

No. 11-345

IN THE
Supreme Court of the United States

ABIGAIL NOEL FISHER,
Petitioner,

v.

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

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

**BRIEF OF *AMICI CURIAE* AMERICAN
COUNCIL ON EDUCATION AND 39 OTHER
HIGHER EDUCATION ORGANIZATIONS
IN SUPPORT OF RESPONDENTS**

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American Association of Colleges of Pharmacy
American Association of Community Colleges
American Association of State Colleges and Universities
American Association of University Professors
American College Personnel Association
American Indian Higher Education Consortium
American Speech-Language-Hearing Association
Association of American Colleges and Universities
Association of American Universities
Association of Catholic Colleges and Universities
Association of Community College Trustees
Association of Governing Boards of Universities and Colleges
Association of Jesuit Colleges and Universities
Association of Public and Land Grant Universities
Association of Research Libraries
Association to Advance Collegiate Schools of Business
College and University Professional Association for Human
Resources
The Common Application
Council for Advancement and Support of Education
Council for Christian Colleges and Universities
Council for Higher Education Accreditation
Council for Opportunity in Education
Council of Graduate Schools
Council of Independent Colleges
Council on Social Work Education
EDUCAUSE
Graduate Management Admissions Council
Group for the Advancement of Doctoral Education in Social Work
National Action Council for Minorities in Engineering, Inc.
National Association for Equal Opportunity in Higher Education
National Association of College and University Business Officers
National Association of Diversity Officers in Higher Education
National Association of Independent Colleges and Universities
National Association of Student Financial Aid Administrators
National Collegiate Athletic Association
Southern Association of Colleges and Schools Commission on
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Student Affairs Administrators in Higher Education
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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	iii
STATEMENT OF INTEREST	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. THE INTEREST IN STUDENT DIVERSITY IS EVEN MORE COMPELLING NOW THAN IT WAS A DECADE AGO	3
A. Student Diversity Is A Compelling Interest.....	4
B. Student Diversity Is Acutely Needed Today	8
1. Students Must Be Equipped To Navigate An Interconnected World	8
2. The Educational Benefits Diversity Confers Remain Essential To Higher Education	11
II. HIGHER EDUCATION INSTITUTIONS NEED FLEXIBILITY TO DEFINE AND ATTAIN DIVERSITY	17
A. American Higher Education Thrives On Pluralism	18

TABLE OF CONTENTS—Continued

1. American Higher Education Is Characterized By The Variety Of Institutional Missions	18
2. The Government Has Repeatedly Endorsed The Value Of A Decentralized Higher Education System In Which Institutions Pursue Their Respective Missions In Their Respective Ways	20
B. Each Institution Must Define Diversity In A Manner Consistent With Its Mission	28
C. Properly Conducted Holistic, Individualized Review Tailored To Institutional Mission Is A Lawful And Effective Means To Attain Diversity.....	31
CONCLUSION	33
ADDENDUM: <i>AMICI</i> ON THIS BRIEF	1a

TABLE OF AUTHORITIES

Page(s)

CASES:

Board of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78 (1978) 7, 22, 24

Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853 (1982)..... 14

Christian Legal Soc’y v. Martinez, 130 S. Ct. 2971 (2010) 30

DeRolph v. State, 677 N.E.2d 733 (Ohio 1997) 14

Edwards v. California Univ. of Penn., 156 F.3d 488 (3d Cir. 1998) 7

Ewing v. Bd. of Regents of Univ. of Mich., 742 F.2d 913 (6th Cir. 1984) 23

Fisher v. Univ. of Tex., 631 F.3d 213 (5th Cir. 2011) 32

Fisher v. Univ. of Tex., 644 F.3d 307 (5th Cir. 2011) 29

Grutter v. Bollinger, 539 U.S. 306 (2003)..... *passim*

Hamilton v. Regents of Univ. of Cal., 293 U.S. 245 (1934)..... 22, 25

Johnson v. California, 543 U.S. 499 (2005)..... 31

TABLE OF AUTHORITIES—Continued

<i>Keyishian v. Board of Regents of Univ. of N.Y., 385 U.S. 589 (1967)</i>	28
<i>M’Culloch v. Maryland, 17 U.S. 216 (1819)</i>	21
<i>Mueller v. Allen, 463 U.S. 388 (1983)</i>	14
<i>Parents Involved in Community Schools v. Seattle School Dist. No. 1, 551 U.S. 701 (2007)</i>	30, 33
<i>Plyler v. Doe, 457 U.S. 202 (1982)</i>	15
<i>Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978)</i>	4, 5, 7, 23
<i>Regents of Univ. of Mich. v. Ewing, 474 U.S. 214 (1985)</i>	<i>passim</i>
<i>Sweezy v. New Hampshire, 354 U.S. 234 (1957)</i>	22, 23, 28
<i>Taylor v. Columbia Univ., 226 U.S. 126 (1912)</i>	21, 22
<i>Trustees of Dartmouth College v. Woodward, 17 U.S. 518 (1819)</i>	20, 21, 25
<i>United States v. Lopez, 514 U.S. 549 (1995)</i>	19

TABLE OF AUTHORITIES—Continued

University v. People,
99 U.S. 309 (1878) 21

Washington Univ. v. Rouse,
75 U.S. 439 (1869) 21

STATUTES:

20 U.S.C. §§ 1001-1002 27

20 U.S.C. § 1232a 28

Morrill Land-Grant Act, 12 Stat. 503 (1862) 25

Pub. L. No. 89-329, 79 Stat. 1219 26

Pub. L. No. 92-318, 86 Stat. 235 27

Pub. L. No. 95-561, 92 Stat. 2143 27

Pub. L. No. 98-511, 98 Stat. 2366 27

Pub. L. No. 99-498, 100 Stat. 1268 27

Pub. L. No. 102-325, 106 Stat. 448 27

Pub. L. No. 105-244, 112 Stat. 1581 27

Pub. L. No. 110-315, 122 Stat. 3078 27

LEGISLATIVE:

H.R. Rep. No. 78-1418 (1944) 26

OTHER AUTHORITIES:

1 James Kent, *Commentaries on American
Law* 416-417 (O.W. Holmes ed.,
12th ed. 1873) 21

TABLE OF AUTHORITIES—Continued

1 Richard Hofstadter and Wilson Smith eds., <i>American Higher Education: A Documentary History 157</i> (1961)	24
A.L. Antonio <i>et al.</i> , <i>Approaching Diversity Work in the University: Lessons from an American Context</i>	5
Alexander Meikeljohn, <i>Education Between Two Worlds</i> (1942)	15
American Council on Educ., <i>U.S. Branch Campuses Abroad</i> (Sept. 2009)	9
Arthur H. Compton, <i>Foreword to Huston Smith, The Purposes of Higher Education</i> (1955)	10
<i>As the World Turns: Implications of Global Shifts in Higher Education for Theory, Research and Practice</i> (Walter R. Allen <i>et al.</i> eds. 2012)	5
Axel Dreher, KOF Swiss Economic Institute, <i>KOF Index of Globalization</i> (Mar. 16, 2012)	8
Benjamin Franklin, <i>Proposals Relating to the Education of Youth in Pennsylvania</i> (1749, reprint 1931)	16
Carl F. Kaestle, <i>Pillars of the Republic: Common Schools and American Society 1780-1860</i> (Eric Foner ed. 1983)	16

TABLE OF AUTHORITIES—Continued

Carl Swisher, <i>American Constitutional Development</i> (1943).....	25
Carnegie Comm'n on Higher Educ., <i>Reform on Campus: Changing Students, Changing Academic Programs</i> (1972)	31
Chester E. Finn, Jr., <i>Scholars, Dollars and Bureaucrats</i> (1978)	27
Civic Learning and Democratic Engagement, <i>A Crucible Moment: College Learning and Democracy's Future</i> (2012)	14
David J. Barron, <i>The Promise of Cooley's City: Traces of Local Constitutionalism</i> , 147 U. Pa. L. Rev. 487 (1999).....	14
Derek Bok, <i>Higher Learning</i> (1986).....	20
Diane N. Ruble, <i>A Phase Model of Transitions: Cognitive and Motivational Consequences</i> , 26 <i>Advances in Experimental Social Psych.</i> 163 (1994)	12
Earle D. Ross, <i>Democracy's College: The Land-Grant Movement in the Formative Stage</i> (1942)	26
Edward H. Reisner, <i>Antecedents to the Federal Act Concerning Education</i> , 11 <i>Educational Record</i> 196 (July 1930)	24

