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 AMICUS CURIAE DAVID BOYLE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

1. 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. (Respondents' version)

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION

STATUTES

RULE

OTHER AUTHORITIES

STATEMENT OF INTEREST OF AMICUS CURIAE

The present amicus curiae, David Boyle (hereinafter, "Amicus"),[1] is respectfully filing this Brief in Support of Respondents in Case 11-345 ("*Fisher v. University of Texas at Austin*"). Amicus has a special vantage point, having been a student at the University of Michigan Law School in a time (1999-2002) leading up to the *Grutter v. Bollinger* (539 U.S. 306 (2003)) decision that vindicated the school's affirmative action program. Amicus has also made frequent efforts to follow affirmative-action issues in the years after *Grutter*.

Amicus (who, incidentally, was not an affirmative-action beneficiary) was a member of a "students for affirmative action" group at the school; but even among the student population in general, there was very strong support for affirmative action, as far as Amicus could tell. In fact, there was an amazing solidarity of many students, from multifarious backgrounds, in supporting the embattled program; a solidarity which would have been absent if the various horror stories of the Petitioner and her supporters about the "divisive effects" of affirmative action were true. A few people questioned affirmative action, but they were very much in the minority (so to speak).

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[1] As per Supreme Court Rule 37, no party or counsel for a party, nor anyone else besides Amicus himself, wrote or helped write this brief, or contributed money to fund the writing or submission of it. Blanket permission is on record with the Court for amicae/i to write briefs.

If not quite "paradise", the school of that period was a showcase of friendly and productive relations and interchange among all sorts of people and ethnic groups. There were not any underrepresented-minority student groups trying to segregate themselves from all contact with whites, or carrying around "Kill Whitey" signs, or such. In fact, Amicus remembers with pleasure the "Butch Carpenter" annual dinner given by BLSA ("Black Law Students Alliance"), and the "Juan Tienda" annual dinner given by LLSA ("Latino Law Students Association"), both of which were widely attended by students and faculty of many ethnicities. The school's APALSA ("Asian Pacific American Law Students Association") did not parade around complaining that Asians were being victimized by the school's affirmative-action policies; rather, they were strong supporters of those policies. So, Amicus' experience at Michigan Law School, the school dealt with in *Grutter*, belies many myths used against affirmative action.

However, Amicus is not completely uncritical of affirmative action, or of the way that schools administer it. So, as a long-time follower of that controversial matter, he felt duty-bound to write this brief in defense of *Grutter* and the University of Texas ("UT") admissions program, but doing so in a measured way that deals with the various strengths or weaknesses of affirmative-action programs, and makes some observations or suggestions for the future of American affirmative action.

To that end, Amicus will try not to repeat too many arguments made by other supporters of Respondent, but instead will largely focus on various

contextual or equitable issues regarding affirmative action, and also focus on rebutting various amicus briefs for Petitioner.

SUMMARY OF ARGUMENT

Especially since racism still persists, affirmative action should continue, at least until 2028. The unfair privileges given to alumni children and others are a larger problem than affirmative action. Affirmative action does not really hurt Jews or Asians, and holistic review is better than review based only on grades and test scores. Each state and its schools can decide for themselves about affirmative action. Various arguments against affirmative action fail, especially since they suggest, at most, reforms of transparency and accountability to affirmative action, instead of the immediate end of affirmative action. The Court can help America thoughtfully ready for a time without either affirmative action, or preferences for the already-privileged such as alumni children.

ARGUMENT

I. SADLY, RACISM STILL LIVES IN AMERICA

While racism may never be fully eliminated in America, great strides have been made in the last six decades since *Brown v. Board of Education* (347 U.S. 483 (1954)). America now even has a black President, Barack Obama, which might have been unthinkable some while back. However, racism still persists, which gives more reason to preserve the UT program and uphold *Grutter*, in the name of valuing diversity and reducing barriers between Americans

of different backgrounds. (Several amici have called for the overturning of *Grutter*, not just of the UT program.)

Some recent, and frightening, examples of current racism: *see, e.g.*, Alex Seitz-Wald, *Fla. Republican: We wanted to suppress black votes*, Salon.com, July 27, 2012, 7:34 a.m., http://www.salon.com/2012/07/27/fla_republican_we_suppressed_black_votes/ (prominent Florida Republican discusses party effort to suppress Afro-American vote); *Walton Henry Butler Says He 'Only Shot a N*gger'*, YouTube, uploaded by SanVicenteMedia on Jul. 31, 2012, http://www.youtube.com/watch?v=RLA5ebQwetQ (apparently-white man alleged to have shot black man in the head uses racial slur); Ruth Manuel-Logan, *Motel 6 Customer Greeted With 'Hello, N*gger' On TV Screen*, NewsOne.com, Aug. 2, 2012, http://newsone.com/2028387/joseph-ross-motel-6-ohio/ (self-explanatory); Asha Anchan, *Families sue St. Paul School District, alleging racial discrimination*, Star Tribune, Aug. 5, 2012, 10:04 p.m., http://www.startribune.com/local/stpaul/165086846.html?refer=y (black students sue school district because now-resigned teacher Timothy Olmsted allegedly made blacks sit at the back of the class and called them "fat, black, and stupid"). While those unpleasant anecdotes regard African Americans, other minorities may have suffered similar experiences.

Also, the well-known shooting death of Trayvon Martin earlier this year may have been due to unnecessary, unreasoning fear of a black "hoodie"-wearing teenager. Indeed, motorist Rodney King's

call for harmony, "Can we all get along?" during the 1992 riots following the acquittal of police officers videotaped beating him, seems not to be fulfilled in this country yet. King died earlier this year, *see, e.g.*, CNN Wire Staff, *Rodney King dead at 47*, CNN, June 17, 2012, http://articles.cnn.com/2012-06-17/us/us_obit-rodney-king_1_los-angeles-police-rodney-king-randy-de-anda?_s=PM:US, and was found at the bottom of a swimming pool: an eerie echo of another black victim, the murdered youth Emmett Till, being found dead in a Mississippi river in 1955. In any case, the vision of another King, the Rev. Dr. Martin Luther King, Jr., a vision of the "beloved community", needs a lot more work, including promotion of diversity and integration.

