

In The
Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, et al.,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Fifth Circuit**

**BRIEF FOR THE STATE OF CALIFORNIA AS
AMICUS CURIAE IN SUPPORT OF RESPONDENTS**

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QUESTION PRESENTED

Whether this Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Grutter v. Bollinger*, 539 U.S. 306 (2003), permit the University of Texas at Austin's use of race in undergraduate admissions decisions.

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INTEREST OF AMICUS CURIAE

The State of California submits this brief pursuant to Supreme Court Rule 37.4 as an amicus curiae in support of the respondents because of its unique position with respect to the issues at play here. California is not only the most populous state in the Union, but also one of the most diverse. According to 2010 U.S. Census data, California has the largest White, Latino and Asian populations in the country, as well as the most American Indians/Alaskan Natives and Native Hawaiians/Pacific Islanders.¹ It has the fifth largest Black/African American population.² California even has the largest population of those identifying as belonging to a race other than those mentioned above and to more than one race.³ As such, California has a particularly compelling interest in ensuring that its public universities provide the educational benefits that derive from having a diverse student body.

In addition, in November 1996, the California electorate amended California's constitution to provide, in relevant part, that the "State shall not discriminate

¹ 2012 Census, Table 18 (Resident Population by Hispanic Origin and State: 2010) and Table 19 (Resident Population by Race and State: 2010), available at <http://www.census.gov/compendia/statab/cats/population.html>.

² 2012 Census, Table 19 (Resident Population by Race and State: 2010), available at <http://www.census.gov/compendia/statab/cats/population.html>.

³ *Id.*

against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.” Cal. Const. art. I, § 31, subd. (a), added by initiative, Gen. Elec. (Nov. 5, 1996), commonly known as Proposition 209. In the wake of Proposition 209, and without regard to this Court’s important ruling in *Grutter v. Bollinger*, 539 U.S. 306 (2003), which is largely irrelevant in California, this State’s public institutions of higher education have endeavored to achieve a suitable level of student body diversity without reliance on race-conscious admissions standards. They have not been successful in achieving a level of diversity that will adequately educate and prepare students for social and civic life following graduation.⁴ If California, with the broad diversity in its population, cannot achieve a suitable level of diversity at its universities, other states, with more homogenous overall populations, will face even greater challenges.

California’s decision to eschew race-conscious methodologies to achieve optimal student body diversity is, of course, a policy choice within the prerogative of California’s voters. But California’s policy choice should not be understood to reflect in any

⁴ Amicus is informed that the President and Chancellors of the University of California plan to submit an amici curiae brief that will explore in detail the impacts of Proposition 209 on the enrollment of underrepresented students of color at the University of California.

measure a diminishment of the strength of California's belief in the importance of student body diversity as an essential component of a comprehensive collegiate education.⁵ Nor should it be understood to diminish California's belief that *federal* constitutional standards for evaluating race-conscious admission policies must allow state universities and colleges broad discretion to fashion suitable admission standards within the limits of the Fourteenth Amendment as described by this Court in *Grutter*.

Notwithstanding Proposition 209, California has a keen interest in ensuring that its future leaders are adequately prepared to function productively in an increasingly diverse and increasingly urban society.

Moreover, California seeks to ensure its future against balkanization and resegregation of communities. Student body diversity at the college and university level is a critical piece of this effort. Many students arrive at college having had limited exposure to different races and cultures, and with biases already imprinted upon them. Their college years provide the opportunity for them to interact "with

⁵ Indeed, in a post-Proposition 209 effort to open California's public colleges and universities to underrepresented minorities, California has afforded non-citizen, undocumented students who attend a California high school for at least three years the ability to pay resident, rather than non-resident, tuition, to attend a California public institution of higher education. *See Martinez v. The Regents of the University of California*, 50 Cal.4th 1277 (2010), *cert. denied*, 131 S.Ct. 2961 (2011).

different people from different places, cultures, races, religions, and socio-economic backgrounds” and to “learn the lessons that will shape their behavior for the rest of their lives.” Chris Chambers Goodman, *Retaining Diversity in the Classroom: Strategies for Maximizing the Benefits that Flow from a Diverse Student Body*, 35 Pepp. L. Rev. 663, 703 (2008) (footnote omitted). In the same vein, the educational experiences uniquely provided by a diverse student fellowship are critical to future civic participation and leadership. Today’s college and university students are tomorrow’s citizens and leaders. As a state facing complex and daunting fiscal, social, and environmental challenges, California is keen to ensure that its future leaders and citizens are up to the task.