TABLE OF AUTHORITIES—Continued

F.W. Garforth, <i>Educative Democracy: John Stuart Mill on Education in Society</i> (1980).....	12
Frank Donovan ed., <i>The John Adams Papers</i> 182 (1965)	16
Henry Rosovsky, <i>Highest Education</i> , 197 <i>The New Republic</i> 13 (1987)	19
Huston Smith, <i>The Purposes of Higher Education</i> (1955).....	11
J.H.C. Newman, <i>The Idea of a University</i> (M.J. Svaglic ed., Univ. of Notre Dame Press 1982) (1873)	11
Jean Piaget, <i>Piaget's Theory</i> , in 1 <i>Carmichael's Manual of Child Psychology</i> (P.H. Mussen ed., 3d ed. Wiley 1970)	12
John Dewey, <i>Democracy and Education</i> (Free Press 1966) (1916).....	16
John S. Brubacher & Willis Rudy, <i>Higher Education in Transition: A History of American Colleges and Universities</i> (4th ed. 1997) (1958).....	20
John Stuart Mill, <i>On Liberty</i> , in <i>Three Essays</i> 134 (Oxford Univ. Press 1975) (1859).....	15

TABLE OF AUTHORITIES—Continued

Jon Bruner, <i>American Leadership in Science, Measured in Nobel Prizes</i> (Oct. 5, 2011)	18
Jonathan R. Cole, <i>The Great American University</i> (2009)	18
Lee C. Bollinger, <i>Why Diversity Matters</i> , <i>Chronicle of Higher Education</i> (June 1, 2007)	10
Martin Trow, <i>Federalism in American Higher Education, in Higher Learning in America 1980-2000</i> (Arthur Levine ed., 1993)	20, 26
Menachem Wecker, <i>Where the Fortune 500 CEOs Went to School</i> , <i>U.S. News & World Report</i> (May 14, 2012)	18
Mitra Toossi, <i>Labor Force Projections to 2020: A More Slowly Growing Workforce</i> , <i>Monthly Labor Review</i> (Jan. 2012)	8
Nat'l Task Force on Civic Learning and Democratic Engagement, <i>A Crucible Moment: College Learning and Democracy's Future</i> (2012)	14
N. Bowman, <i>College Diversity Experiences and Cognitive Development: A Meta-Analysis</i> , <i>80 Review of Educational Research</i> (2010)	5

TABLE OF AUTHORITIES—Continued

N. Denson & M.J. Chang, <i>Racial Diversity Matters: The Impact of Diversity-Related Student Engagement and Institutional Context</i> , 46 American Educational Research Journal 322 (2009).....	5
N. Gottfredson <i>et al.</i> , <i>Does Diversity at Undergraduate Institutions Influence Student Outcomes?</i> , 1 Journal of Diversity in Higher Education 80 (2008).....	6
Noah Webster, <i>On the Education of Youth in America</i> (1790), in <i>Essays on Education in the Early Republic</i> (Frederick Rudolph ed., 1965).....	16
Organization for Econ. Cooperation & Dev., <i>Education at a Glance: OECD Indicators</i> (2011).....	18
Peter B. Pufall, <i>The Development of Thought: On Perceiving and Knowing</i> , in Robert Shaw & John Bransford, <i>Perceiving, Acting, and Knowing: Toward an Ecological Psychology</i> (1977).....	12
Press Release, United States Census Bureau, <i>Most Children Younger Than Age 1 Are Minorities</i> (May 17, 2012).....	8
Raymond V. Gilmartin, <i>Diversity and Competitive Advantage at Merck</i> , Harv. Bus. Rev. (Jan. – Feb. 1999)	10

TABLE OF AUTHORITIES—Continued

Robert M. Hutchins, <i>The Higher Learning in America</i> (Transaction Publishers 1995) (1936)	11
Robert Shaw & John Bransford, <i>Perceiving, Acting, and Knowing: Toward an Ecological Psychology</i> (1977).....	12
Roy J. Honeywell, <i>Educational Works of Thomas Jefferson</i> (1931)	25
S. Hurtado & L. D’Angelo, <i>Linking Diversity and Civic-Minded Practices with Student Outcomes: New Evidence from National Surveys, 98 Liberal Education 2</i> (2012).....	5
Sabrina Tavernise, <i>Whites Account for Under Half of Births in U.S.</i> , N.Y. Times, May 17, 2012	8
Scott Jaschik, <i>International Campuses on the Rise</i> , Inside Higher Ed, Sept. 3, 2009	9
Shanghai Jiao Tong University, <i>Academic Ranking of World Universities: 2011</i>	18
Uri Friedman & Kedar Pavgi, <i>Head of the Class?</i> , Foreign Policy (Nov. 18, 2011).....	18
U.S. Dep’t of State & Institute of Int’l Educ., <i>Study Abroad by U.S. Students Rose in 2009/10 with More Students Going to Less Traditional Destinations</i> (Nov. 14, 2011).....	9

TABLE OF AUTHORITIES—Continued

U.S. Dep't of State, <i>Report of the Visa Office, Classes of Nonimmigrants Issued Visas</i> (2010).....	9
William G. Bowen & Derek Bok, <i>The Shape of the River</i> (1998).....	10
William G. Bowen <i>et al.</i> , <i>Equity and Excellence in American Higher Education</i> (2005).....	18

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HIGHER EDUCATION ORGANIZATIONS IN
SUPPORT OF RESPONDENTS**

STATEMENT OF INTEREST¹

Amici are 40 associations of colleges, universities, educators, trustees, and other representatives of higher education in the United States. *Amici* represent public, independent, large, small, urban, rural, denominational, non-denominational, graduate, and undergraduate institutions and faculty. American higher education institutions

¹ No party or counsel for a party authored or paid for this brief in whole or in part, or made a monetary contribution to fund the brief's preparation or submission. No one other than *amici* or their members or counsel made a monetary contribution to the brief. All parties filed blanket *amicus* consent letters.

enroll over 20 million students. For decades *amici* have worked to achieve student diversity.

Amicus American Council on Education (ACE) represents all higher education sectors. Its approximately 1800 members include a substantial majority of United States colleges and universities. Founded in 1918, ACE seeks to foster high standards in higher education, believing a strong higher education system to be the cornerstone of a democratic society. Among its initiatives, ACE had a major role in establishing the Commission on Minority Participation in Education and American Life, chaired by former Presidents Ford and Carter, which issued *One-Third of a Nation* (1988), a report on minority matriculation, retention, and graduation. ACE regularly contributes *amicus* briefs on issues of importance to the education sector.

The Addendum contains information on the other *amici* on this brief.

SUMMARY OF ARGUMENT

A diverse student body is essential to the educational objectives of colleges and universities. This Court held in *Grutter v. Bollinger*, 539 U.S. 306 (2003), that obtaining the educational benefits that flow from a diverse student body is a compelling governmental interest that justifies narrowly tailored consideration of race in college admissions. The holding in *Grutter* is even more urgent today than it was in 2003. Higher education institutions must equip their students to work and live in an interconnected world, stimulate students' interest in the new and unfamiliar, and prepare them to understand and account for differences. Diversity

thus remains a compelling interest in higher education.

Diversity is not a one-size-fits-all concept, however. Each higher education institution must define student body diversity in a manner consistent with its educational mission. As the Court recognized in *Grutter*, when an institution determines its educational goals—including its conception of diversity—it makes an educational judgment that merits deference. Courts may rightly scrutinize the means chosen to pursue diversity, but they defer to educators’ experience and expertise in determining what sort of diversity, and how much, their institution needs.

Petitioner would depart from this settled analysis and invite judicial superintendence of institutions’ educational objectives. Rather than focus analysis on whether the means chosen fit the articulated educational goals, she would change the focus of judicial scrutiny to the goals themselves—asking courts to supervise and supersede educators’ context-specific educational judgments. That approach would be at odds with the longstanding beneficial tradition of governmental forbearance in American higher education, and should be rejected.