Some may argue that affirmative action stokes racial tensions and prevents a color-blind society. However, one doubts that affirmative action caused any of the nasty incidents listed above. Maybe some Americans hate black people or Latinos ("Hispanics") or Native Americans, *just because they want to hate them*, not because of affirmative action. Race hatred is far older in this country than affirmative action is. So, while affirmative action should end at some point, being an imperfect instrument for social improvement, an instrument using the controversial metric of race: affirmative action is a tool to promote diversity and integration, and should last at least the sixteen more years that Justice Sandra Day O'Connor recommended in her *Grutter* opinion. ("We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." (O'Connor, J.) 539 U.S. at 343.)

Also, self-segregation by minorities may have zero connection to affirmative action. For example, the Nation of Islam group has preached that blacks should self-segregate, e.g., avoid interracial marriage and possibly form a separate nation within America, *see, e.g.*, Wikipedia, *Nation of Islam*, http://en.wikipedia.org/wiki/Nation_of_Islam (as of Aug. 11, 2012, at 13:29 GMT). But group leader Minister Louis Farrakhan has *opposed* affirmative action, *see, e.g.*, Larry Elder, *Think Black*, FrontPage Magazine.com, June 12, 1998, http://archive.frontpagemag.com/readArticle.aspx?ARTID=22753 (mentioning Farrakhan's opposition to affirmative action); *cf.* Hist. Res. Dep't of the Nation of Islam, *Hard Work or Hardly Working? How White People Got So Rich Part 4*, The Final Call, June 28, 2011, 5:04:25 p.m., http://www.finalcall.com/artman/publish/Perspectives_1/article_7944.shtml (decrying affirmative action as really benefiting women, gays, and others, not blacks). So any connection between affirmative action and self-segregation is quite tenuous. (And recall what Amicus mentioned, *supra* at 1-2, about the harmonious interracial atmosphere at Michigan Law School under affirmative action.)

It is true that by creating a "critical mass" of minorities, affirmative action may allow minorities to congregate as a group, whereas if only a tiny number of minorities were at a school, they would have to interact more with white people, or have virtually no social interactions at all. However, this idea of "minority group congregation" could even be used as a reason against allowing a large group of minorities in under *any* circumstances (e.g., minorities with the same grades and test scores as

whites), since that group, being large, might stick together instead of interacting with whites. But that refusal to admit minorities would be absurd. And racist as well.

Rather, colleges should strongly encourage and abet diverse interactions among students, including interracial study groups, so that less-prepared (e.g., admitted with lower test scores) students, from any group, can learn from others who may have stronger prior preparation or qualifications. Integration may take some effort, but it is worth the effort. After all, America put in a huge amount of effort at segregation over the last several hundred years, including slavery, Jim Crow laws, abuse of Latinos and Native Americans, etc. If it now has to put in considerable effort to integrate instead of segregate, this seems only fair.

And true desegregation may also involve ending the practice of turning a blind eye to admission practices which are common but have segregative tendencies, such as giving advantages in college or university admissions to the children of alumni, or of large donors, or of politicians or other powerful people. To these repulsive, and possibly illegal, practices we now turn.

II. THE EVIL OF ALUMNI, DONOR, OR POLITICAL-FAMILY ADMISSIONS PREFERENCES

"[A]ll men are created equal." Decl. of Independence pmbl. (U.S. 1776) Thus, while preferential admission for members of *underrepresented* groups, and traditionally powerless

groups at that, may be justified (and has been justified by this Court, *see, e.g.*, *Grutter*), how can one justify giving advantages to those who are already advantaged or overrepresented, such as those who are "born with a silver spoon" of being an alumna/alumnus offspring, or offspring of a wealthy donor or prominent government officer? *Cf.* the noted 1960's song by Creedence Clearwater Revival, *Fortunate Son*,[2] "It ain't me, it ain't me, I ain't no Senator's son . . . . I ain't no fortunate one [etc.]" *Id.*

Alumni privileges may not be directly at issue in the instant case, since UT may not grant them. (Amicus does not know whether donors' or politicians' children receive any admission bonus at UT.) But since not only the UT program but *Grutter* itself is under threat, Amicus mentions the "legacy admissions" issue, since it would be inequitable, and vile, to end affirmative action in this country before alumni (or donor, or powerful-family) admissions are themselves ended, everywhere and fully.

Alumni preferences are ridiculously ubiquitous. It seems that former President George W. Bush, a notoriously mediocre student, may not have gotten admission to Yale College or Harvard Business School if he were not a Yale alumni child and the son of a Congressman (later President), George H.W. Bush. One wonders if presidential candidate Willard "Mitt" Romney would have gotten into the schools he did, were his father not a governor. And Barack Obama, who maybe should be more properly called

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[2] *On* the album *Willy and the Poor Boys* (Fantasy Records 1969).

Barack Obama Jr. or Barack Obama II (just as George W. Bush could be called "George Bush Jr." or "George Bush II"), may have benefited from being the child of a Harvard alumnus when he applied to Harvard Law School. (Amicus has never heard anyone else mention the Harvard alumni child factor re Barack Obama's career, so he is mentioning it now.)

Amicus does not want to live in the sort of America where most of our leaders not only come from privileged backgrounds, but also get extra rewards just for being privileged. Americans deserve better.

A gold mine of information about this issue is the book *Affirmative Action for the Rich: Legacy Preferences in College Admissions* (The Century Found., Inc. (Richard D. Kahlenberg, ed., 2010)). Chapter 9, "Privilege Paving the Way for Privilege: How Judges Will Confront the Legal Ramifications of Legacy Admissions to Public and Private Universities", is by Judge Boyce F. Martin, Jr. (with Donya Khalili). Martin's words are well worth quoting:

> In 2002, I authored the majority opinion in the Sixth Circuit in the landmark affirmative action case, *Grutter* v. *Bollinger* . . . .
>
> Thus, I enter the debate on college admissions policies firmly on the side of even more diversity. . . . Unfortunately, the ideal standard of focusing on academic skills, benefit to the

community, and a commitment to diversity is undermined by the substantial weight that legacy status carries in the admissions process of many elite public and private universities and graduate schools. . . . At the University of Virginia, half of the 1,400 legacy applicants each year are accepted, a substantially higher admittance rate than for non-legacy applicants . . . .

This is all in spite of studies—such as one done at Duke University . . . . —revealing that legacy students typically underperform compared to their peers . . . .

