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 THE LAW SCHOOL ADMISSION COUNCIL AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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BRIEF OF THE LAW SCHOOL ADMISSION COUNCIL AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

This brief is submitted on behalf of the Law School Admission Council as amicus curiae in support of respondents.[1]

INTEREST OF AMICUS CURIAE

The Law School Admission Council ("LSAC") is a nonprofit corporation devoted to facilitating and enhancing the admissions process for more than 200 law schools in the United States, Canada, and Australia. Founded in 1947, LSAC is best known for administering the Law School Admission Test ("LSAT"), but it also sponsors and publishes research about law school admissions.

LSAC has a strong interest in ensuring that standardized test scores are given the proper weight in the admissions process, and a longstanding commitment to ensuring equal access to legal education for members of minority groups. LSAC participated as amicus curiae before the United States Supreme Court in *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

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[1] No counsel for any party has authored this brief in whole or in part, and no person other than amicus or its counsel has made any monetary contribution intended to fund the preparation or submission of this brief. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

SUMMARY OF ARGUMENT

The inescapable lesson of the statistical evidence compiled year after year by LSAC is that unless America's law schools are allowed to adopt race-conscious admissions policies, many of the nation's lawyers will be trained in an environment of racial homogeneity that bears almost no relation to the world in which they will work.

The simple, demonstrable statistical fact is that most selective law schools in this country will have almost no students of certain races unless they adopt admissions policies designed to alter that outcome. How best to achieve diversity in the face of this problem is a question of educational policy. For good reason, the Court generally defers to the judgment of the States and their expert educators on such questions.

The vast majority of LSAC member law schools have long recognized and acted upon the need to take explicit measures to achieve racially diverse student bodies. Petitioner's suggestion that effective racial diversity may be achieved through race-neutral means is, for law schools, factually incorrect. Neither the use of "percent plans" nor the consideration of "special circumstances" that "disproportionately affect minority candidates," such as socioeconomic status and single-parent households, Pet. Br. 3, is a satisfactory solution for law schools. "Percent plans" do not translate to the law school setting, where they would both fail to achieve diversity and succeed in undermining educational quality. And while considering "special circumstances" could pro-

mote diversity in other, important ways, it would fail to ensure *racial* diversity.

The more modest solution is the actual practice, approved in *Grutter*, of the overwhelming majority of the nation's law schools: including race among the many factors considered in assembling a class rich in diversity, experience, and potential. This approach accounts for numeric measures to an appropriate degree. Test scores and grades assess acquired verbal reasoning skills and certain other cognitive skills, but they do not capture many other qualities important to success both in law school and in the legal profession, and they certainly do not *entitle* anyone to law school admission. As LSAC has long noted, numeric criteria say nothing about the degree to which an applicant's personal attributes—including but not limited to race—might affect the mix of backgrounds, experiences, and ideas from which all students learn.

As the Court considers whether the University of Texas's admissions process for its undergraduate students is a constitutionally legitimate means of providing students the educational benefits of diversity, LSAC respectfully submits that the Court should leave intact the approach approved for law schools in *Grutter*. The *Grutter* solution has been effective in facilitating optimal legal education, allowing law schools to account for numeric measures of certain cognitive skills along with many other applicant attributes, including race, in assembling a class that will maximize the educational experience of all students.

In support of that view, LSAC offers the Court the benefit of decades of experience with the law school admissions process. This brief shares with the Court LSAC's accumulated knowledge about the effect of selective admissions policies on the racial diversity of student populations, and about the value and limitations of performance measures such as the LSAT and undergraduate grades.

ARGUMENT

I. EDUCATION IN A RACIALLY DIVERSE ENVIRONMENT IMPROVES THE QUALITY OF EDUCATION FOR ALL STUDENTS

The importance of educational diversity along multiple valences is not open to question. In *Grutter*, the Court recognized that racial and ethnic diversity in higher education is valuable not for its own sake, but because it contributes significantly to the overall quality of education afforded to all students. For that reason, the Court adopted Justice Powell's suggestion in *Bakke* that diversity "is a compelling state interest that can justify the use of race in university admissions." *Grutter*, 539 U.S. at 325.

Justice Powell appreciated that a "great deal of learning" happens

> through interactions among students of both sexes[,] of different races, religions, and backgrounds ... who are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world.