ARGUMENT

I. THE INTEREST IN STUDENT DIVERSITY IS EVEN MORE COMPELLING NOW THAN IT WAS A DECADE AGO.

This Court held in *Grutter* that obtaining the educational benefits that flow from a diverse student body is a compelling interest that can justify the

narrowly tailored consideration of race in college admissions. That holding was prescient. In an increasingly interconnected world, diversity in higher education is now more urgent than ever.

A. Student Diversity Is A Compelling Interest.

This Court has long recognized that the Equal Protection Clause does not categorically prohibit colleges and universities from considering race in admissions. In *Regents of the University of California v. Bakke*, the Court reversed an injunction barring the State from “ever considering the race of any applicant.” 438 U.S. 265, 320 (1978) (opinion of the Court). Higher education institutions, the Court explained, have a “substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin.” *Id.*

The Court elaborated twenty-five years later in *Grutter*. At issue was the University of Michigan Law School’s use of race as a means to “obtain[] ‘the educational benefits that flow from a diverse student body.’ ” 539 U.S. at 328 (citation omitted). The Law School explained that student body diversity was “ ‘of paramount importance in the fulfillment of its mission.’ ” Br. for Respondents in No. 02-241, at 28 (quoting *Bakke*, 438 U.S. at 313 (opinion of Powell, J.)). A racially integrated learning environment helped its students “learn how to bridge racial divides, work sensitively and effectively with people of different races, and simply overcome the initial discomfort of interacting with people that are very different from themselves that is a hallmark of human nature.” *Id.* at 25. Those educational

benefits, moreover, could be attained only through a race-conscious admissions policy. The Law School had considered a number of race-neutral means of assembling a racially diverse student body, but concluded that all were “demonstrably unworkable or would substitute a different institutional mission for the one that the Law School has chosen.” *Id.* at 33.

This Court upheld the Law School’s admissions policy and endorsed the pursuit of diversity in higher education. Echoing Justice Powell’s *Bakke* opinion, the Court held that higher education institutions have a compelling interest in “obtaining the educational benefits that flow from a diverse student body.” *Grutter*, 539 U.S. at 343; *see also Bakke*, 438 U.S. at 314 (opinion of Powell, J.) (“the interest of diversity is compelling in the context of a university’s admissions program”). Those benefits, the Court recognized, are “substantial.” *Grutter*, 539 U.S. at 330. “[N]umerous studies show that student body diversity promotes learning outcomes, * * * ‘better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.’ ” *Id.* (citation omitted).² Diversity

² Research findings that support this conclusion have grown more robust since *Grutter* was decided. *See, e.g.,* A.L. Antonio *et al.*, *Approaching Diversity Work in the University: Lessons from an American Context*, in *As the World Turns: Implications of Global Shifts in Higher Education for Theory, Research and Practice* 371–401 (Walter R. Allen *et al.* eds. 2012); S. Hurtado & L. D’Angelo, *Linking Diversity and Civic-Minded Practices with Student Outcomes: New Evidence from National Surveys*, 98 *Liberal Education* 2 (2012); N. Bowman, *College Diversity Experiences and Cognitive Development: A Meta-Analysis*, 80 *Review of Educational Research* 4 (2010); N. Denson & M.J. Chang, *Racial Diversity Matters: The Impact of Diversity-*

also promotes cross-racial understanding, helps to break down stereotypes, and enables students to better understand those who are different. *Id.* To seek these benefits through diversity is properly understood to be at the core of institutions' academic mission. *Id.* at 329.

As the *Grutter* Court observed, the educational benefits of diversity are “not theoretical but real.” *Id.* at 330. American businesses emphasized that “the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.” *Id.* Retired military leaders explained that national security depends on the ability to train a “highly qualified, racially diverse officer corps.” *Id.* at 330-331. And “[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.” *Id.* at 332.

Although the *Grutter* Court canvassed the evidence demonstrating the benefits of diversity in higher education, it did not purport to weigh that evidence de novo. Such an exercise would have been misguided, for judges are ill-equipped to assess the merits of particular educational approaches. See *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 (1985) (courts are not “suited to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public

Related Student Engagement and Institutional Context, 46 American Educational Research Journal 322 (2008); N. Gottfredson *et al.*, *Does Diversity at Undergraduate Institutions Influence Student Outcomes?*, 1 Journal of Diversity in Higher Education 80 (2008).

educational institutions—decisions that require ‘an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decisionmaking’ ” (citation omitted)). The universities themselves have the “experience and expertise” to make educational judgments. *Grutter*, 539 U.S. at 333. Accordingly, the Court deferred to the Law School’s judgment that attaining student body diversity was essential to its educational mission. *Id.* at 328.

Judicial deference to institutions’ educational judgments was particularly appropriate in light of the “special niche” universities occupy in the American constitutional tradition. *Id.* at 329. The constitution protects universities’ freedom to define and pursue educational goals. *See, e.g., Ewing*, 474 U.S. at 225; *Board of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 96 n.6 (1978); *Bakke*, 438 U.S. at 319 n.53 (opinion of Powell, J.). And academic freedom extends beyond scholarship to governance by the academies themselves, including control over the composition of the student body. *Grutter*, 539 U.S. at 329 (citing *Bakke*, 438 U.S. at 312 (opinion of Powell, J.)); *see also Edwards v. California Univ. of Penn.*, 156 F.3d 488, 492 (3d Cir. 1998) (Alito, J.). Constitutionally informed principles of academic freedom “provide a basis for the Court’s acceptance of a university’s considered judgment that racial diversity among students can further its educational task, when supported by empirical evidence.” *Grutter*, 539 U.S. at 387-388 (Kennedy, J., dissenting). These time-honored principles buttress *Grutter*’s core holding: Obtaining the educational benefits that flow from student body diversity is a

compelling interest that justifies the narrowly tailored use of race in college admissions decisions.

B. Student Diversity Is Acutely Needed Today.

1. Students Must Be Equipped To Navigate An Interconnected World.

Developments since this Court decided *Grutter* underscore the key role of diversity in American higher education. Today more than ever before, individuals and organizations are linked around the world. Trade, finance, and media are international in scope. The ever-thickening web of economic, political, and social ties between nations makes interaction among people of different backgrounds and cultures a common occurrence. See Axel Dreher, KOF Swiss Economic Institute, *KOF Index of Globalization* (Mar. 16, 2012).

The United States is more racially and ethnically diverse than ever. Mitra Toossi, *Labor Force Projections to 2020: A More Slowly Growing Workforce*, Monthly Labor Review 43 (Jan. 2012). The trend is likely to accelerate in coming years. Most American babies are non-white, and half the population will be racial and ethnic minority group members by mid-century. Press Release, United States Census Bureau, *Most Children Younger Than Age 1 Are Minorities* (May 17, 2012); Sylvia Hurtado, *Linking Diversity with the Educational and Civic Missions of Higher Education*, 30 *The Review of Higher Education* 185, 187 (2007). As the Brookings Institution's senior demographer explained, these projections anticipated "the more globalized multiethnic country that we are becoming." Sabrina

Tavernise, *Whites Account for Under Half of Births in U.S.*, N.Y. Times, May 17, 2012, at A1.

In the last two decades, higher education itself has become profoundly more global. More foreign students seek to study at U.S. colleges and universities: the State Department issued over 400,000 student visas in 2010—up more than 70 percent since 1992. U.S. Dep’t of State, *Report of the Visa Office, Classes of Nonimmigrants Issued Visas* (2010). American students increasingly desire to study abroad as well. “Study abroad by students enrolled in U.S. higher education has more than tripled over the past two decades,” and interest in less traditional destinations like India and Brazil has dramatically increased in recent years. Press Release, U.S. Dep’t of State & Institute of Int’l Educ., *Study Abroad by U.S. Students Rose in 2009/10 with More Students Going to Less Traditional Destinations* (Nov. 14, 2011). Universities increasingly are crossing borders—a much-noted development of the past decade. As of 2009, 78 U.S. colleges and universities had established branch campuses abroad, located from China and Singapore to the Middle East. Scott Jaschik, *International Campuses on the Rise*, Inside Higher Ed, Sept. 3, 2009; see also American Council on Educ., *U.S. Branch Campuses Abroad* (Sept. 2009).