. . . Because many, if not most, institutes of higher education have long discriminated on the basis of race, religion, and/or gender, admission preference given to the children of those who used to be the only people who could be admitted perpetuates the effect of class and race discrimination from generations ago. Most of the beneficiaries of legacy admissions are white Protestant students. These preferences operate like "educational grandfather clauses" . . . . If our universities have a commitment and, indeed, a compelling interest in fostering a diverse campus community, legacy preferences fight their attempts

> to achieve a "critical mass" of diverse students. . . .
>
> . . . .
>
> I do not know what test will be applied to determine whether legacy preferences in admission policies violate the Equal Protection Clause nor whether preference will survive the tests applied. But it is clear to me that legacy preferences are destructive to the diversity of our campuses and the perception of merit in admissions and that they perpetuate the class and race discrimination that the rest of our laws are fighting to stop. I look forward to reading the first cases to examine this issue in light of the Supreme Court's decision in *Grutter*[.]

Id. at 199-201, 209 (footnote omitted).

Amicus is grateful that Judge Martin took the time to discuss, *see id.*, the fact that alumni preferences are a sort of *anti*-"compelling state interest" (being almost the polar opposite of diversity), which should be assiduously avoided. (Diversity is, of course, a compelling state interest; *see Grutter*, *supra*, at, e.g., 325.)

A last comment for now on legacy and other "privilege preferences" comes from across the Atlantic, *see* Gary Younge, *Affirmative action and the real enemy of education equality: Affirmative action faces renewed challenge in the supreme court, but in truth, it's class, not race, that fixes college*

admissions, The Guardian (London), Mar. 2, 2012, 10:14 a.m., http://www.guardian.co.uk/commentisfree/cifamerica/2012/mar/02/affirmative-action-enemy-education-equality,

> This fall, opponents of affirmative action will have another shot with a far more conservative court. Few expect the practice to survive this time [??]. . . .
>
> . . . .
>
> . . . When [Patrick] Hamacher [who sued the University of Michigan over affirmative action] applied, the university of Michigan also awarded extra points if you were the child of alumni: an advantage he enjoyed but did not see fit to relinquish. [Jennifer] Gratz[, who also sued Michigan,] was also turned down by Notre Dame, which gives huge preferences to children of alumni and, as a result, has a greater proportion of them than any other major university. Legacies amount to more than 20% of the freshmen class – or around twice the number of African Americans and Hispanics combined. Gratz did not file suit against legacies. . . .
>
> "The preferences of privilege are nonpartisan," writes Daniel Golden, author of *The Price of Admission: How America's Ruling Class Buys Its Way into Elite Colleges – and Who Gets Left Outside the Gates*:

> "They benefit the wealthy and powerful across the political and cultural spectrum, Democrats and Republicans, supporters and opponents of affirmative action, leftwing Hollywood movie stars and rightwing tycoons, old-money dynasties and nouveau riche. They ensure each fresh generation of upper-class families – regardless of intelligence or academic qualifications – access to the premier college[s] whose alumni hold disproportionate sway on Wall Street and in Fortune 500 companies, the media, Congress, and the judiciary."
>
> If you were serious about looking for a single means of injecting fairness into American universities, you would target the privileged who game the system, not the under-represented and historically excluded who are trying to get a foot in the door.

Id.

On that note: Amicus has wondered whether criticizing affirmative-action beneficiaries rather than "privilege preference" beneficiaries is sometimes a form of negative "racial profiling". Even

those affirmative-action enemies who claim to decry racial profiling may sometimes stereotype or otherwise insult minorities; *see, e.g.*, Cynthia Gordy, *Racial-Profiling Hearing Gets Heated,* The Root, Apr. 17, 2012, 5:58 p.m., http://www.theroot.com/blogs/end-racial-profiling-act/racial-profiling-hearing-gets-heated,

> Roger Clegg, president and general counsel for the Center for Equal Opportunity . . . . opposed the End Racial Profiling Act . . . .
>
> . . . .
>
> Where African Americans are concerned, Clegg first acknowledged that they are often stopped on the basis of race alone, which he opposes. "Nonetheless, I think we have to recognize that it's going to be tempting for the police and individuals to profile so long as a disproportionate amount of street crime is committed by African Americans," he continued. "And there will be a disproportionate amount of street crime committed by African Americans so long as more than seven out of 10 African Americans are being born out of wedlock ... So ultimately, people in society who don't like racial profiling are going to have to face up to this problem."
>
> (After some groaning from the audience, Sen. Dick Durbin called the room to order.)

Id. Clegg may claim to oppose racially profiling blacks, but his insensitive remarks—which even caused "groaning", *id.*—border on racial profiling themselves, or at least simplistic stereotyping. (Amicus is not disputing, e.g., Clegg's statistics about non-marital births among African Americans; but Clegg is a little conclusory about how that might produce crime, and a little apologetic for officials performing racial profiling, *see id.*)

See also, e.g., U.S. Cath. Bishops, *Brothers and Sisters to Us—Pastoral Letter on Racism* (1979), *available at* http://usccb.org/issues-and-action/cultural-diversity/african-american/brothers-and-sisters-to-us.cfm,

> [R]acism is sometimes apparent in the growing sentiment that too much is being given to racial minorities by way of affirmative action programs . . . . At times, protestations claiming that all persons should be treated equally reflect the desire to maintain a *status quo* that favors one race and social group at the expense of the poor and the nonwhite.

Id.

Even unconscious insensitivity, e.g., someone using the term "illegal amigos" without malice to talk about Latinos, can still be hurtful. The thoughtlessness that would be shown by overturning affirmative action while "privilege preferences" survive, would not make any court look fair or thoughtful.

We now turn to mention of some groups who have been excluded from the best of American life in the past, but who are not truly hurt by affirmative action, everything considered, despite dangerous myths to the contrary.

III. JEWS AND ASIANS ARE NOT "VICTIMS" OF AFFIRMATIVE ACTION

The Brief *Amicus Curiae* of the Louis D. Brandeis Center for Human Rights Under Law, et al., in Support of Petitioner (May 29, 2012), is one amicus brief in this case that refers to historical discrimination against Jews in college admissions, and compares the current situation of college-applicant Asians to that which Jews used to face, *see id. passim*. However, this is a facile analogy. Of course, overt discrimination against anyone, Jew, Gentile, Asian, non-Asian, etc., is horrible. However, geographical preferences for applicants in Nebraska or Wyoming may also not favor Jews and Asians. Does this mean that those "Midwest-Rockies" preferences are some plot against Asians and Jews? Maybe not.