Bakke, 438 U.S. at 312 n.48 (quotation omitted). Decades of empirical research have confirmed that insight. In approving the consideration of race among many factors in law school admissions, the Court in *Grutter* had the benefit of express district court findings as well as extensive social science research showing that diversity "helps to break down racial stereotypes, ... promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society." *Grutter*, 539 U.S. at 330 (quotations omitted).[2] The need for racial and

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[2] Social science research published since *Grutter* has confirmed the positive effect of racial diversity in a college setting on cognitive skills such as critical thinking and problem solving. *See, e.g.*, Nicholas A. Bowman, *College Diversity Experiences and Cognitive Development: A Meta-Analysis*, 80 Rev. Educ. Res. 4, 20, 22 (2010); Mitchell J. Chang et al., *The Educational Benefits of Sustaining Cross-Racial Interaction Among Undergraduates* 17, 18, Research and Occasional Paper Series, Center for Studies in Higher Education, Univ. Cal. Berkeley (Feb. 2005); Nida Denson & Mitchell J. Chang, *Racial Diversity Matters: The Impact of Diversity-Related Student Engagement and Institutional Context*, 46 Am. Educ. Res. J. 322 (2009); Samuel R. Sommers et al., *Cognitive Effects of Racial Diversity: White Individuals' Information Processing in Heterogeneous Groups*, 44 J. Experimental Soc. Psych. 1134, 1134 (2008). The positive impact of racial diversity has also been observed in the law school setting. Charles E. Daye et al., *Does Race Matter in Educational Diversity? A Legal and Empirical Analysis*, 13 Rutgers Race & L. Rev. 82, 84 (2012). That recent research is consistent with earlier findings that racial and ethnic diversity facilitates creative problem solving, promotes concern for the public good, and enhances cross-racial sensitivity and understanding. *See, e.g.*, Taylor Cox, Jr., Cultural Diversity in Organizations: Theory, Research, and Practice (1993); Poppy Lauretta McLeod et al., *Ethnic Diversity and Creativity in Small Groups*, 27 Small Group Res. 248, 257 (1996); Daniel A. Powers & Christopher G. Ellison, *Interracial Contact and Black Racial*

ethnic diversity within law schools is particularly important, the Court concluded, given the disproportionate representation of the legal profession in positions of national leadership. *Id.* at 332-33.

Law schools recognize that no two individuals are influenced in precisely the same way by a shared experience. Each individual's experiences and perspectives, even within a given racial or ethnic group, will be unique. But "[j]ust as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority" in our society. *Grutter*, 539 U.S. at 333. Racial diversity therefore fosters a greater multiplicity of individual perspectives, and including a variety of students increases the likelihood that the aggregate range of experiences and perspectives within the student body will be broader—and the educational experience of all students correspondingly richer.

Petitioner does not contest the educational benefits that racial diversity provides all students. Petitioner instead contends that those benefits may be pursued only at the institutional level, and not at the classroom level. That argument turns the logic of *Grutter* on its head. A school cannot fulfill its "compelling interest in securing the educational benefits of a diverse student body," *id.* at 333, if students are not in fact encountering and engaging each other in a learning environment. A "critical mass" of underrepresented minorities within the meaning of *Grutter*, *id.*, is necessarily one of sufficient size to fa-

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Attitudes: The Contact Hypothesis and Selectivity Bias, 74 Soc. Forces 205, 213-16 (1995).

cilitate the interactions that are the very design of race-conscious admissions, and any school that is serious about implementing the educational goals of diversity will analyze whether such interactions are in fact being achieved.

II. THE COURT SHOULD NOT SECOND-GUESS THE UNIVERSITY'S EDUCATIONAL POLICY JUDGMENT ABOUT HOW BEST TO ACHIEVE A DIVERSE STUDENT BODY

In *Grutter*, the Court deferred to the law school's "educational judgment that ... diversity is essential to its educational mission," in keeping with the Court's "tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits." *Grutter*, 539 U.S. at 328. The question of *how* to achieve such diversity is likewise a question of educational policy warranting the Court's deference.

Petitioner opposes any special regard for a school's own determination of the best admissions program for its needs, but the Court has always been "reluctan[t] to trench on the prerogatives of state and local educational institutions." *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 (1985). The Court's forbearance reflects both federalism concerns and a healthy awareness of judges' limited competence in university administration. *See id.*; *see also San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42-43 (1973) (courts lack "specialized knowledge and experience" in educational policy). Because federal courts are not "suited to evaluate the substance of the multitude of academic deci-

sions" made by public educational institutions, those institutions are granted "the widest range of discretion" in carrying out their educational missions. *Ewing*, 474 U.S. at 225 n.11, 226 (quotation omitted).