To equip them to navigate today’s and tomorrow’s interconnected world, universities must stimulate students’ thirst for the new and unfamiliar. Student body diversity catalyzes the exploratory spirit: “The experience of arriving on a campus to live and study with classmates from a diverse range of backgrounds is essential to students’ training for this new world,

nurturing in them an instinct to reach out instead of clinging to the comforts of what seems natural or familiar.” Lee C. Bollinger, *Why Diversity Matters*, Chronicle of Higher Education (June 1, 2007).

This acquired affinity for the unfamiliar enables students to contribute to economic, scientific, and social progress, and to function in the global economy. A purpose of higher education is to equip professionals and business leaders to interact with diverse customers, clients, co-workers, and business partners. See Raymond V. Gilmartin, *Diversity and Competitive Advantage at Merck*, Harv. Bus. Rev. 146 (Jan. - Feb. 1999). Students who have had scant interaction with peers of different races and ethnicities are hampered when they graduate into a nation in which minorities generate more than \$600 billion in purchasing power, and a world that is irreversibly interdependent. As one leading business executive has put it, “[o]ur success as a global community is as dependent on utilizing the wealth of backgrounds, skills and opinions that a diverse workforce offers, as it is on raw materials, technology and processes.” William G. Bowen & Derek Bok, *The Shape of the River* 12 (1998) (quoting Robert J. Eaton, Chairman and CEO of Chrysler Corporation).

If the United States is to be the world’s economic pace-setter, colleges cannot send students into that world wearing blinders. So, too, in fields such as law, the natural sciences, and medicine, where international collaboration increasingly is basic, students today must receive direct experience with people of different races and ethnicities. They cannot adequately acquire it from books, and they will sorely need it. See Arthur H. Compton,

Foreword to Huston Smith, The Purposes of Higher Education xiv (1955).

2. The Educational Benefits Diversity Confers Remain Essential To Higher Education.

Diversity prepares students to engage with the modern world, but that is not its only benefit. Diversity serves time-honored, indispensable goals of higher education. It inspires students to lead “the examined life;” it prepares them to maintain the robust democracy that is their inheritance; and it enables them to overcome barriers that separate them from one another, divide them from the world they need to know, and block their intellectual development.

1. A venerable purpose of higher education is to foster “the examined life.” That is the focus of educators who view higher learning as desirable for its own sake, apart from its economic utility. See Robert M. Hutchins, *The Higher Learning in America* (Transaction Publishers 1995) (1936); J.H.C. Newman, *The Idea of a University* (M.J. Svaglic ed., Univ. of Notre Dame Press 1982) (1873). These educators consider the crucial work of higher education to be challenging students’ embedded preconceptions, including, often, their most deeply-held values; for only by critically examining them can students gauge rationally whether their preconceptions are worthy. Educators who hold this view emphasize thinking logically, exposing fallacy, and testing assumption through rigorous questioning and dialectic, all in order to develop students’ powers of reason.

Diversity contributes vitally to the process of learning, on which the powers of reason depend. A precept of developmental psychology is that we learn by formulating, revising, and refining conceptions of the world each time we encounter new facts, beliefs, experiences, and viewpoints. Peter B. Pufall, *The Development of Thought: On Perceiving and Knowing*, in Robert Shaw & John Bransford, *Perceiving, Acting, and Knowing: Toward an Ecological Psychology* 173-174 (1977). Faced with new information, students either assimilate it to fit the existing conception, or revise the conception to accommodate the new information. This “disequilibration,” as Jean Piaget called it, and the subsequent restoration of cognitive balance, force learners to refine their thinking. Piaget taught that “disequilibration” experiences have greatest impact when they come from “social interaction.” Jean Piaget, *Piaget’s Theory*, in 1 Carmichael’s *Manual of Child Psychology* (P. H. Mussen ed., 3d ed. Wiley 1970). A student, confronted by a peer who has a new or unexpected way of looking at the world, meets that perspective as an equal, and can explore and absorb it more fully than if merely informed of it in, for example, a lecture. See, e.g., Diane N. Ruble, *A Phase Model of Transitions: Cognitive and Motivational Consequences*, 26 *Advances in Experimental Social Psych.* 163, 171 (1994). Colleges and universities supply and catalyze “that collision which is obtained only in society and by which a knowledge of the world and its manners is best acquired.” F.W. Garforth, *Educative Democracy: John Stuart Mill on Education in Society* 164 (1980) (citing David Ricardo).

These bedrock principles of developmental psychology, to which educators at all levels subscribe, teach that exposing students to an array of peer life experiences and perspectives is critical to learning. The familiar is less valuable; it tends merely to reinforce preconception. But the new and different are food for intellectual growth. Student diversity provides all learners opportunities to develop their intellects, by exposure to increasingly complex and nuanced models presented by peers. These new perspectives and experiences are especially educational when encountered in direct interaction with a peer, because peer encounters entail the give-and-take and the emotional processes that promote complex thinking.

A diverse campus thus awakens students from the sleepy “unexamined life” of which Socrates warned. Interaction among students from diverse backgrounds exposes each to a broader array of vantage points from which to view his or her own values than does interaction among like-minded students whose experiences are similar. Of course, students will not and should not always accept new perspectives and abandon their own. Higher education teaches students to employ reason to decide for themselves which of their beliefs to retain, and which to cast aside in favor of other discovered truths. And students in diverse institutions often learn that anticipated differences in perspectives or views do not exist, or do not correlate as expected with race or ethnicity. Preconception is thereby dispelled, and stereotype is thereby rebutted.

2. Another purpose of higher education is to prepare students for citizenship. An educated

citizenry is the predicate of a thriving democracy. *Mueller v. Allen*, 463 U.S. 388, 395 (1983); *DeRolph v. State*, 677 N.E.2d 733, 736 (Ohio), *clarified*, 678 N.E.2d 886 (Ohio 1997). Colleges and universities seek to develop students' capacity not only to comprehend and reach their own informed views on issues of public import, but also to engage in deliberative aspects of democracy—to interact and debate with other citizens, listen with an open mind, and persuade—so as to achieve collective solutions to public problems. See Nat'l Task Force on Civic Learning and Democratic Engagement, *A Crucible Moment: College Learning and Democracy's Future* (2012). The "Constitution presupposes the existence of an informed citizenry prepared to participate in governmental affairs." *Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 876 (1982) (Blackmun, J., concurring). Government has long conceived higher education as an engine to ready students for citizenship in "a common vessel." See David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. Pa. L. Rev. 487, 543-544 (1999).

A diverse student body demonstrably prepares students for citizenship. Diversity of backgrounds tends to broaden and give more credibility to campus discussion and debate, by exposing students to perspectives borne of different life experiences. Such exposure makes students better-informed voters, jurors, school board and neighborhood association members, and engaged participants in consideration of public affairs. Effective civic participation depends on ability to work with those whose backgrounds are different; students educated in a diverse setting are better prepared to work with

fellow citizens from all walks of life. “Learning is not merely the acquiring of mastery over intellectual subject matter * * *. [I]n our schools and colleges, every citizen of the world should become ‘at home’ in the human ‘state.’” Alexander Meikeljohn, *Education Between Two Worlds* 277 (1942).

Student diversity in higher education thus takes students

out of the narrow circle of personal and family selfishness * * * accustoming them to the comprehension of joint interests, the management of joint concerns—habituating them to act from public or semi-public motives and guide their conduct by aims which unite instead of isolating them from one another.

John Stuart Mill, *On Liberty, in Three Essays* 134 (Oxford Univ. Press 1975) (1859).

3. A third aim of higher education is to enable students to overcome barriers that separate them from one another, divide them from the world they need to know, and impede their intellectual growth. The developing theme of American higher education from the start has been to eradicate divisions and differences that limit students, and thereby to teach critical self-reflection and impart knowledge. That theme, perhaps more than any other, has defined the role and achievement of higher education in our society.

“The ‘American people have always regarded education and [the] acquisition of knowledge as matters of supreme importance.’” *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (citation omitted). The Founders saw higher education as essential to train

the nation's leaders who, John Adams held, should be recruited not from among "the rich or the poor, the high-born or the low-born, the industrious or the idle; but all those who have received a liberal education." Frank Donovan ed., *The John Adams Papers* 182 (1965). They believed that education institutions must build and reinforce bonds among citizens. Even in an era when college was accessible only to the well-placed few, they advocated common schools to bring together the nation's young and instill a sense of national community. Noah Webster, *On the Education of Youth in America* (1790), in *Essays on Education in the Early Republic* 66 (Frederick Rudolph ed., 1965); Carl F. Kaestle, *Pillars of the Republic: Common Schools and American Society 1780-1860*, at 7 (Eric Foner ed. 1983) (quoting Benjamin Rush).