We are not in the old days any more, among other things. The brief, *see id.* at 24-25, refers to the unpleasant quotas wielded against Jews around the 1920's at places like Harvard. The sorry picture of a bunch of crusty, bigoted old Jazz Age "WASPs" in Cambridge, Massachusetts maybe worrying that the school song would have to be changed to "Harvard Nagilah" because of a supposed "Hebrew horde", is very discouraging and is even reminiscent of Nazism. (If school administrators felt Jews were not

socially integrated, measures such as social mixers or even "deportment classes" could have been helpful, instead of extreme measures like ghettoizing many Jews out of the university through a vicious quota.)

However, these days Jews are hardly in the same position as in the 1920's. *See, e.g.*, Daniel Brook, *A Tough Decision for Yale's Jewish Students*, Diverse: Issues In Higher Education, Feb. 3, 2000 (originally *in* Jewish Currents, Jan. 2000 ed.), *available at* http://diverseeducation.com/article/451c1/a-tough-decision-for-yale-s-jewish-students.html,

> When the shock waves of the 1960s finally shook Yale's gothic ivory towers, anti-Jewish hiring discrimination was a thing of the past. . . .
>
> . . . .
>
> . . . In the past, Jews could look out for their own interests and at the same time feel justifiably self-righteous in fighting for the underdog. Today, in America, Jews have attained such a high position that these two things do not always coincide. Today's generation of young Jews has to make the tough choice of deciding between them.

Id. Among other things, if, say, Jewish students in the Ivy League comprise about 25% of the total (a rough composite of figures Amicus has heard over the years), and have done so since about the 1960's when discrimination against Jews seemed to be on the retreat, then there have been, by simple math,

several generations of numerous Jewish Ivy Leaguers, maybe a quarter of alumnae/i, who have passed on alumni privileges (and possibly other privileges, e.g., donor privileges) to their children or grandchildren. (*See* the Brook article *supra* about American Jews' attainment of "high position", *id.*)

So, one could argue that Jews, if counted as "whites" (rather than as "Mediterranean-Asians", say), have passed on traditional white racial privilege, legacy privilege, to their descendants applying to these schools, just as white Anglo-Saxon Protestants have for generations. Why do litigants not sue for the end of largely-white alumni preferences, then, instead of trying to end affirmative action for underrepresented minorities? The mind boggles.

There is also the issue of whether all racial preference is really corrosive, especially re American foreign aid. For example, it is widely known that the U.S. gives at least $3 billion of aid every year to the country of Israel, which is a self-declared Jewish state. However, Amicus has not noticed a huge rush of affirmative-action opponents begging the Government to stop all aid to Israel until Israel stops giving racial preferences to Jews, since such preferences would (ostensibly) stigmatize Jews and make them feel less worthy, at the same time as they give them advantages over others not receiving such preference. This lack of complaint is interesting, and evinces a possible double standard.

(Amicus himself does not mind that some of his taxpayer money has gone to a Jewish state such as

Israel. But not to recognize that it *is* a Jewish state, with that openly and highly racialized status, would be hypocritical and silly. *See, e.g.*, Rabbi Michael Lerner, *Recognize Palestine AND Re-Affirm Israel as a Jewish State*, Tikkun, Sept. 14, 2011, http://www.tikkun.org/nextgen/recognize-palestine-and-re-affirm-israel-as-a-jewish-state: "Israel was the first affirmative action state[.]" *Id.*)

An additional point of interest is affirmative action *in America* for Jews. *See, e.g.*, Minority Bus. Dev. Agency (U.S. Dep't of Com.), *Director Hinson Remarks at the 2009 Minority Enterprise Development (MED) Week Conference, Washington, DC*, Aug. 28, 2009, *available at* http://www.mbda.gov/node/420, "MBDA supports businesses . . . owned and operated by members of the Native American, Hasidic Jewish, . . . Asian, Alaska Native, Pacific Islander [and other minority] communities." *Id.* Amicus wonders why "Hasidic", a religious label (and why not non-Hasidic Jews also?), is being lumped in with racial labels, *see id.*; but that issue aside, the presence of Jews (and Asians) as American affirmative-action beneficiaries, *see id.*, demolishes the idea of affirmative action as some horrible plot against Jews (or Asians).

(Additionally, President Ronald Reagan—a relatively conservative man—established this preference for Jews, *see, e.g.*, Richard Severo, *Reagan Grants Hasidim 'Disadvantaged' Status*, N.Y. Times, June 29, 1984, *available at* http://www.nytimes.com/1984/06/29/nyregion/reagan-grants-hasidim-disadvantaged-status.html. Do most people

consider Reagan a flaming bigot who promoted corrosive race preferences? Amicus doubts it.)

As for Asians: once again, at Amicus' school, the Asian/Pacific student organization avidly supported affirmative action, *see supra* at 2. So were they supposedly too inept (!) to defend their own interests? or, were they simply recognizing that diversity benefits our Nation? Probably the latter. *See also* the Br. of Amici Curiae Asian Pac. Am. Legal Ctr., et al. in Supp. of Appellees and in Affirmance of the Dist. Ct. J. (Mar. 11, 2010), submitted in the Fifth Circuit version of this case:

> A Hmong applicant whose family fled to the United States as refugees . . . could benefit from the consideration of race in UT's admissions policy. . . .
>
> . . . .
>
> The suggestion that Asian American students do not share in the well recognized benefits of a diverse educational environment is both inaccurate and illogical. . . .
>
> . . . .
>
> UT's effort to admit a critical mass of African American and Latino students through its holistic admissions policy is good for Asian American students.

Id. at 4, 7, 18. Unless one thinks that all the Asian groups listed on the brief are a "bunch of dupes", it seems that affirmative action is good for Asians—and everyone else.

The Brief of the Asian American Legal Foundation and the Judicial Education Project as *Amici Curiae* in Support of Petitioner (May 29, 2012) claims that Asian Americans "constitute a minority without significant political influence", *id.* at 22. Perhaps this "lack of Asian political power" would be news to Governors Nikki Haley of South Carolina and Bobby Jindal of Louisiana, U.S. Secretary of Energy Steven Chu, and other prominent Asian-American political figures.

