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 DEAN ROBERT POST AND DEAN MARTHA MINOW AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Amicus Martha Minow is the Dean and the Jeremiah Smith, Jr. Professor of Law at Harvard Law School, where she has taught since 1981. *Amicus* Robert Post is the Dean and the Sol & Lillian Goldman Professor of Law at Yale Law School, where he has taught since 2003.[1] Harvard Law School and Yale Law School are esteemed private educational institutions established in 1817 and 1824, respectively. Deans Minow and Post are filing this brief in their personal capacities.

Both Dean Minow and Dean Post help set policy for the admission of new students at their respective schools, oversee implementation of admissions procedures, and have personally reviewed many applications during their careers. Both Harvard Law School and Yale Law School have respected and rigorous admissions procedures. Each school assesses each applicant individually and holistically. Each takes into account all aspects of an applicant's achievements and background in attempting to predict accurately an individual's potential.

This form of individualized assessment is consistent with—and indeed, based upon—principles this Court has recognized and approved in the past. For more than three decades, Harvard and Yale Law Schools have used admissions procedures that treat

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part and that no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief are on file with the Clerk in accordance with this Court's Rule 37.3(a).

"each applicant as an individual in the admissions process." *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 318 (1978) (opinion of Powell, J.). *Id.* at 317 (opinion of Powell, J.). These resource-intensive admissions procedures seek to assure that each admitted student will succeed long after graduation. The procedures involve "individualized decisions, in which ethnic background plays a part, under a presumption of legality and legitimate educational purpose." *Id.* at 319 n.53 (opinion of Powell, J.). In both schools' admissions programs, "race or ethnic background may be deemed a 'plus' in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats." *Id.* at 317 (opinion of Powell, J.). Neither law school admits students as measured merely by "numbers" derived from standardized testing and grade point averages.

Amici write to urge the Court to reaffirm these basic principles. As constituent parts of private institutions that accept federal funds, both Harvard and Yale Law Schools are subject to the strictures of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. As a consequence, the admissions policies and practices of both schools will be governed by this Court's pronouncements concerning the constitutional propriety of respondent's use of race-conscious admissions factors in conjunction with its state-mandated "percentage plan." *Amici* urge that the Court resolve this case by confirming the propriety of admissions procedures like those used by the Harvard and Yale Law Schools.

Harvard and Yale Law Schools have each been successful in selecting and training leaders for the American legal profession. They have done so by carefully evaluating each applicant based on the

entirety of his or her record. Race can be an inescapable part of that record. It is neither feasible nor desirable to assess each applicant individually without also giving appropriate significance to race, particularly when applicants themselves deem race to be central to their identities or life experiences. An assessment that ignores what a candidate identifies as a salient aspect of his or her experience is neither holistic nor consistent with the dignity of that applicant.

Were this Court altogether to preclude considerations of race from the admissions process, each school would be disadvantaged in its efforts to select individuals who will produce the most effective classroom experience for training students to succeed in the opportunities and challenges that lawyers, whether practicing or not, must inevitably confront. Neither school could plausibly employ a percentage plan of the sort that Texas has mandated. Both schools would find themselves in the untenable position of directing applicants to suppress references to their own race and to censor discussion of any experiences that might reveal their race.

Amici submit this brief to urge the Court to respect the fundamental framework of law school admissions that has served the legal profession so well for decades and that will help ensure that the profession will continue to lead the nation in the future.

BACKGROUND

This Court has recognized that "universities, and in particular, law schools, represent the training ground for a large number of our Nation's leaders." *Grutter* v. *Bollinger*, 539 U.S. 306, 332 (2003). "Individuals with law degrees occupy roughly half the state governorships, more than half the seats in the United

States Senate, and more than a third of the seats in the United States House of Representatives." *Id.* This "pattern is even more striking when it comes to highly selective law schools," which "account[] for 25 of the 100 United States Senators, 74 United States Courts of Appeals judges, and nearly 200 of the more than 600 United States District Court judges." *Id.*[2] Indeed, every current member of this Court attended either Harvard Law School or Yale Law School.

