." 539 U.S. at 343. One-third of that period has elapsed. We are aware of no organized effort by higher education leadership to phase out preferences, or even to formulate a plan for doing so. To the contrary, the evidence cited above is illustrative of the actual patterns since *Grutter*: Preferences have become larger and more pervasive.

The *Fisher* case illustrates a similar trend: In states that had developed successful efforts to shift to race-neutral admissions, post-*Grutter* initiatives

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[45] Sander, *supra* note 43.

[46] Richard Sander, *Class in American Legal Education*, 89 University of Denver Law Review 631, 651 (2011).

[47] Sander, *supra* note 43.

in Texas have reintroduced preferences under rationales[48] at war with *Grutter*'s assertion that the Constitution forbids "[e]nshrining a permanent justification for racial preferences," 539 U.S. at 342. Powerful interest groups in states that have banned racial preferences in admissions, notably California, are constantly seeking to overturn or evade the bans.[49]

The drift of policy is unmistakably towards using large racial preferences for many decades, or even centuries, in pursuit of proportional representation of every racial and ethnic group at every higher education institution.

Meanwhile, despite this Court's optimism in *Grutter* that the number of qualified minority applicants was increasing, 539 U.S. at 343, indisputable data show that the racial gap in academic preparation widened substantially from 1989 until 1999[50] and at least slightly on some tests in the past dec-

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[48] As Judge Garza pointed out in his special concurrence, "the University's reliance on race at the departmental and classroom levels will, in practice, allow for race-based preferences in seeming perpetuity." App. 87a

[49] See, e.g., Editorial, "We're sorry Californians voted for Prop 209. But the Legislature's attempt to undo it is wrong," *Los Angeles Times* (Oct. 6, 2011) at 18; Peter Wood, *A Veto for Racial Preferences,* Chronicle of Higher Education, Oct. 12, 2011, http://chronicle.com/blogs/innovations/.

[50] Abigail and Stephan Thernstrom, *Secrecy and Dishonesty: The Supreme Court, Racial Preferences, and Higher Education*, Constitutional Commentary 209, 224-27 (2004) (racial gaps in reading, mathematics, and science scores at the end of high school on federally-administered National Assessment of Educational Progress (NAEP) tests and similar pattern with SAT scores). See also *Id.* at 227 ("In 1999, . . . [w]hite students were 9.8 times as likely as their black peers to score 750 or better on the verbals, and 13.1 times as likely to do that well in math.")

ade.[51] Numerous studies show that on average blacks do not catch up with their white classmates during college or graduate school. They tend to fall farther behind.[52]

III. Key Assumptions Accepted By The Court Below Are Doubtful: Evidence Suggests Large Racial Preferences Add Little Classroom Diversity And Do Not Make the University More Attractive To Minority Candidates

A. Self-Segregation Into "Soft" Courses by Recipients of Large Preferences Limits Classroom Diversity

1. As noted above, a pervasive characteristic of large admissions preferences is that the recipients are at a competitive disadvantage in courses. Many of them consequently seek out courses and majors where they will suffer least — academically and personally — from their relatively weaker preparation. Over time, this means that students admitted with large preferences tend to concentrate in the "softest" majors and courses.[53]

This process of self-segregation directly undercuts a central premise of UT's reintroduction of racial preferences in 2004. Officials justified the new preferences primarily on the ground that too many courses at the University lacked meaningful "diversi-

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[51] For example, the white-black gap in combined verbal and math SAT scores rose from 196 points in 2000 to 208 in 2011. *See* College Board, *2000 College-Bound Seniors: A Profile of SAT Program Test Takers* at 6; *College-Bound Seniors 2011* at 3, http://professionals.collegeboard.com/profdownload/cbs2011_total_group_report.pdf/ /

[52] E.g., Thernstrom, *supra* note 50**,** at 227-32; Sander, *supra* note 3, at 435-36; Bowen & Bok, *supra* note 25, at 77.

[53] Arcidiacono *et al., supra* note 10.

ty," meaning a significant presence of blacks and Hispanics. App. 23a, 156a-157a. But admitting students with large racial preferences is not an effective strategy for diversifying classrooms. The larger the preference, the more ill-prepared students will self-segregate into soft majors and courses. UT's policy will at best produce a high ratio of racial engineering to classroom diversity — the opposite of "narrow tailoring."

2. Such self-segregation into soft courses will result from any system of admissions preferences that create large disparities in academic preparation within the student body. Most relevant here, the Texas Top Ten Percent plan, whatever its merits in advancing diversity, created a student body with very wide disparities in academic preparation, largely (though not entirely) along racial lines. This may well explain the fact that, according to the University of Texas, classroom diversity decreased between 1996 and 2002 even though minority enrollment increased. App. 86a.

B. Experience After Racial Preferences Were Banned At The University Of California Shows A "Warming" Effect On Minority Applications And Enrollments

1. Respondents have advanced the familiar argument that racial preferences are vital to persuade racial minorities that they are "welcome" on a college campus, and that reducing preferences would have what some call a "chilling effect" on minorities' interest. And the court below suggested that minorities were discouraged from attending UT after it implemented *Hopwood*. But the best available evidence suggests that this is a myth, and that in fact bans on racial preferences seem to produce a "warming effect," making the affected institutions more

desirable — not less — to prospective black and Hispanic students.