That brief also claims, *see id.* at 26, that UT is really aiming at "racial balance" instead of diversity. However, the brief itself recites statistics saying that Asians are roughly 4% of Texans, but roughly 16% of the UT student body, as of 2010, *see id.* at 7-8. If so, UT has done a *very* poor job of racial balancing, since they let in four times as many Asians as would create "racial balance", *see id.* Rather than accuse UT of having math skills that bad, perhaps it is more logical to conclude that UT is not aiming for "racial balance" at all. (One also notes that many Asians entering colleges now will pass on alumni preferences to their children, who will receive that racialized privilege.)

A more fertile place to look at exclusion of Asians might be the armed forces, *see, e.g.*, Heritage Found., *Racial Composition of New Enlisted Recruits in 2006 and 2007*, http://www.heritage.org/static/reportimages/3E59D41279449CAB99F8C7CF54E02351.gif, showing that Asian males in recent years have been underrepresented in the U.S. military compared to their percentage of the population, *see id.* If there is some quota keeping Asians out of the

military, it should cease immediately, perhaps with the help of some of the groups complaining that Asians are underrepresented in colleges.

Finally, speaking of the military, a group which often requires high physical fitness: the Brandeis brief, *supra* at 14, may not come up to the high standard of an archetypal "Brandeis brief" when it unnecessarily and excessively questions the very idea of holistic review, and of qualifications like good physical shape, *see id.* at, e.g., 30. We explore these issues below.

IV. AMICUS' PERSONAL EXPERIENCES IN INTERVIEWING COLLEGE APPLICANTS, RE THE LIMITED UTILITY OF GRADE AND TEST SCORES

"'It is our ambition for Princeton that it should develop, not mere scholars, but leaders – men of sound body, mind and spirit.' . . . 'Harvard should seek out young men of "the healthy extrovert kind . . . so much admired by the American public."'" *Id.* at 30-31 (citations omitted). The Brandeis brief cites these early-20th-Century pronouncements as being exclusive of Jewry, *see id.* Amicus is tempted to quip, God forbid that leadership, body, health, extroversion, or spirit ever be counted in a person's favor. (Recall the old formula, *Mens sana in corpore sano*—"A sound mind in a sound body", from the Latin.) Of course, the schools listed may have *misused* the listed criteria in order to exclude Jewish applicants. That does not mean the criteria themselves are wrong.

And such criteria may have been used for far longer than that brief might claim. *See, e.g.*, Harv. Univ. Libr., *Harvard University. Faculty of Arts and Sciences. Admission lists, 1743-1764: an inventory*, http://oasis.lib.harvard.edu/oasis/deliver/~hua47011, "Historical note[:] In the 18th century, [a]s specified in the College Laws, if the student successfully displayed sufficient knowledge of both Latin and Greek and *indicated a good moral character*, he was granted admission to Harvard." *Id.* (emphasis added) So it seems that "character" has been used for centuries in American college admissions—as it should have been—, and is not just some nefarious 20th-Century (or 21st-Century) trick to make life miserable for Jews and Asians.

And Amicus knows something about holistic review. He has for several decades interviewed applicants to the college (name withheld here) whence he was graduated. (Amicus was even, for several years, the head of a regional committee of college alumni who interview applicants.) He interviewed on multiple occasions high school seniors who had perfect "4.0" (all A's) grade-point averages, and who often even had paperwork attesting to that status.

On many of those occasions, though, Amicus was flabbergasted at the poor interview performance of the "perfect students" in question. Whether poor command of spoken English, or lack of articulateness, or lack of ability to think on one's feet, or just plain stupidity: various deficits plagued many of these "4.0 paragons" whom he interviewed. Amicus has wondered how much the college, and the

Nation, would suffer if these unfortunate applicants were admitted.

This is proof that the utility of grade numbers, and maybe test score numbers, is highly limited. *Ceteris paribus*, it's better to have all A's than all F's, of course. But there is so much more to a college application than numbers, that it would be highly mistaken to make "academic merit" (at least as measured by sheer numbers) the be-all and end-all of college admissions.

In fact, the pity is not that there *is* holistic review, as some fanatical devotees of grades and test scores would claim; rather, the pity is that colleges do not offer holistic review to *everybody*. Mere numbers only convey so much, so that only an inferior assessment of a candidate can result without holistic review; and holistic review would ideally include an interview for each and every applicant.

On a broader level: college is not just a "consumer experience" where an applicant comes and says, "I have all A's, so I command you to let me in so I can buy a college degree from you and be a happy consumer." Rather, college is...collegiate, as the word "college" would suggest, meaning that the school's own society and human relations are important, not to mention the society and interpersonal relations of the whole American nation. Superior academic performance should be sought largely out of the sheer love of learning, not just as a "golden ticket" which applicants can use to force their way into a school, when those applicants may be lacking in

other respects, or the school and society could profit hugely from having a more diverse student body.

Another aspect of diversity is allowing each diverse State to experiment on its own with affirmative action or other admissions programs, instead of ending affirmative action permanently through some premature federal *diktat*. The next section addresses this issue.

V. FEDERALISM AND AFFIRMATIVE ACTION

Some racial measures, may, naturally, be too dangerous or odious for the Court to permit, even if a State or subdivision of a State cries "state sovereignty" or "states' rights" in an attempt to get away with hateful practices. *See, e.g., Brown v. Bd. of Educ.*, 347 U.S. 483 (using Equal Protection Clause, Fourteenth Amendment, to desegregate Topeka schools). However, this does not mean that States' traditional authority over education, whether under the "police power", or the Tenth Amendment, or otherwise, is a nullity. Federalism does not mean respecting only the federal government, after all.