Removal of barriers is thus the essence of American higher education, necessary both for personal growth and the continued growth of the Nation. "A democracy is more than a form of government; it is primarily a mode of associated living" that depends on "communicated experience." John Dewey, *Democracy and Education* 101 (Free Press 1966) (1916). And we demand even more of graduates now, as the nation "break[s] down * * * barriers of class, race, and national territory," because such a society produces "more numerous and more varied points of contact" and "a greater diversity of stimuli to which an individual has to respond." *Id.* Inculcating not only "an ability" but also "an inclination" "to serve mankind, one's country, friends and family," wrote Franklin, is "the great Aim and End of all learning." Benjamin

Franklin, *Proposals Relating to the Education of Youth in Pennsylvania* 30 (1749, reprint 1931).

**II. HIGHER EDUCATION INSTITUTIONS
NEED FLEXIBILITY TO DEFINE AND
ATTAIN DIVERSITY.**

Diversity is thus inherent in achievement of basic purposes of higher education, and appropriate diversity for a particular institution is a matter of educational judgment. But Petitioner would have courts not only scrutinize the means institutions use to attain diversity—a familiar judicial role—but also second-guess a university’s considered judgment about what type of diversity to pursue in light of its distinct educational mission.

This Court should not displace a university’s educational judgment with a cramped prescription of what kind of diversity and how much diversity an institution needs. To do so would represent a sharp break from the longstanding and salutary tradition of governmental forbearance in higher education. Institutional pluralism, the hallmark of American higher education, is traceable to that forbearance and has allowed our colleges and universities to become the envy of the world. To impose a single definition of diversity on all of higher education would conflict with the Court’s precedents and undermine those benefits.

A. American Higher Education Thrives On Pluralism.

1. American Higher Education Is Characterized By The Variety Of Institutional Missions.

American higher education is preeminent in the world and a beacon to other countries. Most of the world's leading universities are here. See Shanghai Jiao Tong University, *Academic Ranking of World Universities: 2011*; William G. Bowen *et al.*, *Equity and Excellence in American Higher Education* 54 (2005). Our universities “produce a very high proportion of the most important fundamental knowledge and practical research discoveries in the world”; the scholars and scientists they train are global leaders in their fields. Jonathan R. Cole, *The Great American University* 5 (2010). Our nation invests in higher education more resources per student than any other. Organization for Econ. Cooperation & Dev., *Education at a Glance: OECD Indicators* 209 (2011). Since World War II, “by a wide margin” professors at American universities have been awarded more Nobel prizes for physics, chemistry, medicine, and economics than any other country. Jon Bruner, *American Leadership in Science, Measured in Nobel Prizes*, Forbes.com (Oct. 5, 2011). Graduates of American colleges and universities serve in leadership roles in this and other countries to an extent unequalled by any nation in history. *E.g.*, Uri Friedman & Kedar Pavgi, *Head of the Class?*, Foreign Policy (Nov. 18, 2011); Menachem Wecker, *Where the Fortune 500 CEOs Went to School*, U.S. News & World Report (May 14, 2012).

The hallmark of American higher education is its unique pluralism. In contrast to most other countries, in the United States the path of higher education is not directed from a central ministry. Higher education here, allowed to evolve organically, is now characterized by a rich diversity of institutions: community colleges and four-year institutions, public and private universities, non-profit and for-profit colleges, religious-affiliated and secular institutions, vocational and liberal arts colleges. This diversity is matched by an equally broad array of institutional missions—from one university’s commitment to religious leadership, to a small college’s focus on the student’s self-governance and manual labor, to a leading technology institute’s engagement with the cutting edge of physical science.

The pluralism of American higher education fosters a healthy competition among institutions that is key to the success of the entire system. See Henry Rosovsky, *Highest Education*, 197 *The New Republic* 13 (1987). Colleges and universities in the United States compete for students, faculty, and resources. They strive to distinguish themselves and to offer advantages over their peer institutions, testing new educational strategies and learning from one another. When an institution identifies a successful strategy, others adapt it; when an institution stumbles, others draw lessons. Yet each institution ultimately forges its own path in light of its distinct mission. These efforts have led American colleges and universities to become, like the States themselves, “laboratories for experimentation to devise various solutions where the best solution is far from clear.” *United States v. Lopez*, 514 U.S. 549,

581 (1995) (Kennedy, J., concurring). Their innovation drives the rich variety within American higher education and is responsible for its unparalleled success.

2. The Government Has Repeatedly Endorsed The Value Of A Decentralized Higher Education System In Which Institutions Pursue Their Respective Missions In Their Respective Ways.

These features of American education did not arise by accident. A long tradition, nearly unique among nations, of government forbearance with respect to educators' judgment has figured prominently in this vibrant system. Since the founding of the Republic, this Court, the Executive and Congress in key judicial and policy decisions repeatedly have opted to grant colleges and universities more, not less, authority in implementing higher education practices and principles. See Martin Trow, *Federalism in American Higher Education, in Higher Learning in America 1980-2000* (Arthur Levine ed., 1993); John S. Brubacher & Willis Rudy, *Higher Education in Transition: A History of American Colleges and Universities* 9 (4th ed. 1997) (1958). American universities are accorded "greater freedom from government supervision than higher education enjoys in any other major country of the world." Derek Bok, *Higher Learning* 14 (1986).

The Court long has championed colleges' and universities' authority to make educational judgments. In *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819), for example, the Court confronted whether a state

possessed power to alter a college charter, and held that a college's board of trustees was better suited than the government to govern it. Chief Justice Marshall's opinion acknowledged that a college would sometimes err, but, he explained, decisions in educational matters should be made by the educators, not the legislature. See 1 James Kent, *Commentaries on American Law* 416-417 (O.W. Holmes ed., 12th ed. 1873).

The Court has proceeded in the intervening two centuries to reinforce colleges' and universities' authority in the educational sphere. In the decades following the *Dartmouth College* decision, tensions arose between legislatures and higher education institutions over questions of taxation and contract. Could a state legislature lawfully tax a university whose charter exempted it from tax? More than the power to tax was at stake, as that power implicated broader government influence over higher education. Cf. *M'Culloch v. Maryland*, 17 U.S. (4 Wheat) 316, 431 (1819). The seemingly unassailable argument that a legislature should not be able to "bargain away forever the taxing power of the State" weighed in favor of governmental authority. *Washington Univ. v. Rouse*, 75 U.S. (8 Wall.) 439, 443 (1869) (Miller, J., dissenting). Yet the Court upheld the institutions' autonomy, see, e.g., *id.* at 440; *University v. People*, 99 U.S. 309, 310, 325 (1878), in the expectation that they would act in accordance with their educational purposes. *Washington Univ.*, 75 U.S. at 440-441.

In the early twentieth century, questions arose that ranged from administration of a private university's endowment, *Taylor v. Columbian Univ.*, 226 U.S.

126 (1912), to a public university's discretion to require military training, *Hamilton v. Regents of Univ. of Cal.*, 293 U.S. 245 (1934). In each circumstance the Court declined to substitute its judgment for that of the institution. In *Taylor*, for example, the Court upheld the university's administration of a scholarship where the charitable purpose was accomplished "in some degree, at least." *Id.* at 135.

The Court extended the principle in the 20th century to the interplay of constitutional due process and a university's autonomy over its students. In *Board of Curators of the University of Missouri v. Horowitz*, 435 U.S. 78 (1978), the Court held that the Fourteenth Amendment Due Process Clause does not require a public university to provide a hearing before dismissing a student on academic grounds. *Id.* at 87. The Court weighed the interest in protecting students from arbitrary dismissal against "harm to the academic environment" that would result from "[j]udicial interposition" in university affairs. *Id.* at 90-91. Although the student's interest was "weighty" because she would be unable to continue her medical education, *id.* at 100 (Marshall, J., concurring in part and dissenting in part), the Court "decline[d] to ignore the historic judgment of educators" that a hearing should not be required. *Id.* at 90 (opinion for the Court). To "enlarge the judicial presence in the academic community," the Court said, would "risk deterioration." The Court thus determined not to intervene in the academic decision; doing so would "raise[] problems * * * requiring care and restraint." *Id.* at 90-91.