If the efforts of California’s public institutions of higher education continue to be unsuccessful at achieving the needed diversity of their student bodies without resort to race-conscious admission methods, California’s voters may choose to abandon the choices reflected in Proposition 209. If they do, California will need the flexibility and deference permitted by *Grutter*. For that reason, California endorses the views expressed by New York and its supporting States. California submits this separate brief as *amicus curiae* to clarify the importance of diversity to the State notwithstanding its self-imposed limit on the methodology for achieving diversity in its public institutions of higher education.

SUMMARY OF ARGUMENT

In *Grutter*, this Court affirmed that public universities have a compelling interest in securing the educational benefits of a diverse student body, which interest can justify admissions policies that consider race as one of many factors taken into account in a holistic, individualized assessment of an applicant. In doing so, this Court correctly recognized that significant benefits for all students derive from having a diverse student body at public universities. Majority and minority students alike benefit from campus environments that more realistically reflect the pluralistic society in which they live and in which they will be expected to contribute socially and economically, and to assume positions of leadership.

In addition, meaningful diversity on university campuses benefits not only students, but society as a whole. *Grutter* acknowledged the overriding importance of preparing students for work and citizenship. A diverse student body better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals. Moreover, it has been shown that because of the “resegregation” of American society, many students enter college with limited precollege exposure to people of different races, cultures, and ethnicities. Interaction during college years with students of different races and cultures can help disrupt the cycle of resegregation and lead to more positive cross-racial interaction and understanding.

Providing underrepresented students of color access to full participation in the social and economic life of the community after graduation is equally important. This Court has noted that effective participation by members of all racial and ethnic groups in the Nation's civic life is essential if the dream of one Nation, indivisible, is to be realized.

The reasoning and conclusions of the Court in *Grutter* should be reaffirmed.

ARGUMENT

DIVERSITY AT PUBLIC UNIVERSITIES, INCLUDING RACIAL DIVERSITY, ENHANCES THE EDUCATIONAL EXPERIENCE FOR STUDENTS AND PRODUCES GRADUATES BETTER PREPARED TO CONTRIBUTE TO A PLURALISTIC SOCIETY

Diversity encompasses the “broad understanding that all types of background experiences . . . bring different perspectives and added complexity” to human dynamics. Meera E. Deo et al., *Paint by Number? How the Race and Gender of Law School Faculty Affect the First-Year Curriculum*, 29 Chicano-Latino L. Rev. 1, 3 (2010). Although the term “diversity” refers broadly to a number of social, political, and cultural factors, including “class, national origin, sexual orientation, geographic region, political affiliation, religion, ability/disability and age,” race, like gender, has “a distinct, significant, and foundational role in shaping experiences in the U.S.” *Id.* (footnote omitted).

To be sure, consideration of race in governmental decision-making has traditionally been prohibited because, in the vast majority of cases, race is irrelevant. But, as this Court has recognized, “[c]ontext matters”; not every decision influenced by race is equally objectionable. *Grutter*, 539 U.S. at 327. In the context of higher education, the consideration of race, along with a whole host of other factors that differentiate students from one another, has proven to be indispensable in achieving the educational benefits of a diverse student body – an interest sufficiently compelling to justify the use of race in university admissions. *Id.* at 325. Diversity, including racial diversity, not only signals that the doors of public education are truly open to all, but also contributes to the educational experience of college students and better prepares graduates to function productively in an increasingly pluralistic society.