University and law school decisions about *how* best to pursue student-body diversity are, like the decision whether to pursue diversity at all, educational policy judgments entitled to substantial deference. In evaluating the likely effectiveness of a proposed policy, schools are aided by a cumulative understanding of the workings of educational institutions that is the province of educators, not the courts. *See id.* at 226. Perhaps most important, the success of any policy must be measured not only by whether it produces racial and ethnic diversity, but also by whether it does so without sacrificing other, equally important educational goals—such as academic selectivity and diversity along other dimensions. Striking the optimal balance among these different and sometimes competing objectives calls for the exercise of the most careful and informed educational judgment. Schools are entitled to "the widest range of discretion," *id.* at 225 n.11, in making that complex and educationally critical decision.

III. LAW SCHOOLS CANNOT ACHIEVE MEANINGFUL RACIAL DIVERSITY WITHOUT TAKING RACE INTO CONSIDERATION AS ONE OF MANY ADMISSIONS FACTORS

A. Minority Law School Applicants Are Significantly Underrepresented In The Highest Ranges Of Numeric Admissions Criteria

No nationally accredited law school in the United States is open to all applicants who can afford the tuition.[3] Because of what society rightly expects and demands of its lawyers, law schools rightly expect and demand much of their students. To help law schools predict which applicants will be able to meet their expectations, the schools have for decades relied on two numeric measures: undergraduate grade point average ("UGPA") and performance on the LSAT.

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[3] Indeed, the American Bar Association has promulgated a longstanding accreditation standard (Standard 501(b)) that provides: "A law school shall not admit applicants who do not appear capable of satisfactorily completing its educational program and being admitted to the bar." Am. Bar Ass'n, *2011-2012 Standards and Rules of Procedure for Approval of Law Schools*, Standard 501(b), *available at* http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2012_standards_chapter_5.authcheckdam.pdf (last viewed Aug. 12, 2012). Interpretation 501-3 to this Standard advises that "the factors to consider in assessing compliance with Standard 501(b)" include "the academic and admission test credentials of the law school's entering students, the academic attrition rate of the law school's students, the bar passage rate of its graduates, and the effectiveness of the law school's academic support program." *Id.*

Such measures are valuable tools for admissions decisionmakers, but they also create a potential problem when formulating an educationally optimal class on the basis of a broad range of attributes and factors. Applicants of certain minority races and ethnicities are significantly underrepresented in the highest LSAT/UGPA ranges. *See infra* at 10-12. Most law schools seek students who excel in all areas, including the critical-thinking skills measured by the LSAT and the academic achievement reflected in undergraduate grades. Accordingly, law schools do place value on high grades and test scores. And minority applicants are simply much less likely than others in the general applicant pool to fall in the highest ranges of these numeric indicators.

The raw numbers are startling. For the fall 2010 entering class, there were a total of 7,789 law school applicants who had both LSAT scores of 165 or above and UGPA of 3.5 or above. Of that number, just 63 were black. LSAC, *National Decision Profiles, 2006-2010* (2012), http://www.lsac.org/private/selectnatdecisionprofiles.pdf. Only 236 were Hispanic or Puerto Rican. As shown in the below table, the numbers are consistent for preceding years, with the share of African-American applicants in this upper range lingering just under 1%, and the percentage of Hispanic applicants remaining about 2.5%:

Applicants in the 165+ LSAT/3.5+ UGPA Range			
	Total applicants	Black applicants	Hispanic applicants[4]
2010	7,789	63 (0.81%)	236 (3.03%)
2009	6,276	57 (0.91%)	160 (2.55%)
2008	5,691	42 (0.74%)	129 (2.27%)
2007	5,837	43 (0.74%)	141 (2.42%)
2006	5,950	47 (0.79%)	150 (2.52%)

See id.; *see also* Jeffrey Evans Stake, *Minority Admissions to Law School: More Trouble Ahead, and Two Solutions*, 80 St. John's L. Rev. 301, 316 (2006) (explaining that in 2005, the students with LSATs above 159 and UGPAs above 3.75 were 82% white, 10% Asian, 3% black, 4.4% Hispanic/Latino, Chicano Mexican, or Puerto Rican, and 0.4% American Indian).