Forbearance with respect to educational judgment figured in *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957), where a university lecturer declined to answer a state attorney general’s questions about the content of his lectures. The inquiry, Chief Justice Warren said, “unquestionably was an invasion * * * of academic freedom and political expression—areas in which the government should be extremely reluctant to tread. * * * To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.” *Id.* at 250. Justice Frankfurter in concurrence cited “‘four essential freedoms’ of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.’” *See Bakke*, 438 U.S. at 312 (opinion of Powell, J.) (quoting *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring in the result)). “[W]ho may be admitted to study” is paradigmatic academic judgment. *See id.* at 312; *see also id.* at 405 (opinion of Blackmun, J.); *id.* at 366 n.42 (opinion of Brennan, J.) (“The Regents, not the legislature, have the general rule-making or policy-making power with regard to the University.”).

The Court further extended the forbearance principle in *Regents of the University of Michigan v. Ewing*, 474 U.S. 214 (1985), upholding a public university’s dismissal of a student who failed a key exam. The court of appeals had held the decision an arbitrary deprivation of property because plaintiff was the only student in seven years denied an opportunity to retake the exam, and a university pamphlet promised a retest. *Id.* at 221; *see Ewing v. Board of Regents of Univ. of Mich.*, 742 F.2d 913,

915-916 (6th Cir. 1984). On that record, application of standards for arbitrary government action in non-university contexts might well have produced a different result. But the Court held the dismissal an “academic decision” and cited “[c]onsiderations of profound importance [that] counsel restrained judicial review,” *Ewing*, 474 U.S. at 225, including the right to decide “who may be admitted to study.” *Id.* at 226 n. 12. The “narrow avenue for judicial review” the Court set focused solely on whether the decision “[was] such a substantial departure from accepted academic norms as to demonstrate that the [faculty] did not actually exercise professional judgment.” *Id.* at 225, 227. The Court concluded that academic judgments “made daily by faculty members * * * require ‘an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decisionmaking.’” *Id.* at 226 (quoting *Horowitz*, 435 U.S. at 89-90).

The other branches of government, too, in decisions with profound consequence for American colleges and universities, have opted to leave the conduct of higher education to educators. Thus, in the Administration of George Washington, Congress rejected establishment of a national university that would set federal standards for all of the new nation’s colleges. 1 Richard Hofstadter and Wilson Smith eds., *American Higher Education: A Documentary History* 157 (1961). (Congress greeted a similar proposal by John Quincy Adams “with a gale of laughter.” Edward H. Reisner, *Antecedents to the Federal Act Concerning Education*, 11 *Educational Record* 196, 197 (July 1930).) Had the idea of a national university carried, the United

States likely would have developed the more centralized, governmental control of higher education characteristic of the European nations. The decision *not* to establish such an institution or a charter-granting federal ministry of education—a decision of which Chief Justice Marshall was aware when he addressed the *Dartmouth College* case—preserved the pluralism, adaptiveness, and will to innovate that remain American higher education hallmarks. Thus Thomas Jefferson founded a university in Virginia based on the “illimitable freedom of the human mind * * * to follow truth wherever it may lead.” Roy J. Honeywell, *Educational Works of Thomas Jefferson* 99 (1931).

The design of federal support to higher education has reinforced institutional authority. In the Morrill Land-Grant Act, 12 Stat. 503 (1862), Congress granted 11,000 square miles of land to states for agricultural and mechanical arts colleges, “without excluding other scientific and classical studies.” *Id.* at 504. By then the principle of federal government abstention from judgments about the conduct of higher education was so engrained that President Buchanan vetoed an earlier version of the Act as an unconstitutional exercise of federal power. See Carl Swisher, *American Constitutional Development* 374 (1943). Unquestionably the Morrill Act was a transformative assertion of federal interest in higher education. Yet the Act imposed virtually no requirements on the type of institution or curriculum that could benefit from this massive grant. See 12 Stat. 504; *Hamilton*, 293 U.S. at 258-259 (state accepting federal land-grants “remain[ed] untrammelled by federal enactment and [was] entirely free to determine for itself” the content and

objectives of instruction). Instead of drawing a federal blueprint, Congress mandated flexibility that produced an extraordinary range of institutions and programs, prompting one educator to observe that “of all the good fortune which has attended the carrying out of the act of 1862, this variety of plans and methods in the various states was the best.” Earle D. Ross, *Democracy’s College: The Land-Grant Movement in the Formative Stage* 68-69 (1942) (quoting Andrew D. White).

In the most important 20th century higher education laws, the government similarly favored educators’ authority. The first of these, the Servicemen’s Readjustment Act of 1944 (known as the GI Bill)—at the time the most far-reaching financial boost to higher education in the nation’s history—again provided aid in a manner that maximized institutional autonomy in the educational realm. *See* 58 Stat. 288. Congress rejected proposals that would have prescribed detailed standards for institutions to receive aid, and directed that “no department, agency, or officer of the United States * * * shall exercise any supervision or control, whatsoever, over * * * any educational or training institution.” 58 Stat. 289. By structuring the aid with few prescriptions on the types of institutions or programs for which it could be used, the adopted approach reaffirmed the value of competition among institutions, each with its own educational model, as the best way to promote quality higher education. *See* H.R. Rep. No. 78-1418, at 3 (1944); Trow, *Federalism in Higher Education, in Higher Learning in America* at 58-59.

In the second major 20th century enactment of federal support for higher education, the Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (1965), and in amendments to it since,³ Congress again and again has rejected proposals to assert federal authority over colleges' and universities' educational judgment. In legislating the modern mechanisms of federal student aid, Congress rejected an emphasis on grants to institutions, close federal regulation of educational judgment, and centralized standard-setting. Instead, the Act preserves the institutions' independence and pluralism by directing aid to individual students who may choose among several thousand institutions. See 79 Stat. 1263 (requiring regulations "leaving opportunity and flexibility for the development of State plan standards and methods that will best accommodate the varied needs of institutions"); Chester E. Finn, Jr., *Scholars, Dollars and Bureaucrats* 61 (1978). The federal student aid program addresses institutional eligibility to receive and disburse aid in part through a highly decentralized, non-governmental accreditation system to the expert authority of which the institutions submit individually. See 20 U.S.C. §§ 1001-1002. And these structural protections are buttressed by the General Education Provisions Act,

³ Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235; Education Amendments of 1978, Pub. L. No. 95-561, 92 Stat. 2143; Education Amendments of 1984, Pub. L. No. 98-511, 98 Stat. 2366; Higher Education Amendments of 1986, Pub. L. No. 99-498, 100 Stat. 1268; Higher Education Amendments of 1992, Pub. L. No. 102-325, 106 Stat. 448; Higher Education Amendments of 1998, Pub. L. No. 105-244, 112 Stat. 1581; Higher Education Opportunity Act, Pub. L. No. 110-315, 122 Stat. 3078.

which forbids the federal government from “exercis[ing] any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution.” 20 U.S.C. § 1232a.

The authority of colleges and universities in educational matters reaches not only “[t]eachers and students [who] must always remain free to inquire, to study and to evaluate,” *Keyishian v. Board of Regents of Univ. of N.Y.*, 385 U.S. 589, 603 (1967) (quoting *Sweezy*, 354 U.S. at 250), but also “autonomous decisionmaking by the academy itself.” *Ewing*, 474 U.S. at 226 n.12. The federal government has repeatedly assented to that proposition for two centuries, in reliance on the fiduciary duty of those charged with maintaining the institutions. If one lesson can be distilled from the historical relationship between the United States government and higher education, it is that when educators exercising professional judgment conclude that there is powerful educational basis for a practice, government should be loath to bar it.