A. Diversity Benefits Students in the Classroom

The benefits of diversity are not merely theoretical, but real and substantial. *Grutter*, 539 U.S. at 330. The college-level classroom experience, intended as a laboratory within which students are challenged to think “outside of the box,” both individually and collectively, is greatly enhanced by the presence of diverse cultures and life experiences. Numerous studies have confirmed this, at every level of a student’s education. See, e.g., Emily J. Shaw, *Researching the Educational Benefits of Diversity*, College Board Research

Report No. 2005-4, available at http://professionals.collegeboard.com/profdownload/pdf/051092RDCBReport05-4_050420.pdf (surveying social science studies regarding the educational benefits of diversity). At the university level, campus diversity promotes cross-racial understanding; breaks down racial stereotypes; fosters better understanding of different races; and leads to classroom discussions that are livelier, more spirited, more enlightening and more interesting. *Grutter*, 539 U.S. at 330; Goodman, *supra*, 35 Pepp. L. Rev. at 667-68. The “benefits of educational diversity . . . include well-developed critical thinking skills, cognitive development, and an ability to interact with other members of our increasingly diverse society.” Deo et al., *supra*, 29 Chicano-Latino L. Rev. at 31 (footnote omitted). Indeed, students who interact with peers from diverse backgrounds show greater relative gains in critical and active thinking. *Id.*

These benefits are particularly relevant to development of critical thinking. Prof. Kevin R. Johnson, Dean of the law school at the University of California at Davis, comments: “[D]iversity and excellence are inextricably interrelated, mutually reinforcing, and well worth striving for by any . . . school worth its salt.” Kevin R. Johnson, Symposium: *The Future of Legal Education: The Importance of Student and Faculty Diversity in Law Schools: One Dean’s Perspective*, 96 Iowa L. Rev. 1549, 1550 (2011). Dean Johnson continues: “[M]embers of different minority groups in the aggregate bring different life experiences, perspectives, and knowledge to bear on the analysis

of the law and legal doctrine than their white counterparts." *Id.* at 1562; *see also*, Kevin R. Johnson, *Cry Me a River: The Limits of "A Systemic Analysis Of Affirmative Action In American Law Schools,"* 7 *Afr.-Am. L. & Pol'y Rep.* 1, 15-20 (2005) ("The impact of environment on students of color in law school, particularly the effects of unconscious racism on minority students' feelings of belonging and their actual performance, is well-documented.").

B. Diversity in the Classroom Benefits Society Later

Beyond the benefits to classroom learning itself, increased enrollment of underrepresented students of color better prepares students to enter a diverse society upon graduation and to contribute to social-cultural harmony. Deo et al., *supra*, 29 *Chicano-Latino L. Rev.* at 31; *see also* Rebecca K. Lee, *Implementing Grutter's Diversity Rationale: Diversity and Empathy in Leadership*, 19 *Duke J. Gender L. & Pol'y* 133, 141 (2011) (citing numerous amici curiae briefs in *Grutter* submitted by businesses and corporations extolling the importance of an appreciation of diversity in developing leadership); Goodman, *supra*, 35 *Pepp. L. Rev.* at 669 (quoting Okianer Christian Dark, *Incorporating Issues of Race, Gender, Class, Sexual Orientation and Disability into Law School Teaching*, 32 *Willamette L. Rev.* 541, 553-54 (1996)). This Court has acknowledged the overriding importance of preparing students for work and citizenship (*Grutter*, 539 U.S. at 331) and has recognized

that a diverse student body better prepares students for an increasingly diverse workforce and society. *Id.* at 330. Employers and corporate and military leaders agree that in the modern workplace, experience with, and the ability to work effectively with, individuals from different backgrounds and cultures is an important proficiency. *Lee, supra*, 19 Duke J. Gender L. & Pol'y at 139-141. Analyzing the briefs of amici curiae filed in *Grutter*, Prof. Lee observed that:

Workplace diversity is important because it contributes to a work environment that is less discriminatory and more effective as well as "inclusive, comfortable, and reflective of the multicultural communities in which [businesses do] business." Employers also can make better decisions and creatively problem-solve by drawing upon the diverse input from a diverse workforce, enabling businesses to more successfully compete in the marketplace. As the business amici emphasized, these abilities must be taught in order to properly prepare individuals for future leadership posts. As one amicus asserted, this training must be provided in institutions of higher education, before students fully join the workforce, because business employers cannot reproduce the protected environment of the school setting where differing perspectives can be shared freely. Nor can employers provide a non-hierarchical setting where learning can best take place among equally situated individuals.