These statistics affect all of American legal education, not just the most highly selective law schools. Their impact on law school admissions is obvious and inevitable. Even with the use of race-conscious admissions policies, black applicants as a group still experience one of the lowest overall acceptance rates of any race or ethnic group. *See National Decision Profiles, 2006-2010*, *supra* (showing 2009-2010 admissions ratio of 44% for black applicants, 75% for white applicants, 67% for Asian applicants, and 59%

[4] These figures include individuals who self-identified as Hispanic, Latino, or Puerto Rican, as well as individuals who self-identified as Chicano or Mexican American before 2010, when that category was abandoned.

for Hispanic applicants); *see also* Symposium, *Who Gets in? The Quest for Diversity After* Grutter, 52 Buff. L. Rev. 531, 573 (2004) (remarks of D. Chambers) (lower rate of acceptance among black and Hispanic applicants "is due almost entirely to [their] somewhat lower mean undergraduate grades and much lower mean LSAT scores"). An analysis of predicted admissions data for the 2000-2001 applicant pools demonstrated that the acceptance rate for black law-school applicants would have fallen by nearly 40% if grades and test scores had been the sole admissions criteria. Updated analyses, using data from the 2010 entering law school class, show that little has changed in the intervening years. For that class, 76% of white applicants were admitted to at least one nationally accredited law school, while acceptance rates for minority groups lagged at 46% for black applicants; 61% for Hispanic applicants; and 69% for Asian applicants. In a numbers-only admissions model, minority acceptance rates would plummet, particularly for black candidates, whose acceptance rate would fall to just 24%. LSAC, *Updated Wightman Race-Blind Admission Model Results: 2009-2010 Applicant Data* 4 (Aug. 2012), http://www.lsac.org/LSACresources/publications/PDFs/raceblindadmissionresults.pdf.

The real-world consequences of these statistics are illustrated by the experience of law schools that have prohibited affirmative action. In 1997, the first year in which the University of California, Berkeley School of Law was legally barred from considering race pursuant to a California ballot measure, it enrolled no African-Americans—not one—and only seven Latino applicants. *See* Rachel F. Moran, *Di-*

versity and Its Discontents: The End of Affirmative Action at Boalt Hall, 88 Cal. L. Rev. 2241, 2247 (2000). At UCLA School of Law, African-American and Latino first-year enrollment dropped from 64 in 1996 to 49 in 1997. *See* Linda F. Wightman, *Consequences of Race-Blindness*, 53 J. Legal Educ. 229, 230 n.7 (2003). By 2000, there were only 21 African-American or Latino students enrolled in University of California law schools. *Id.*[5] In Texas, the results were similar. In the years just after University of Texas Law School was barred from taking race into account along with test scores and grades, African-American enrollment fell from 7% to 1.7%. *See* Clark D. Cunningham et al., *Using Social Science to Design Affirmative Action Programs*, 90 Geo. L.J. 835, 855-56 (2002) (7% in 1996; 1.7% in 1999). The University of Michigan Law School likewise enrolled fewer underrepresented minorities after that State's affirmative-action ban, even as the law school's class size increased. Teresa A. Bingman & Daniel M. Levy, *More Fair to Whom*, Mich. Bar J., Jan. 2012, at 26.[6]

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[5] Minority enrollment has been rebounding somewhat at California schools, apparently because of creative diversity strategies that might not be permissible under all affirmative action bans. *See, e.g.*, Erin Zlomek, *California Schools Get Around an Affirmative Action Ban*, Bloomberg Businessweek (Apr. 19, 2012), http://www.businessweek.com/articles/2012-04-19/california-schools-get-around-an-affirmative-action-ban (last viewed Aug. 12, 2012).

[6] A recent report found that affirmative action bans have reduced minority enrollment in graduate school by about 12% across multiple fields. *See* Liliana M. Garces, *The Impact of Affirmative Action Bans in Graduate Education* 4, Civil Rights Project Report, UCLA (July 2012). Also, minority students evi-

Petitioner's account of the experience of Texas schools post-*Hopwood* is not inconsistent with these data. The University of Texas Law School's current 31% minority enrollment lags the Texas undergraduate system's majority minority enrollment. *Compare* Pet. Br. 10, *with* UT Law Admissions, *Quick Facts*, http://www.utexas.edu/law/admissions/jd/quickfacts.php (last viewed Aug. 12, 2012). The statistics petitioner cites are the product of policies instituted at the undergraduate level for the express purpose of restoring minority representation. Even assuming the policies petitioner discusses could survive constitutional scrutiny when explicitly race-conscious policies would not, they are not effective solutions for law schools, as explained below. *Infra* at 15-19; *cf.* Mark C. Long, *Race and College Admissions: An Alternative to Affirmative Action?*, 86 Rev. of Econ. & Stat. 1020, 1029-30 (2004) (analyzing why minority enrollment at public colleges would plummet if percent plans wholly replaced affirmative action).

Given these data, it is clear that for many law schools, the only way to achieve racial diversity is to adopt some policy consciously designed to enhance the representation of minorities among the students they admit.

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dently experience greater "hostility and internal and external stigma" in States with affirmative action bans. Deirdre M. Bowen, *Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action*, 85 Ind. L.J. 1197, 1199 (2010).