Both schools seek to educate future leaders of the American legal profession. For more than 188 years, "[t]he primary educational purpose of Yale Law School [has been] to train lawyers and to prepare its students for leadership positions in the public and private sectors both in the U.S. and globally."[3] Similarly, the mission of Harvard Law School is "[t]o educate leaders who contribute to the advancement of justice and the well being of society."[4]

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[2] These observations remain as true today as they were a decade ago. *See* Jennifer E. Manning, Cong. Research Serv., R41647, *Membership of the 112th Congress: A Profile* 4 (2011) ("Law degrees are held by 167 Members of the House (38% of the total House) and 55 Senators (55% of the total Senate)."); Am. Bar Ass'n, *Lawyers in the 112th Congress—House of Representatives* (2012), http://www2.americanbar.org/calendar/ABAday/Documents/lawyersincongress_112h.pdf (listing the law schools which members of the House of Representatives attended); *Am. Bar Ass'n, Lawyers in the 112th Congress—Senate* (2012), http://www2.americanbar.org/calendar/ABAday/Documents/lawyersincongress_112s.pdf (listing the law schools which members of the Senate attended).

[3] *See* Yale Univ., *Mission Statements of the Schools of Yale University* 3, http://www.yale.edu/about/yale-school-mission-statements.pdf.

[4] *See* Harvard Law Sch, *Harvard Law School's Mission/Values*, http://www.law.harvard.edu/about/

Both schools are fortunate to have large pools of talented applicants from which they can select those students whom they believe have the greatest potential to succeed in public and private life. For the class of 2014, Yale Law School enrolled just 205 students out of 3,173 applicants.[5] That same year, Harvard Law School enrolled 559 students out of 6,364 applicants.[6]

Both schools could entirely fill each entering class with students who have the highest possible Grade Point Averages ("GPAs") and Law School Admission Test ("LSAT") scores. But neither school chooses to do so. In isolation, these "objective" measures cannot identify the future leaders of the bar. Both schools deny admission to more than half of the applicants who have either a 4.0 or greater GPA or a 174 or greater LSAT (99th percentile).

Although GPAs and LSAT scores are certainly relevant, they inevitably reveal only a partial view an applicant's potential. To be meaningful, objective "numbers" must be set in the context of an applicant's background and circumstances.

Both Harvard and Yale recognize from long experience that intangible virtues like courage, commitment, leadership, and moral compass are highly relevant to an applicant's potential to succeed in the legal profession. The "numbers" do not identify such virtues, which become visible only when the life story

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administration/hr/careers/mission.html (last accessed Aug. 10, 2012).

[5] *See* Yale Law Sch., *Entering Class Profile*, http://www.law.yale.edu/admissions/profile.htm (last accessed Aug. 10, 2012).

[6] *See* Harvard Law Sch., *Class Profile and Fact Sheet*, http://www.law.harvard.edu/prospective/jd/apply/classprofile.html (last accessed Aug. 10, 2012).

of an applicant is carefully scrutinized in all its gritty details. Both schools therefore invest heavily in admissions processes that aspire to undertake such scrutiny. These processes allow us to admit students we believe to be of the highest quality, meaning students we believe are most likely to become successful lawyers and leaders in the American legal profession.

The application processes at both schools share certain common features. Each application includes a personal statement, letters of recommendation, a list of professional experiences, an academic transcript, and an LSAT score. At both schools, the admissions office reviews every individual application and essay and can directly reject less competitive applications. The admissions offices then distribute a subset of applications to faculty members, who assess each application according to its individual strengths and weaknesses, with the missions of their respective school in mind. Finally, both schools aggregate feedback from faculty to make final decisions about who to admit and who to place on a waiting list.[7]

Each school assesses applicants individually, based upon their unique experiences and promise. We do so for two reasons. The first is that intangible qualities are often apparent only when each applicant is given the opportunity to express his or her own personal

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[7] Each school's application process also has a few unique features. Once Yale Law School distributes applications to faculty, three faculty members individually review each application and rate it on a scale of two to four. At Harvard Law School, the admissions office works with faculty to review and rate applications. At least two people, and sometimes as many as five, read every application. In addition, Harvard Law School conducts candidate interviews by invitation as part of the evaluation process.

story. The quality of our students would be immeasurably poorer if we were to select them only "on the numbers."

The second is that our pedagogical responsibility as educators is to select an entering class which, when assembled together, will produce the best possible educational experience for our students. Law students learn not merely from their faculty or their books, but also from each other. No one who has graduated from a law school can seriously doubt that the hours of peer debate among individual students and within study groups contribute at least as much to the education of law students as does time spent in class. Each year, therefore, we aspire to assemble a student body in which the potential for students to learn from and with each other is maximized. This requires selecting a class in which students have different points of view, are committed to diverse aspirations, and have complementary strengths.