In *Grutter*, this Court supported the idea of letting States and universities experiment with different types of college admissions practices, *see* 539 U.S. at 342. *See also New St. Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932): "Denial of the right to experiment may be fraught with serious consequences to the nation. . . . [A] single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." (Brandeis, J., dissenting)

There have been well-meaning but perhaps misguided attempts to say that States *must* offer affirmative action. *See, e.g.*, NBC 7 San Diego, *Court Upholds Affirmative Action Ban*, Associated Press, Apr. 3, 2012, 8:12 a.m., http://www.nbcsandiego.com /news/local/Court-Upholds-Affirmative-Action-Ban-145933275.html, "[A] federal appeals court panel upheld California's ban on using race, ethnicity and gender in admitting students to public colleges and universities. The ruling marked the second time the 9th U.S. Circuit Court of Appeals turned back a challenge to the state's landmark voter initiative, Proposition 209[.]" *Id.* Just because affirmative action is *allowed*, that does not mean it is *mandatory*, and that the will of the State's people, if the people oppose affirmative action, supposedly means nothing, *see id.*

Conversely, if the people of a State want affirmative action, it should be allowed. The Brief Amicus Curiae of Pacific Legal Foundation, et al. in Support of Petitioner (dated May, 2012) claims, *see id.* at 13-14, that race-neutral solutions work well in some states, such as California, so that race-based affirmative action is no longer needed. However, just because the absence of affirmative action may have worked well for one State, that does not mean it will work well in every State. States are different, and the conditions in them, and the desires of the people, are different.

A State may have the power to offer affirmative action, or same-sex marriage, or any number of things, without undue federal interference. In large part, the choices of a State should be respected. *See,*

e.g., *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. ____, 132 S. Ct. 2566 (2012) (upholding states' rights to make substantial choices, e.g., to refuse an expansion of Medicaid). And in affirmative-action cases, there may also be more-than-usual deference due, *see, e.g.*, *Grutter*, "Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions", *id.* at 328 (O'Connor, J.). Texas and its University in Austin chose affirmative action, and the Court should affirm that choice.

Speaking of deference, Amicus shall now "defer" to some other amici's arguments against UT, though not always agreeing with them.

VI. SOME REBUTTALS TO MISCELLANEOUS AMICUS BRIEFS

The Brief of Abigail Thernstrom, et al. as *Amici Curiae* in Support of Petitioners (undated) claims, *see id.* at 6, that admissions are "zero-sum" in that schools purportedly "rob Peter to pay Paul", since minority students attending one institution will not be attending another, so that the latter institution will be less diverse than before. However, the pool of acceptable minority students may be flexible in size; e.g., if preferences are available at even "lower-tier" schools, so that those schools are willing to take students they would not have otherwise, then the pool may be larger than it would have been without preferences. The numerical qualifications of students may be lower the larger the pool is, but, among other things, tutoring or remedial work can help students with potential. Athletes, too, may need some

assistance in competing academically; but would Thernstrom ban the admission of athletes because of this? Finally, not all qualified minorities may apply; so colleges can step up recruitment of minorities as to widen the pool.

The brief also presents what Amicus shall call the "racist moron" scenario, *see id.* at 8 n.7: i.e., the claim that students at elite institutions are less likely to be bigots, so that less-elite institutions need minority students more badly, to provide diversity. This imaginative claim may be hard to justify, though. After all, less-elite institutions may be down the socioeconomic ladder anyway, and thus have a larger number of underrepresented minorities anyway, before affirmative action.

Also, Thernstrom's claim that "top-drawer" people are less bigoted may be questionable. —The recently-deceased intellectual and writer Gore Vidal came from an elevated social background, and, while he did not attend college, attended Phillips Exeter Academy (which may offer a better education than some colleges do). However, Vidal—an acerbic type who once called Truman Capote's death "a good career move"—suggested in his later years that "white nations like America and Russia needed to unite against the supposed threat of Asia", Michael Lind, *Gore Vidal: The Virgil of American populism*, Salon.com, Aug. 2, 2012, 9:30 a.m., http://www.salon.com/2012/08/02/gore_vidal_the_virgil_of_american_populism/. This ridiculous "Whites Unite vs. the 'Yellow Peril'" scenario, *see id.*, shows that "elite" people can be as bigoted as anyone else.

In addition, Thernstrom claims that the research of public-policy professor Robert Putnam shows that diversity often creates conflict, misery, and distrust, especially in the short term, *see* Thernstrom Br. at 10-13. However, Putnam supports affirmative action, *see, e.g.*, Applied Res. Ctr., *Robert Putnam's E Pluribus Unum: No Trust Before Justice*, ARC.org, undated but website copyrighted 2012, https://www.arc.org/content/view/531/178/. *See also* Robert D. Putnam, *E Pluribus Unum: Diversity and Community in the Twenty-first Century*[,] *The 2006 Johan Skytte Prize Lecture*, Wiley Online Libr., June 15, 2007, originally *in* 30 Scandinavian Pol. Stud. 2, pp. 137–174, June 2007, *available at* http://onlinelibrary.wiley.com/doi/10.1111/j.1467-9477.2007.00176.x/full,

> It would be unfortunate if a politically correct progressivism were to deny the reality of the challenge to social solidarity posed by diversity. It would be equally unfortunate if an ahistorical and ethnocentric conservatism were to deny that addressing that challenge is both feasible and desirable. . . . The task of becoming comfortable with diversity will not be easy or quick, but it will be speeded by our collective efforts and in the end well worth the effort.

Id. This hopeful yet realistic spirit, *see id.*, seems to comport with our national ethos better than does Thernstrom's pessimism.

The Brief of the Honorable Allen B. West as *Amicus Curiae* in Support of Petitioner (May 25, 2012) lambasts race-conscious policies as an enemy of military readiness, *see id. passim*. West also portrays former Joint Chiefs of Staff Chairman, Colin Powell, as an enemy of race preferences, *see id.* at 11-13, 25. This is intriguing in light of Powell's high-profile support of affirmative action at the University of Michigan, *see, e.g.*, CNN, *Powell defends affirmative action in college admissions*, Jan. 20, 2003, 4:25 p.m., http://edition.cnn.com/2003/ALLPOLITICS/01/19/powell.race/,

> Calling himself a "strong proponent" of affirmative action . . . . Colin Powell said Sunday[,] "I believe race should be a factor among many other factors in determining the makeup of a student body of a university."
>
> . . . .
>
> Powell's statement goes further than friend-of-the-court briefs the Bush administration filed . . . last week opposing the University of Michigan's affirmative action admissions policy.

Id. So, West's brief may not only be off-point (i.e., regarding the military, not college admissions), but it may misstate Colin Powell's position on affirmative action.