B. Discarding Test Scores And Grades Is Not An Educationally Responsible Answer To The Problem Of Minority Underrepresentation In The Highest UGPA/LSAT Ranges

Petitioner asserts that there are purportedly race-neutral alternatives that could effectively facilitate satisfactory racial diversity. Pet. Br. 3, 34-42. But none of the alternatives is a sound or efficacious means of pursuing meaningful diversity in a law school setting.

1. Petitioner contends that Texas's "ten percent plan" ensures sufficient racial diversity to render unnecessary any consideration of race at the margins. But percent plans, even if effective for undergraduate admissions, make no sense for law schools. At the undergraduate level, the idea is that the state college or university attains diversity by offering admission to the top x percent of the class (on the basis of grade point average alone) at all state high schools. If such a plan promotes diversity at all, it is only because it depends on de facto racial segregation in state high schools. *See* Jose L. Santos et al., *Is "Race-Neutral" Really Race-Neutral?: Disparate Impact Towards Underrepresented Minorities in Post-209 UC System Admissions*, 81 J. Higher Ed. 675, 678 (2010).[7] But the nation's colleges and universities are not racially segregated in the way high

[7] Because percent plans are "heavily dependent on segregation," it is not clear they can properly be characterized as "race-neutral." Marta Tienda & Teresa A. Sullivan, *The Promise and Peril of the Texas Uniform Admission Law* 16, Presentation at Am. Ed. Res. Ass'n (Apr. 8, 2006).

schools in Texas apparently are. Even if it were wise to adopt a diversity policy that depends for its success on continued racial segregation, it is impossible to see how such a plan would work to enhance diversity where there is no pool of racially segregated institutions from which to draw.

The fundamental challenges for a law school contemplating a percent-plan admissions program are obvious. What pool of colleges and universities would a Texas state law school draw from, for example? All colleges and universities nationwide? If so, the law school could offer admission to only a minuscule fraction of the very top graduates—maybe no more than the valedictorian of every college and university in the nation. But do enough of them want to go to law school? And is the pool of valedictorians nationwide racially diverse? Perhaps the plan could be limited to just colleges and universities in Texas, or the Big Twelve schools. But are those schools sufficiently segregated that adopting such a plan would enhance the law school's diversity? Perhaps Texas could focus on accepting only the top graduates of historically black colleges. But in what sense would that be "race-neutral"? LSAC knows of no workable design for a percent-plan program in a law school.

Even if they worked to obtain diversity, percent plans would seriously compromise the educational values served by selectivity in law school admissions. Percent plans exalt undergraduate grades while discarding test scores for applicants sufficiently close to the top of their classes. Yet test scores are a critical piece of the evaluation process. The fact that a college student is in some top percentage of her class may say much about her preparation for legal

study—or it may not. *See* Lisa Anthony Stilwell et al., *Predictive Validity of the LSAT: A National Summary of the 2009 and 2010 LSAT Correlation Studies*, LSAC Technical Report 11-02, at 8 (2011) (showing that LSAT scores predict law school performance better than undergraduate GPAs do). If the college is small and noncompetitive, or academically lax, or if it has a reputation for inflating grades, then a high grade point average alone signifies very little. *See* LSAC, *LSAC Statement of Good Admission and Financial Aid Practices* 2 (2012). Indeed, it is easy to imagine a forward-planning college applicant intentionally matriculating at a less selective institution than may be ideal for him in part to game a professional-school percentage plan, and equally easy to imagine that some less-than-scrupulous institutions might encourage such gaming. The LSAT was designed in part to fill the information gaps and dissimilarities that are inherent in a selective admission process drawing candidates from a wide array of educational backgrounds. *See infra* at 20-21. Depriving law schools of its use would impose significant educational costs.

But there is more to the problem than just the elimination of test scores. Most law schools take very seriously the process of selecting, from among the thousands of applications they receive, the students they think will contribute the most to the interactive educational environment characteristic of American law schools. *See infra* at 23-26. In this process, law schools consider a wide range of attributes beyond just grades and test scores. Any admissions plan that focuses rigidly on undergraduate grades would cut off that critically important subjec-

tive evaluation process, forcing the school to live with whatever applicants fall within an arbitrarily defined grade category. That is not a sensible path to quality legal education. *See* LSAC, *Cautionary Policies Concerning LSAT Scores and Related Services* (2005).