2. An authoritative analysis by two leading labor economists, David Card and Alan Krueger, found that the propensity of highly-qualified blacks to apply to Berkeley, UCLA, and the University of Texas at Austin did not meaningfully change after those schools implemented bans on racial preferences.[54]

3. Strikingly, labor economist Kate Antonovics and Richard Sander (a coauthor of this brief) found that black and Hispanic students admitted to the UC system after the race-preferences ban were substantially more likely to accept the offer and enroll, compared to similarly qualified students before Prop 209.[55] This "warming effect" for blacks and Hispanics at UC Berkeley was approximately 15%. Although we do not know why this happened, the available evidence is consistent with the hypothesis that these students believed their diplomas would be more valuable without the taint of being presumed to have been admitted because of their race.

4. This reinforces all of the findings discussed in Part I of this brief. While race-based advocacy groups overwhelmingly express support for racial preferences, the warming effect evidence suggests that individually, many blacks and Hispanics strong-

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[54] David Card and Alan B. Krueger, *Would the Elimination of Affirmative Action Affect Highly Qualified Minority Applicants? Evidence from California and Texas*, 58 Industrial & Labor Relations Review 416 (2005). Card & Krueger examined "highly-qualified" blacks because their admission chances would be minimally affected by the ban, which reduced the chances most other blacks; students are less likely to apply when their admission chances are low.

[55] Kate Antonovics and Richard Sander, *Affirmative Action Bans and the Chilling Effect* (2011 working paper, available at http://www.seaphe.org/working-papers/).

ly prefer to avoid settings where they may be stigmatized by a racial preference.

IV. The Lack Of Socioeconomic Diversity At Elite Schools Refutes The Notion That Large Racial Preferences Can Qualify As Narrowly Tailored

1. An outpouring of research since *Grutter* and *Gratz* has documented the shocking lack of socioeconomic diversity in the upper reaches of higher education**.** Whether we measure "socioeconomic status" (hereafter "SES") by the incomes, education, or occupations of a student's parents (or some combination), highly selective colleges draw three-quarters of their students from the top quartile of the SES spectrum, and half from the top tenth.[56] A young person from the bottom quartile of the SES distribution is less than one-hundredth as likely to attend a "top ten" law school as a young person from the top tenth of the SES distribution.[57]

2. Low-and-moderate-SES students can confer as much or more intellectual and viewpoint "diversity" benefit upon universities, the available research and real-world observation suggest, as the mostly high-SES racial minorities currently favored by preferential admissions.[58] By recruiting and giving admissions preferences to such low-and-moderate-SES students, universities could also increase social mobility in, and the legitimacy of, American institutions no less than do their current racial preference

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[56] Anthony Carnevale and Stephen Rose, *Socioeconomic Status, Race/Ethnicity, and Selective College Admissions*, in Richard Kahlenberg, editor, America's Untapped Resource: Low-Income Students in Higher Education (2004).

[57] Richard Sander, *supra* note 46 (2011).

[58] Richard Sander, *Listening to the Debate on Reforming Law School Admissions Preferences*, 89 Denv. L. Rev. 881 (2011).

programs.[59] Favoring low-and-moderate-SES students could also increase racial diversity (if not as much as racial preferences) because disproportionate numbers of low-and-moderate-SES students are black and Hispanic. So socioeconomic preferences could confer net diversity benefits equal to or greater than racial preferences without the costs of spurring resentment among non-preferred racial groups and straining fundamental equal protection principles.

3. Many low-and-moderate-SES students are better-prepared for college and graduate school at every level of selectivity than most of black and Hispanic students currently entering those schools under preferential admissions programs.[60]

4. But while universities often imply that their "diversity" policies embrace socioeconomic disadvantage, the available evidence suggests that the vast majority do very little to recruit or to give admissions preferences to low-and-moderate-SES students, and that their racial-preference programs do very little to foster SES diversity because the vast majority of preferentially admitted blacks and Hispanics are from relatively privileged backgrounds.[61] Indeed, data from law schools suggests that low-or-moderate SES is a *disadvantage* in admissions, when controlling for other credentials like LSAT scores and college grades.[62]

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[59] *Id*. We submit that the following from *Grutter,* 539 U.S. at 332, is equally true of low-and-moderate SES students: "All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training [for future leaders]."

[60] Sander, *supra* note 58.

[61] Sander, *supra* note 46, at 651.

[62] *Id*. at 657.

5. The principle that racial classifications must be a last resort[63] and the above-cited empirical data showing a rich, untapped supply of low-and-moderate-SES students who could enhance diversity point to the same conclusion:

The narrow-tailoring requirement should be interpreted to mean that universities must subordinate racial preferences to socioeconomic ones. Specifically, any university seeking to continue to use racial preferences should first have the burden of proving that (a) socioeconomic preferences could not provide educational benefits as valuable as those provided by racial preferences; and (b) any racial preferences that can still be justified will be no larger than the same school's socioeconomic preferences.

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[63] *E.g.*, *Parents Involved in Cmty Sch. v. Seattle Sch. Dist. No.* 1, 551 U.S. 701, 735 (2007); *id.*, at 789-90 (Kennedy, J., concurring in part and concurring in the judgment) ("individual racial classifications employed in this manner may be considered legitimate only if they are a last resort to achieve a compelling interest"); *Grutter*, 539 U.S. at 339; *Id.*, at 387-95 (Kennedy, J., dissenting).

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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OCTOBER 2011