Id. at 141-42 (footnotes omitted).

No less important to California, however, is the hope that the honing of critical-thinking skills with respect to the issue of diversity can contribute to a more sophisticated and nuanced interpretation of cultural differences and conflicts, which in turn may help to identify the root sources of racial, ethnic, and cultural conflicts. See, e.g., Hemant Shah, *Press Coverage of Interethnic Conflict: Examples from the Los Angeles Riots of 1992*, 2007 J. Disp. Resol. 177 (2007); Lisa C. Ikemoto, *Traces of the Master Narrative in the Story of African American/Korean American Conflict: How We Constructed "Los Angeles,"* 66 S. Cal. L. Rev. 1581 (1993). The successful development of such critical-thinking skills, however, is improbable if culturally diverse voices are absent from the college classroom.

C. Diversity Benefits California by Counter- ing the Effects of Resegregation

Manifestly, racial and ethnic diversity can facilitate increased cross-racial interactions. Such a contribution to a student's social development takes on added importance given that "more and more students come to college with few or no experiences with racially or ethnically diverse peers." Victor B. Saenz, *Breaking the Segregation Cycle: Examining Students' Precollege Racial Environments and College Diversity Experiences*, 34 Rev. Higher Educ. 1, 2 (2010). Most of the nation's largest cities "have predominantly minority school districts, with most of them surrounded by overwhelmingly White suburban school districts." *Id.* at 3 (citations omitted). African American

students overwhelmingly attend predominantly minority schools and all students are “increasingly less likely to live in diverse communities or attend diverse schools, curtailing their opportunities for meaningful diversity experiences prior to college.” *Id.* at 4.

A 2004 study of California’s public high schools, based on 2000 data, illustrates that racial segregation is regrettably the reality for many high school students. Robert Teranishi et al., *Opportunity at the Crossroads: Racial Inequality, School Segregation, and Higher Education in California*, Teachers College Record 106, No. 11 (2004). Teranishi’s study found that, of California’s 823 comprehensive public high schools, 373 schools had a majority of White students (comprising on average 71.2% of the students), 209 schools had a majority of Chicano/Latino students (comprising on average 70.6% of the students), and 11 schools had a majority of African American students (comprising on average 66.5% of the students). In total, 66% of White students in California in 2000 attended White majority schools and 56% of Latinos attended Latino majority schools. When combined, “Latinos and African Americans in Latino majority schools constituted an average of 95% of all enrolled students.” *Id.* at 2230-32.

Research shows that “racial separation, especially in the adolescent years, could potentially foster negative effects, allowing stereotypes and myths about other racial and ethnic groups to flourish because students lack direct experiences that can contradict or challenge their misinformed opinions.” Saenz, *supra*,

34 Rev. Higher Educ. at 5. Researchers at the University of North Dakota, where an overwhelming percentage of the students are White, also found that students “bring with them ideological predispositions and the baggage of political socialization by parents, peers, schools, and the media.” Kathryn R.I. Rand & Steven Andrew Light, *Teaching Race Without a Critical Mass: Reflections on Affirmative Action and the Diversity Rationale*, 54 J. Legal Educ. 316, 322 (2004). Students’ “perceptions of people of color are circumscribed by their upbringing in racially homogeneous communities, and by their lack of exposure to diversity in the classroom.” *Id.* at 327. Students who come from the most segregated of precollege environments (i.e., White students from predominantly White environments) are likely to benefit significantly from attending diverse institutions. Saenz, *supra*, 34 Rev. Higher Educ. at 31; see also Brandon Paradise, *Racially Transcendent Diversity*, 50 U. Louisville L. Rev. 415, 469-72 (2012) (reviewing studies that research the impact of racially mixed secondary schools on experiences of attending those schools). Students benefit from exposure to diverse classmates not only in the classroom experience, but also in the community after graduation.