By contrast, it makes good sense for law schools to seek to promote experiential, linguistic, and socioeconomic diversity in their student bodies—the "special circumstances" touted by petitioner as potential admissions criteria. In fact, most law schools already do pursue such forms of diversity. But pursuing other forms of diversity does not significantly promote racial diversity in law schools, which is why the many law schools that rely on non-racial diversity criteria also consider race in admissions. *See* Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions*, 72 N.Y.U. L. Rev. 1, 44 (1997). It bears special emphasis that the most commonly suggested proxy for race—socioeconomic status—does not in fact facilitate racial diversity. Because racial variances in numeric criteria are consistent across all socioeconomic levels, *see id.* at 42 (tbl. 10), an admissions policy that considers socioeconomic status is of little or no assistance to minority candidates. *See* William Darity et al., *Who Is Eligible? Should Affirmative Action be Group- or Class-Based?*, 70 Am. J. Econ. & Sociology 238, 239 (2011); Timothy T. Clydesdale, *A Forked River Runs Through Law School: Toward Understanding Race, Gender, Age, and Related Gaps in Law School Performance and Bar Passage*, 29 Law & Soc. Inquiry

711, 755 (2004). Further, the vast majority of people who are economically disadvantaged are white, meaning that "poverty-based affirmative action" primarily benefits white applicants, "by simple force of the numbers." Deborah C. Malamud, *Assessing Class-Based Affirmative Action*, 47 J. Legal Educ. 452, 465 (1997).[8] Racial diversity simply cannot be realized through consideration of purportedly race-neutral factors believed to predominate in one racial group or another.

2. If schools cannot expressly consider race among many factors in admissions, the only option remaining to law schools for which racial diversity is a priority is to ease admission requirements for all students and hope that the result is a more variegated student body. LSAC believes that discarding grades and test scores as tools for evaluating certain important skill sets in the admissions process would be a profoundly unwise course for American legal education. It goes without saying that when it comes to the study of law, an applicant's cognitive ability and critical-thinking skills are significant indicators of success. They are not the only indicators; nor are they the only quality for which law schools appropriately screen when selecting a class. But the educational mission of law schools depends in critical part on the ability to identify and admit applicants whose cognitive skills will enable them to benefit

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[8] *See also* Deirdre M. Bowen, *Meeting Across the River: Why Affirmative Action Needs Race & Class Diversity*, 88 Denv. U.L. Rev. 751, 766 n.95 (2011); Monica L. Rose, *Proposal 2 and the Ban on Affirmative Action: An Uncertain Future for the University of Michigan in Its Quest for Diversity*, 17 B.U. Pub. Int. L.J. 309, 333 (2008).

from—and contribute meaningfully to—the legal learning process.

Undergraduate grades and LSAT scores are the principal means by which law schools can screen and select for these skills. *See* Pamela Edwards, *The Shell Game: Who Is Responsible for the Overuse of the LSAT in Law School Admissions?*, 80 St. John's L. Rev. 153, 157 (2006); Linda F. Wightman, *The Role of Standardized Admission Tests in the Debate About Merit, Academic Standards, and Affirmative Action*, 6 Psychol. Pub. Pol'y & L. 90, 94-95 (2000). LSAT scores, which reflect acquired, high-level reading and verbal reasoning skills, are an effective predictor of students' performance in law school. *See* Stilwell et al., *Predictive Validity, supra*, at 8; Linda F. Wightman, *Beyond FYA: Analysis of the Utility of LSAT Scores and UGPA for Predicting Academic Success in Law School*, LSAC Research Report 99-05, at 3 (Aug. 2000). LSAT scores are also used in conjunction with undergraduate grades, to help law school administrators better understand and evaluate the records of students at colleges with which they are not especially familiar. *See* William P. LaPiana, A History of the Law School Admission Council and the LSAT, Keynote Address, LSAC Annual Meeting, at 5-10 (1998).

Indeed, the LSAT was designed in part to serve precisely that function. In the years before World War II, law schools had developed "a very complex system for the evaluation of college grades and ... had built up a lot of tables predicting what a certain average at a particular college meant." *Id.* at 5 (quotation omitted). After the war, with returning veterans attending college in record numbers, law schools

were faced with a flood of transcripts from new colleges for which they had little or no data. The LSAT, introduced in 1947, gave law schools both a tool for evaluating unfamiliar college transcripts and a reliable universal standard by which all students could be compared. *Id.*

In that respect, the LSAT worked—and works today—to increase access to legal education. In the past, high LSAT scores opened the doors of elite law schools to applicants from minority religious groups and white ethnic groups who might otherwise have been overlooked, often because they attended less prestigious colleges from which a high grade point average was of uncertain significance, and sometimes as a result of cultural biases. *See id.* at 9-10. Even now, the LSAT helps law schools identify promising students at undergraduate institutions with which they do not have extensive experience. "[I]f one believes in the relative validity of the test results, then their widespread use in admissions can be seen as a net gain for fairness." *Id.* at 7.