B. Each Institution Must Define Diversity In A Manner Consistent With Its Mission.

Petitioner’s arguments threaten to undermine the institutional pluralism this Court and the other Branches have been so careful to preserve. In Petitioner’s view, the University of Texas has no justification for considering race in admissions because it has *already* achieved a racially diverse student body. The argument has two distinct parts. First, Petitioner contends that, under the Top 10% Law—which guarantees admission to all students in

the top ten percent of their high school graduating class—UT has become “one of the most diverse public universities in the nation” and that additional diversity would be “‘gratuitous.’” Pet. Br. 35 (citing *Fisher v. Univ. of Tex.*, 644 F.3d 307, 307 (5th Cir. 2011) (Jones, C.J., dissenting from denial of reh’g en banc)). Relatedly, Petitioner suggests that UT’s interest in a diverse student body must be limited to the pursuit of a “critical mass” of minority students, as the Court used that term in *Grutter*. Pet. Br. 29.

Both contentions are wrong, and both misconceive the Court’s role. Determinations about what kind of diversity, and how much, a higher education institution needs entail quintessential academic judgment. *Grutter*, 539 U.S. at 328-329, 333. Because it is at the heart of “a university’s definition of its educational objective,” *id.* at 388 (Kennedy, J. dissenting), diversity is best defined by an institution for itself, in accordance with its mission and concept of education. The constitutionally protected freedom to assemble a diverse student body would amount to little if it did not include the freedom to define the diversity being sought.

Grutter endorsed deference to institutional judgment on such matters—not only to the abstract decision that “diversity is a compelling interest,” but also to the more practical and institution-specific determinations about what diversity means for an institution. The University of Michigan Law School identified one particular conception of diversity—“‘enroll[ing] a “critical mass” of minority students’”—and determined that attaining critical mass was “necessary to further its compelling interest in securing the educational benefits of a

diverse student body.” 539 U.S. at 329, 333 (quoting Br. for Respondent in No. 02-241, at 13). The Court deferred to that judgment based in part on the Law School’s “experience and expertise” within the educational realm. *Id.* But one law school’s particular judgment about what type of diversity to pursue in light of its mission does not bind every other college and university in the nation. The First Amendment affords *each* institution “particular latitude in defining diversity.” *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 792 (2007) (Kennedy, J., concurring in part); *see also Grutter*, 539 U.S. at 388 (Kennedy, J., dissenting) (distinguishing permissible “deference to a university’s definition of its educational objective” from impermissible “deference to the implementation of this goal”). What constitutes diversity sufficient for the educational objectives of one school might not suffice at another.

Deference is owed educators’ educationally derived conceptions of diversity because such matters require evaluation of cumulative information for which those responsible for higher education are best qualified. *See Ewing*, 474 U.S. at 226. How, for example, the mix of students affects learning involves considerations educators are best equipped to gauge. Such judgments require knowledge of campus and classroom dynamics, cognitive processes, and ways to nurture students’ capacity for moral reasoning, along with other specialized knowledge in which educators are trained. These “complex educational judgments” lie “primarily within the expertise of the university.” *Grutter*, 539 U.S. at 328. Courts should therefore “resist substitut[ing] their own notions of sound educational policy for those of the school authorities

which they review.” *Christian Legal Soc’y v. Martinez*, 130 S. Ct. 2971, 2988 (2010) (internal quotations omitted).

Such judgments also depend on the institution’s particular mission. The education a small liberal arts college aims to impart may call for a student body different than that a flagship state university needs; the student body a secular university seeks may ill-suit an institution committed to a delicate balance of Catholicism and denominational inclusiveness. In the admission process, the weight placed on academic metrics, such as standardized test scores and grade-point averages, varies from one institution to another. And institutions’ needs evolve over time. For courts to override educators’ reasoned judgment about how much diversity and what kind of diversity the institution needs would truncate American colleges’ and universities’ historic right to assemble students in a way that fits the institutions’ educational philosophies—philosophies that with salutary effect are themselves extraordinarily varied. See Carnegie Comm’n on Higher Educ., *Reform on Campus: Changing Students, Changing Academic Programs* 35 (1972). The Fourteenth Amendment does not require this result. On the contrary, strict scrutiny “is designed to take relevant differences into account.” *Johnson v. California*, 543 U.S. 499, 515 (2005).

C. Properly Conducted Holistic, Individualized Review Tailored To Institutional Mission Is A Lawful And Effective Means To Attain Diversity.

As the foregoing observations suggest, the Fifth Circuit was correct to focus its scrutiny on UT’s

“decisionmaking process” in admissions rather than the merits of UT’s judgment as to whether it had achieved sufficient diversity. *Fisher v. Univ. of Tex.*, 631 F.3d 213, 231 (5th Cir. 2011). *Grutter* affords colleges and universities a substantial degree of deference in defining their educational goals, but it requires courts to ensure that any race-conscious *means* used to pursue those goals are narrowly tailored to the end.

Quotas and mechanical formulas are not narrowly tailored to achieve the benefits of student body diversity where they make “an applicant’s race or ethnicity the defining feature of his or her application.” 539 U.S. at 337. Diversity is a compelling educational interest because students benefit from exposure to peers from a broad variety of backgrounds; racial and ethnic diversity is one component of that variety, but it is hardly the only component. By failing to account for “‘all pertinent elements of diversity,’” *id.* at 334 (citation omitted), quotas and mechanical formulas are a poor fit for the goal of student body diversity. That is why they fail strict scrutiny.

A properly conducted holistic, individualized consideration of each applicant, on the other hand, is precisely tailored to achieve the goal of student body diversity. Such review “ensures that all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions.” *Id.* at 337. “The point of the narrow tailoring analysis in which the *Grutter* Court engaged was to ensure that the use of racial classifications was indeed part of a broader assessment of diversity, and not simply an effort to

achieve racial balance.” *Parents Involved*, 551 U.S. at 723 (citation omitted); *see also id.* at 722 (“what was upheld in *Grutter* was consideration of ‘a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element’” (citation omitted)).

The Court’s core holding on this point in *Grutter* thus remains valid: universities can “consider race or ethnicity * * * as a ‘plus’ factor in the context of individualized consideration of each and every applicant.” 539 U.S. at 334. The University of Texas did so here, as part of its holistic, applicant-by-applicant review. Its educational judgment should be respected, and the educational benefits that flow from diversity reaffirmed.

CONCLUSION

This Court should affirm the Court of Appeals, reaffirm *Grutter*, and protect colleges’ and universities’ freedom to pursue their respective missions.

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ADDENDUM

ADDENDUM: *AMICI* ON THIS BRIEF

- The American Council on Education is described at page 2 of this brief.
- The American Anthropological Association (AAA) is the world's largest organization of individuals interested in anthropology. It represents more than 10,000 archaeologists and anthropologists in the academy and practice.
- The American Association of Colleges of Pharmacy (AACP) is a national organization representing the interests of pharmacy education and educators. Comprising 129 accredited colleges and schools of pharmacy including more than 6,400 faculty, 57,000 students enrolled in professional programs, and 5,700 individuals pursuing graduate study, AACP is committed to excellence in pharmacy education.
- The American Association of Community Colleges (AACC) is the primary advocacy organization for the nation's community colleges. It represents nearly 1,200 two-year, associate degree-granting institutions.
- The American Association of State Colleges and Universities (AASCU) is a higher education association of more than 400 public colleges, universities, and systems whose members share a learning- and teaching-centered culture, a historic commitment to underserved student populations, and a dedication to research and creativity that advances their regions' economic progress and cultural development.

- The American Association of University Professors (AAUP) represents some 48,000 faculty members and research scholars. It defends academic freedom and the free exchange of ideas in higher education.
- The American College Personnel Association (ACPA) is the largest comprehensive student affairs association that advances student affairs and engages students for a lifetime of learning and discovery. ACPA, with almost 8,000 members, supports and fosters college student learning through the generation and dissemination of knowledge, which informs policies, practices, and programs for student affairs professionals and the higher education community.
- The American Indian Higher Education Consortium (AIHEC) is the unifying voice of our nation's 37 Tribal Colleges and Universities—a community of federally recognized public institutions working to strengthen tribal nations and make a lasting difference in the lives of American Indians and Alaska Natives. AIHEC serves its network of member institutions through public policy, advocacy, research, and program initiatives to ensure strong tribal sovereignty through excellence in American Indian higher education.
- The American Speech-Language-Hearing Association (ASHA) is the professional, scientific, and credentialing association for more than 150,000 members and affiliates who are audiologists, speech-language pathologists, and

speech, language, and hearing scientists in the United States and internationally. Support personnel in audiology and speech-language pathology also affiliate with ASHA.