It is essential to California’s future success as a multicultural society that historic patterns of segregation not be perpetuated. Racially and ethnically diverse college settings and a student’s college diversity experiences can “significantly mediate or interrupt these perpetuation effects” of increasingly segregated precollege environments. Saenz, *supra*, 34 Rev. Higher Educ. at 30-31.

D. Diversity Benefits California by Lending Greater Legitimacy to Social and Political Processes

Diversity in education also serves as a bridge linking citizens to their government, providing legitimacy to the Nation's leaders and our political processes. Goodman, *supra*, 35 Pepp. L. Rev. at 670. This diversity in institutions of higher education plays an important role in our democratic system. See, e.g., Carla D. Pratt, *The Tenth Annual Frankel Lecture: Commentary: Taking Diversity Seriously: Affirmative Action and the Democratic Role of Law Schools: A Response to Professor Brown*, 43 Hous. L. Rev. 55, 57 (2006).

In fact, this Court has recognized that diversity in educational institutions benefits society by fostering effective participation by members of all racial and ethnic groups “in the civic life of our Nation,” which “is essential if the dream of one Nation, indivisible, is to be realized.” *Grutter*, 539 U.S. at 332. The Court explained:

In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training.

Id.

Put another way, the “delegated trust” placed in our government and the legitimacy of “the project that is our democracy,” is increased when “individuals from historically subordinated and marginalized groups have a meaningful opportunity to effectively participate in our democracy.” Pratt, *supra*, 43 Hous. L. Rev. at 59. Pratt explains this benefit of diversity in the context of the legal profession, but the rationale is just as applicable to other areas of society:

[T]he need for a diverse legal profession extends far beyond the desire to open the doors of individual success to people of color. . . . Because governance by the people and the dispersal of power are normative ideals underlying democracy, our democracy is enhanced by policies directed to achieve these ideals. A democratic rationale for affirmative action in legal education looks forward to creating diverse democratic leadership for the future. But it also looks back to a time when our democracy stood on the verge of collapse because we did not fully subscribe to the foundational democratic principles of freedom, inclusion, and equality. The civil unrest that erupted during the Civil Rights Movement is indicative of what can happen when a nation that proudly professes to be built upon democratic ideals fails to extend the rights and privileges of democracy to everyone equally.

Id. at 62 (footnotes omitted).

It is also important that California's broad and rich diversity is reflected in its appointed and elected leaders. For example, California's Chief Justice, The Honorable Tani Cantil-Sakauye is Asian-Filipina American. California's Attorney General, Kamala D. Harris, is African American/Asian. In addition to the Chief Justice, three Associate Justices on California's Supreme Court, Justices Kennard, Chin, and Liu, are Asian American. Recently retired Associate Justice Carlos Moreno is Mexican American, and former Associate Justice Janice Rogers Brown, now a judge of the United States Court of Appeals for the District of Columbia Circuit, is African American. Manifestly, maintenance of this sort of representation in state government can only be achieved by efforts to ensure diversity in undergraduate and law school classes.⁶ States that see a need to use race as one part of a holistic scheme to achieve such diversity should be permitted to do so.

⁶ As indicated earlier, California has chosen to eschew use of race-conscious admission standards in its public law schools. Efforts by the California's public universities and colleges to achieve a suitably diverse student body are supplemented by private universities which are not limited by Proposition 209. For example, Associate Justice Kennard graduated from the University of Southern California School of Law; Justice Chin, from the University of San Francisco School of Law; Justice Liu from Yale Law School; and former Justice Moreno, from Stanford Law School.

CONCLUSION

The State of California respectfully urges this Court to reaffirm that public institutions of higher education have a compelling interest in providing the educational benefits that derive from having a diverse student body, and that such interest can justify the use of race-conscious standards as part of a holistic admissions scheme.

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