Despite the LSAT's success in expanding access to legal education, we have already seen how the test could have the opposite effect for certain racial minorities, if given inappropriate weight in the admissions process. But addressing that problem by discarding test scores and grades altogether would seriously undermine the important educational interest in accurately measuring the critical-thinking skills necessary for success in law school.[9] The academic

[9] Repeated studies by LSAC researchers have confirmed that the test accurately predicts minority law school performance, and the LSAT therefore cannot be discounted as inherently racially biased. *See, e.g.*, Lynne L. Norton et al., *Analysis*

mission and standards of the nation's law schools depend in no small part on accounting for these skills when selecting students. Law schools have carefully honed their selection processes over the decades to reflect their values and missions. Their academic judgment in the selection of their students warrants the Court's deference and respect.

In sum, the alternatives to race-conscious admissions would allow a law school to effectuate racial diversity only by discarding admissions criteria long deemed important to the educational mission. But an approach that undermines educational quality defeats the entire purpose of law school diversity programs to *maximize* the quality of education offered to all students, and is therefore unsound. Even absent the usual deference this Court gives to the academic policy judgment of States and their experienced educators, there is simply no plausible basis for concluding that there are educationally responsible, "race-neutral" means to attain the benefits of racial and ethnic diversity in legal education.

C. Race-Sensitive Admissions Policies Can Achieve Racial Diversity Without Compromising The Ability Of The School To Assemble An Educationally Optimal Class

Faced with the need to take some measures to ensure diversity, most law schools have correctly rejected proposals that they abandon altogether the

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of Differential Prediction of Law School Performance by Racial/Ethnic Subgroups Based on 2005-2007 Entering Law School Classes, LSAC Technical Report 09-02 (2009).

selective and comprehensive admissions process through which they assemble classes maximizing the educational experience for all students. Instead, they pursue a much more modest course, including race among the many non-numeric factors they consider in deciding which applicants will create a class that best advances the school's overall educational goals. In doing so, law schools merely recognize that membership in an identifiable racial or ethnic minority group is at least as salient as other experiential and background attributes—attributes that schools properly regard as valuable because they broaden the perspectives students bring to the interactive classroom environment. *See supra* at 4-6. This approach to admissions strikes the appropriate balance between reliance on numeric measures of critical-thinking skills and assessment of other attributes equally important in the admissions process.

1. It has been the consistent position of LSAC that "[t]here is no entitlement to a seat in law school, regardless of one's test scores and undergraduate grades." Philip D. Shelton, *Top Ten Misconceptions About the LSAT*, Law Services Report, Jan./Feb. 1999, at 9; *see also* LSAC, *Cautionary Policies Concerning LSAT Scores and Related Services*, *supra*. That conclusion follows from the recognition that the goal of law school admissions is not simply to reward academic promise or achievement, whether measured by LSAT scores, UGPA, or any other indicator. Legal education is not an awards program. Rather, it is a process with a two-fold mission: to enhance students' legal reasoning skills and mastery of legal principles, and to prepare them for meaningful participation and leadership in the profession and in so-

ciety. *See Grutter*, 539 U.S. at 332-33; *Sweatt v. Painter*, 339 U.S. 629, 634 (1950). The goal of law school admissions is to compose a class that best promotes those objectives for all students.

Grades and LSAT scores are important factors in this process. *See supra* at 19-21. But they are not the only important factors. As LSAC has repeatedly cautioned, "[t]est scores and grade-point averages should play only a limited role in the admission process," LSAC, *The Art and Science of Law School Admission Decision Making* 3 (2002), and should be "examined in relation to the total range of information available about a prospective law student," LSAC, *Cautionary Policies Concerning LSAT Scores and Related Services* 1 (2005).[10]

The LSAT, for instance, was never intended to serve as a measure of "merit." *See* LaPiana, *supra*, at 8. Though it is an important measure of cognitive abilities, the LSAT "measures only a limited set of skills." Shelton, *Misconceptions*, *supra*, at 9. It does

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[10] The proper role of test scores and grade point averages is best appreciated by considering all of the other factors LSAC deems important to the admissions decision. Those factors are reviewed in *The Art and Science of Law School Admission Decision Making*, *supra*, at 9-10, and include academic factors such as advanced degrees and the difficulty of college course work; demographic factors including age, gender, race/ethnicity, geographic residence, socioeconomic status, family size, religion, and dominant language; work experience; leadership and extracurricular experience including community, volunteer, and athletic activities; accomplishments such as special artistic talents or overcoming adversity; evidence of good character and qualities such as integrity, maturity, honesty, compassion, judgment, and motivation; and other skills and abilities, such as communication, analytical, or advocacy skills.