- The Association of American Colleges and Universities (AAC&U) is the leading national association concerned with the quality, vitality, and public standing of undergraduate liberal education. It has more than 1,250 member institutions, including accredited public and private colleges, community colleges, and universities of every type and size. Its mission is to reinforce the collective commitment to liberal education at both the national and local levels and to help individual institutions keep the quality of student learning at the core of their work as they evolve to meet new economic and social challenges.
- The Association of American Universities (AAU) is an association of 61 leading public and private research universities in the United States and Canada. Founded to advance the international standing of U.S. research universities, AAU today focuses on issues that are important to research-intensive universities, such as funding for research, research policy issues, and graduate and undergraduate education.
- The Association of Catholic Colleges and Universities (ACCU) serves as the collective voice of U.S. Catholic higher education. Through programs and services, ACCU strengthens and promotes the Catholic identity and mission of its member institutions so that all associated with

Catholic higher education can contribute to the greater good of the world and the Church.

- The Association of Community College Trustees (ACCT) represents over 6,000 board members who govern community, technical, and junior colleges.
- The Association of Governing Boards of Universities and Colleges (AGB) is the only national association that serves the interests and needs of academic governing boards, boards of institutionally related foundations, and campus CEOs and other senior-level campus administrators on issues related to higher education governance and leadership. Its mission is to strengthen, protect, and advocate on behalf of citizen trusteeship that supports and advances higher education.
- The Association of Jesuit Colleges and Universities (AJCU) represents all 28 Jesuit institutions in the U.S. and is affiliated with over 100 Jesuit institutions worldwide. The first Jesuit institution opened in 1548 in Messina, Sicily, and since that time, Jesuit institutions remain committed to academic rigor, with a focus on quality teaching, learning, and research to educate the whole person. Jesuit teachings are inspired by many years of social justice priorities and providing access to all students from all socio-economic backgrounds.
- The Association of Public and Land-grant Universities (APLU) is a research and advocacy organization of public research universities, land-grant institutions, and state university

systems with member campuses in all 50 states, U.S. territories, and the District of Columbia.

- The Association of Research Libraries (ARL) is an organization of 126 research libraries at comprehensive, research-extensive institutions in the U.S. and Canada that share similar research missions, aspirations, and achievements.
- The Association to Advance Collegiate Schools of Business (AACSB) represents nearly 1,300 business schools worldwide in 84 countries. Its primary mission is to advance quality management education worldwide through accreditation, thought leadership, and value-added services.
- The College and University Professional Association for Human Resources (CUPA-HR) serves as the voice of human resources in higher education, representing more than 14,000 human-resources professionals at over 1,800 colleges and universities across the country. Its membership includes 92 percent of all United States doctoral institutions, 75 percent of all master's institutions, 60 percent of all bachelor's institutions, and nearly 600 two-year and specialized institutions.
- The Common Application is committed to providing reliable services that promote equity, access, and integrity in the college application process. It serves students, member institutions, and secondary schools by providing applications that students and school officials may submit to any of its nearly 500 member institutions.

Membership is open to colleges and universities that promote access by evaluating students using a holistic selection process.

- The Council for Advancement and Support of Education (CASE) is a professional association serving educational institutions and the advancement professionals who work on their behalf in alumni relations, communications, development, marketing, and allied areas. CASE helps its members build stronger relationships with their alumni and donors, raise funds for campus projects, produce recruitment materials, market their institutions to prospective students, diversify the profession, and foster public support of education.
- The Council for Christian Colleges & Universities (CCCU) is an international association of 170 fully accredited Christ-centered institutions of higher education committed to the integration of Christian faith and higher learning. Its member institutions transform lives by faithfully relating scholarship and service to biblical truth. CCCU member and affiliate campuses currently serve over 400,000 students.
- The Council for Higher Education Accreditation (CHEA) promotes academic quality through review and formal recognition of higher education accrediting bodies.
- The Council for Opportunity in Education (COE) expands educational opportunities for low-income students, first-generation students, students with disabilities, veterans, and adult learners.

- The Council of Graduate Schools (CGS) is an organization of institutions of higher education in the United States, Canada, and across the globe engaged in graduate education, research, scholarship, and the preparation of candidates for advanced degrees.
- The Council of Independent Colleges (CIC) represents 619 liberal arts colleges and universities and 90 state associations and other higher education organizations.
- The Council on Social Work Education (CSWE) strengthens the quality of social work education by providing national leadership and a forum for collective action. CSWE sets and maintains policy and program standards, accredits degree programs in social work, promotes research and faculty development, and advocates for social work education.
- EDUCAUSE is an association of over 2,000 colleges and universities. It promotes innovation and progress in higher education through the effective design and implementation of information technologies.
- The Graduate Management Admission Council (GMAC) is an organization of more than 200 leading graduate management school members located in the United States and worldwide. It owns and administers the GMAT® exam and provides research and market intelligence, marketing and recruiting tools and programs, worldwide professional development opportunities, and innovative grant initiatives

designed to serve the graduate management community.

- The Group for the Advancement of Doctoral Education in Social Work (GADE) promotes excellence in doctoral education in social work and facilitates information exchange among its member doctoral programs.
- The National Action Council for Minorities in Engineering, Inc. (NACME) ensures American competitiveness in a flat world by leading and supporting the national effort to increase the number of successful African American, American Indian, and Latino women and men in science, technology, engineering and mathematics education and careers. It has supported over 24,000 students with more than \$124 million in scholarships and other support.
- The National Association for Equal Opportunity in Higher Education (NAFEO) is the umbrella organization of the nation's Historically Black Colleges and Universities and Predominantly Black Institutions. It is the only membership association of its kind, representing the presidents and chancellors of the diverse black colleges and universities: public, private, and land-grant, two-year, four-year, graduate, and professional, historically and predominantly black colleges and universities.
- The National Association of College and University Business Officers (NACUBO) is a membership organization representing more than 2,500 colleges, universities, and higher education service providers across the country and around

the world. It represents chief business and financial officers through advocacy efforts, community service, and professional development activities. NACUBO's mission is to advance the economic viability and business practices of higher education institutions in fulfillment of their academic missions.

- The National Association of Diversity Officers in Higher Education (NADOHE) is the leading voice of chief diversity officers in higher education. Its membership includes almost 200 colleges and universities, as well as individual members, affiliated professional organizations, and two formal state chapters.
- The National Association of Independent Colleges and Universities (NAICU) serves as the unified national voice of private, nonprofit higher education in the United States. It has nearly 1,000 members nationwide, including traditional liberal arts colleges, major research universities, special service educational institutions, and schools of law, medicine, engineering, business, and other professions. NAICU represents these institutions on policy issues primarily with the federal government, such as those affecting student aid, taxation, and government regulation.
- The National Association of Student Financial Aid Administrators (NASFAA) represents more than 18,000 student financial assistance professionals at nearly 2,800 institutions of higher education, serving over 16 million students. It supports the training, diversity, and professional development of financial aid

administrators; advocates for public policies and programs that increase student access to and success in postsecondary education; and serves as a forum for communication and collaboration on student financial aid issues.

- The National Collegiate Athletic Association (NCAA) serves as the organizing, regulating, and standard-setting body for 23 intercollegiate sports. The NCAA's active membership includes over 1,000 institutions of higher education that jointly create seasons of amateur intercollegiate competition across three Divisions.
- The Southern Association of Colleges and Schools Commission on Colleges (SACSCOC) is the regional body for the accreditation of degree-granting higher education institutions in the Southern states. Its mission is the enhancement of educational quality throughout the region, and it strives to improve the effectiveness of institutions by ensuring that institutions meet standards established by the higher education community that address the needs of society and students.
- Student Affairs Administrators in Higher Education (NASPA) is the leading association for the advancement, health, and sustainability of the student affairs profession. It serves a full range of professionals who provide programs, experiences, and services that cultivate student learning and success in concert with the mission of our colleges and universities. NASPA has more than 13,000 members in all 50 states, 29 countries, and 8 U.S. Territories.

- The Thurgood Marshall College Fund (TMCf) is the only national organization founded for the sole purpose of providing scholarships to students attending the nation's public Historically Black Colleges and Universities. In addition to scholarships, TMCf provides leadership development and training as well as programmatic and capacity building support to its member schools.