The Brief of the Texas Association of Scholars As Amicus Curiae In Support of the Petitioner (undated) features the delightful declaration, *see id.* at 31, that "Diversity Has No Societal Value and

May Cause Significant Societal Harm to All Americans" (!!). Amicus had no idea. The brief's sentiment sounds quite clannish.

Moreover: in a novel that Amicus has been thinking for a number of years about writing, a main character is an evil U.S. President given to statements like "Diversity is a weakness." It is amusing to see that the "truth", *see* Br. of Tex. Ass'n of Scholars, *supra*, at 31, is at least as strange as that part of Amicus' fiction.

The Brief of *Amici Curiae* California Association of Scholars, et al. in Support of Petitioner (May 29, 2012) opines, *id.* at 7 n.2, that the Court, as "[a]n alternative to overruling *Grutter*[,] overrule [*Regents of the Univ. of Cal. v.*] *Bakke*[, 438 U.S. 265 (1978)] on Title VI [of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d)]. Such an approach would have the virtue of avoiding the constitutional issue." However, such an approach would also have the vice of possibly seeming sly and circuitous, which may not help the image of the Court in the present high-profile case.

The Brief of the Southeastern Legal Foundation, Inc., as *Amicus Curiae* Supporting Petitioner (May 29, 2012) raises the question, *see id.* at 17, of whether minorities (or any race) have something racially distinct to offer in math or science classes. However, while "2 + 2 = 4" is probably not going to change according to the race of a student, dialogue about the *uses and ethics* of science (say, regarding genetic alteration, or climate change and its remedies, e.g., whether Third World countries could be affected disproportionately by global warming)

could easily benefit from racial, gender, and other forms of diversity in the classroom.

The Brief for *Amici Curiae* Current and Former Federal Civil Rights Officials in Support of Petitioner (May 29, 2012) states, *id.* at 18, that "through the Internet, professors and students can instantly access any diverse viewpoint . . . . regardless of the racial or ethnic identifications of course classmates." While the Internet has its uses: if one goes too far with this, then why not just abandon the physical campus altogether and have all college students live in a virtual bubble?

The previous brief's point of view reminds Amicus of the old *Doonesbury* comic strip where Reverend Scot Sloan, at a Christmas pageant, says that "The part of Baby Jesus is played by a hidden 40 watt light bulb." *Id.* (*Available at*, e.g., G.B. Trudeau, *40: A Doonesbury Retrospective* (2010), p. 68, Google Books, http://books.google.com/books?id=duzo PmkCy1QC&printsec=frontcover&dq=40:+A+ Doonesbury+Retrospective&source=bl&ots=7ZTeM6 pXEG&sig=J-pY4qhczz2vgujIYT9OE8yYqs0&hl =en&sa=X&ei=05YlUOWRIqbtiwLK6YG4DQ&ved =0CDYQ6AEwAA#v=onepage&q=40%3A%20A%20D oonesbury%20Retrospective&f=false; strip is dated Dec. 21, 1973) Sometimes the glow of a screen is not quite a substitute for reality.

So, the civil rights officials' "Video Game Theory" of campus diversity may not work too well. If one followed their theory, one may as well permanently excuse Justices Clarence Thomas and Sonia Sotomayor (who were both helped by affirmative

action to launch their spectacular legal careers) from appearing in person at the Court, since they could appear by "Twitter" or some other electronic medium instead. Amicus will keep a weather eye to see whether that happens.

Finally: the Amicus Brief of the American Center for Law and Justice in Support of Petitioner (May 29, 2012) mentions, *see id.* at, e.g., 8-9, the difficulty of the issue of just how to define what someone's race is, whether by percentage of "blood" (particular racial background), or otherwise. However, while there is no perfect solution to that question: if Americans can abide a Black History Month without giving a precise blood-quantum definition of "Black", then perhaps the country can abide affirmative action that does not have an exact definition of "Black" or any other group.

Of late, there has been controversy about the supposed Cherokee heritage of Harvard law professor Elizabeth Warren. While many do wonder about just how she considers herself Cherokee, her unusual case does not give reason to penalize others, including "full-blooded" blacks, Latinos, or Native Americans, by taking away their affirmative action. Warren can be punished (if need be), by public ridicule or otherwise, without less-privileged persons having to suffer needlessly.

VII. KEEPING AFFIRMATIVE ACTION ACCOUNTABLE

Similarly, affirmative action itself can be mended, if need be, instead of prematurely ended.

The merits brief for Respondents (August, 2012) does a fine job of defending the UT program as a narrowly-tailored, seriously needed program which is an actual improvement on the Michigan program allowed in *Grutter*, e.g., not requiring daily reports about race as Michigan Law School did, *see* Resp'ts' Br., *supra*, at 2. One particularly worthy observation is that "It would be an abrupt—and destabilizing—step for the Court to overrule *Grutter* just nine years after this Court reconsidered and reaffirmed Justice Powell's opinion in *Bakke*." *Id.* at 53.

Indeed, there is a reliance interest in keeping affirmative action alive until at least 2028, 25 years after *Grutter*. However, that reliance interest may cut both ways: i.e., the public may be relying on the cessation of affirmative action by 2028.

Amicus has not seen any great rush of affirmative-action supporters clamoring for, or planning for, that 2028 transition. So, in promoting accountability for affirmative action, the Court may want to focus on making that date a reality, not just a nullity. *See, e.g.*, *Grutter*, 539 U.S. at 346: "[O]ne may hope, but not firmly forecast, that over the next generation's span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action." (Ginsburg, J., concurring in the judgment)

Educational institutions, after all, are not always prone to candor or other optimal behavior. For example, Amicus himself, when he heard around 2008 about the controversial "Wolverine Scholars Program" which let applicants with high grades

apply to Michigan Law School, but only if they had not taken the LSAT (!!!) before an admissions decision, he was curious what was going on; was it, say, an attempt to game the U.S. News and World Report rankings? Eventually, he had to request information about the Program under the Freedom of Information Act and pay c. $1560.00 to get it. (By the way, the Program failed and was canceled; *see* Elie Mystal, *The Life and Death of the Michigan 'Wolverine Scholars' Program*, Above the Law, Nov. 17, 2011 at 12:55 p.m., http://abovethelaw.com/2011/11/the-life-and-death-of-the-michigan-wolverine-scholars-program/, for some fascinating details.)