not, for instance, assess writing ability, effectiveness of advocacy, negotiating ability, leadership potential, or a number of other skills and attributes integrally related to success in law school and the legal profession. *See* LSAC, *LSAC Statement of Good Admission and Financial Aid Practices*, *supra*, at 1; Deborah W. Post, *Misuse and Abuse of the LSAT: Making the Case for Alternative Evaluative Efforts and a Redefinition of Merit*, 80 St. John's L. Rev. 41, 59 (2006). Nor does the LSAT evaluate important personal characteristics—including motivation, perseverance, personal integrity, courage, social skills, and passion—that play a crucial role in determining success in law school and in a legal career. *See* Kevin McMullin, *Building a Better Legal Population: Schools Shouldn't Rely So Heavily on Test Scores in Admissions*, Tex. Law., Nov. 23, 1998, at 6; Edwards, *The Shell Game*, *supra*, at 158; *see also* LSAC, *LSAC Statement of Good Admission and Financial Aid Practices*, *supra*; Michael J. Sandel, Justice: What's the Right Thing To Do? 169 (2009).

Most significantly, neither LSAT scores nor grades provide any indication of how an applicant will affect the mix of backgrounds, experiences, outlooks, and ideas reflected within the class of students. As discussed, most of the nation's law schools base their entire approach to legal education on the premise that heterogeneity in the student body improves both cognitive learning and preparation for leadership in the profession and society. Heterogeneity along a number of dimensions—race, gender, age, socioeconomic status, personal history, geography, special skills and talents among them—

contributes significantly to the learning process on a law school campus.

In sum, a "sound admission program" is more than an exercise in assessing an applicant's cognitive skills and "predicting first-year academic performance." LSAC, *Art and Science of Law School Admission*, *supra*, at 4. Its "goal is much broader—assembling a class of individuals who contribute to each other's learning experiences, and who possess talents and skills that will contribute to the profession, frequently talents and skills not measured on the LSAT or captured in undergraduate grades." *Id.*; *see* LSAC, *LSAC Statement of Good Admission and Financial Aid Practices*, *supra*, at 12; Post, *supra*, at 54. Assessing which applicants best meet those criteria is a quintessential academic judgment, properly entrusted to university officials. *See Grutter*, 539 U.S. at 329; *Ewing*, 474 U.S. at 226-26; *Bakke*, 438 U.S. at 312 (Powell, J.). A policy that includes the appropriate consideration of grades and test scores but also gives weight to other factors, including racial and ethnic diversity, provides law school administrators with the information and latitude they need to compose a class that maximizes the quality of education for all students.

2. It is precisely the flexibility afforded admissions officials that distinguishes the type of race-sensitive law school admissions policy approved in *Grutter* from "quota" systems. Under the quota system in *Bakke*, admissions decisionmakers had no opportunity to compare minority candidates to non-minority candidates. There was no way to consider, for instance, whether the cognitive skills and special talents of a given non-minority candidate might bet-

ter enhance the school's overall educational environment than those of a given minority candidate. It was this flaw—the "insulat[ion]" of a racial group from "competition with all other applicants"—that defined "quota" for Justice Powell in *Bakke*, *id.* at 315, and now marks the constitutional line between permissible and impermissible consideration of race. *See Grutter*, 539 U.S. at 336-39.

Under *Grutter*, a law school faculty and staff who make admissions decisions evaluate all aspects of all applicants, separately and as compared to one another, in order to assemble a class that provides the best education to all students. Non-minority candidates, just like minority candidates, are screened for subjective factors: Would the candidate make the student body more heterogeneous along a non-racial dimension? Bring some exceptional talent or personal experience to the class? Be a leader or otherwise contribute to the law school community in a way not readily captured by numeric criteria? The current systems operate in a way "flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application." *Id.* at 337. Research sponsored by LSAC into law school admissions processes confirms that such systems do not in practice operate like the quota system in *Bakke*. *See* Wightman, *Consequences of Race-Blindness*, *supra*, at 252.

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The admissions practices authorized by the Court in *Grutter* have enabled law schools to pursue meaningful enrollment of minority students without for-

saking other important measures such as test scores and grades. The data are unambiguous: there is still a demonstrated need for policies that include race among the many other factors relevant to admissions. The Court accordingly should reaffirm the constitutional validity of those policies.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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