The requested information, *available at* http://tinyurl.com/WoScFOIA, has notable and surprising features. E.g., on page 4 of an April, 2009 Decision and Recommendation of the ABA Accreditation Committee (p. 33 of the PDF), we see, "A third goal of the program is to increase student diversity. Under Michigan law, race may not be taken into account . . . [E]liminating the LSAT as a factor in admissions decisions removes a potential impediment to minority admissions[.]"

So, while the Program did not violate the law, *see id.*, there are questions of candor to the public in a controversial issue such as racial diversity. Amicus does not remember *any* public mention of racial diversity as being a purpose of the Program. Amicus, by contrast, would have been proud of that purpose and trumpeted it to the public, rather than "burying" it (even unintentionally...) in documents to an elite committee so that it had to be found out by expending over $1500 and many hours of work.

(Incidentally, one wonders how thoughtful the "increase diversity" effort really was, since the Program essentially excluded the University of Michigan-Dearborn and -Flint campuses, which have relatively less-affluent and more-minority student bodies than the Ann Arbor campus. Still, the Program was *declared* to be about racial diversity, and should have been *publicly* declared as such.)

Mentioning this issue here shows that Amicus is not an uncritical observer of diversity issues, nor a mindless follower of his own law school. A prime lesson here is that institutions showing a lack of transparency should be criticized, and urged towards more transparency.

One way to do this is by following some of the advice in the Brief Amici Curiae for Richard Sander and Stuart Taylor, Jr. in Support of Neither Party (May, 2012). The brief is very pessimistic about affirmative action, *see id. passim*. However, there are constructive ideas in the brief, such as in Section V, "The Court Should Require Each State School That Seeks To Use Racial Preferences To Make Them No Larger Than Its Socioeconomic Preferences And To Disclose Their Size, Operation, And Effects And A Timetable For Phasing Them Out By 2028", *id.* at 32. Amicus disagrees with the first idea mentioned there: if a school were forced to keep racial preferences no larger than socioeconomic ones, that could cause problems. For example, a school not offering socioeconomic preferences would not be able to offer racial ones. Also, in a holistic program, one might not be able to quantify one preference as being larger than another, so that it might be impossible to

make a racial preference "smaller" than a socioeconomic.

But the second idea, about disclosure of race preferences' mechanics and consequences, and about keeping faithful to *Grutter* by having schools make a good-faith, thorough plan for phasing out affirmative action by a quarter-century after *Grutter*, is an excellent idea. Amicus is for affirmative action, unlike Sander and Taylor, but he sees no downside to their suggestion.

The Brief for the National Black Law Students Association as *Amicus Curiae* in Support of Respondents (Aug. 8, 2012) nicely rebuts some of Sander and Taylor's other ideas. For example, the Sander/Taylor brief claims that there is an "academic mismatch" problem, whereby minorities do badly when affirmative action admits them to schools where they are not up to academic par, *see id. passim*. The "NBLSA" brief, *supra*, admits that there may be some "mismatch" or other academic problems, but shows they may result from factors besides affirmative action, and notes that it may be patronizing to minority students, and deprive them of agency and free choice, to take away affirmative action entirely, rather than let them take the risk of going to a school where they may not be at the top of the academic heap, *see id.* at 4, 8.

While the two briefs just mentioned may seem antagonistic, they can be reconciled, as Amicus has just shown. Affirmative action can endure, at least until 2028, but it should proceed with more candor, and information for the public and applicants, than

before. If informed choice is one core component of "ordered liberty", then the Court can help keep affirmative action accountable, to the benefit of all.

VIII. THE GENERATIONS AFTER *GRUTTER*

Amicus has a dream: that people will one day not be judged by the color of their skin, or by their parents' alumni, donor, politician, or celebrity status. The Court can help America achieve a fair and bright future by promoting this dream.

While it might be too much to ask the Court to consider and outlaw the sordid business of "privilege preferences", like legacy preferences, right now, the Court can at least make some thoughtful commentary upon the issue. Once again, Amicus would find it obscene if the Court were to outlaw affirmative action while any "privilege preferences" still stand. If this means keeping affirmative action beyond 2028, so be it.

And affirmative action need not end exactly in 2028, although it would be ideally best if it did. For example, the economic crisis of 2008, which may have hit minorities harder than others, is one real-life factor which could advise pushing back affirmative action's end date several years beyond 2028. (As brilliant as the Court is, it could not foresee in 2003 the economic crash 5 years later.)

But preparation for a 2028 transition is prudent in any case, and could include, say, a gradual tightening of academic standards for affirmative-action recipients over the next 16 years, so as to

prepare people for the leap to a world without race preferences.

President Obama himself has said that his daughters, seeing their father's status, should not receive affirmative action preferences, *see, e.g.*, David Paul Kuhn, *Obama shifts affirmative action rhetoric*, Politico, Aug. 10, 2008, 8:24 a.m., http://www.politico.com/news/stories/0808/12421.html. Amicus is comfortable with that, and also thinks that, say, a "check-off", whereby an under-represented-minority applicant may tick a box on the application form and ask *not* to have his or her ethnicity considered, may be a good idea.

Even minor improvements by the Court will be welcome. E.g., perhaps it is time to retire the term "critical mass" from the lexicon. Comparing minorities to a fissionable lump of uranium is probably not the most fortunate nomenclature, especially if one wants to reduce racial tensions. "Significant number" or "substantial group" may be less explosive terms than "critical mass".

Minor improvements, after all, may forestall the need for major destruction. For example, if the Court is not fully happy with the UT plan, e.g., if it found the consideration of integration down to the classroom level to be excessive, it could still leave the rest of the plan intact. (Amicus does not object to any aspect of the UT plan, but is realistic enough to guess that not all on the Court may share his views.)

And the Court's improved national rubric for affirmative action, including the transparency and timing-out aspects this brief has mentioned, will

help affirm affirmative action, but with added accountability. This balanced decision will, God willing, hasten the time when, as Martin Luther King said, "in some not too distant tomorrow the radiant stars of love and brotherhood will shine over our great nation with all their scintillating beauty." (Letter from Birmingham Jail, Apr. 15, 1963)

CONCLUSION

Amicus respectfully asks the Court to uphold the judgment of the court of appeals, *Grutter*, and *Bakke*, with any needed modifications; and humbly thanks the Court for its time and consideration.

August 13, 2012 Respectfully submitted,

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