Rigorous individualized assessments do *not* in any way utilize numerical matrices, formulas, guidelines, or set-asides for any groups, including children of alumni or individuals of color or other minority status. Stated simply, race is not considered in any systematic way by either law school. Race is not quantified, nor does it have a fixed role in the qualitative assessment of applications.

Yet race cannot be excluded as relevant to the effort to obtain a full appreciation of an applicant's perspectives, accomplishments, and leadership potential. It is neither feasible nor desirable to ignore race in the evaluation of an applicant's file. To do so would be inconsistent with the aspiration to have a holistic, individualized assessment. It would be as arbitrary and misleading as ignoring what an applicant studied

previously, how demanding was her education, or whether English was her first language. Careful, respectful, individualized consideration is therefore necessary to select the best students who together will create the most effective educational environment.

SUMMARY OF ARGUMENT

At the core of the admissions processes of Harvard and Yale Law Schools is respect for the individual. Both schools perform an individualized, holistic, and careful assessment of each applicant, with a focus on understanding the complex forces, struggles, and experiences that illuminate an applicant's achievements, perspectives, and potential. This intensive process serves compelling educational interests.

To select the most meritorious applicants, it is necessary to evaluate intangible aspects of their character. This same evaluation process is indispensable to our efforts to create a rich and dynamic learning environment. We use individualized assessments to assemble a broadly diverse student body that can robustly debate ideas inside and outside the classroom in ways that are essential for legal education. A diverse student body is also of great pragmatic value in preparing students for the practice of law in today's increasingly globalized and heterogeneous economic world.

If this Court were to interpret the Fourteenth Amendment in a manner that precluded considerations of race, even in the context of truly individualized assessments, the admissions processes of both Harvard and Yale Law Schools would be severely undermined. Were Title VI to prevent us from recognizing the race of applicants, even for those applicants for whom race is a salient aspect of

identity, we would be unable to conduct holistic evaluations. It is neither feasible nor desirable to suppress race from the self-presentation of applicants. Not only would it exclude relevant aspects of individual files, but it would also censor applicants' self-understandings.

Considering race as part of an individualized, holistic process is entirely consistent with the Fourteenth Amendment. Just as classifications that reduce "an individual to an assigned racial identity," *Parents Involved in Cmty. Sch.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701, 795 (2001) (Kennedy, J., concurring), are inconsistent with the dignity of persons, so rules that would force institutions entirely to ignore what an individual has to say about his or her race can be incompatible with the respect that each person is due. In our admissions process, we invite applicants to share their personal and unique stories. Title VI would deny the dignity of applicants were it to compel us to ignore to what applicants have to say about the meaning of race in their own lives.

A constitutional rule that would prohibit all considerations of race would also have severe adverse effects. Not only would it upset the substantial reliance interests of schools that have designed admissions policies on the foundations of *Bakke* and *Grutter*, but it would also effectively force schools either to censor the essays of applicants or to abandon the very process of individualized assessment that has heretofore been at the core of our admissions procedures. The educational consequences would be devastating.

ARGUMENT

I. HOLISTIC EVALUATIONS SERVE A COMPELLING EDUCATIONAL INTEREST IN SELECTING THE BEST APPLICANTS WHO TOGETHER WILL CREATE THE BEST EDUCATIONAL ENVIRONMENT.

Harvard and Yale Law Schools—and other educational institutions with similar missions—have found it necessary to consider each applicant individually in order to identify and train the leaders of tomorrow. The process of individualized assessment enables us to select the best applicants and to establish the pedagogical atmosphere that is most conducive to learning.

A. Holistic Consideration Is Necessary To Select The Most Meritorious Applicants.

Numerical qualifications, like GPA and LSAT scores, are useful in making threshold determinations of an applicant's academic abilities. Yet essential dimensions of character and commitment are not revealed by simple test scores.

An admissions process must be able to distinguish students who can only memorize facts and apply existing legal principles, from students who can understand the deep social policies and implications of the law. The latter kind of student is more likely to contribute to classroom and hallway discussions, and in the future to become a leader of the legal profession. The challenge of the admissions process at Harvard and Yale Law Schools is to differentiate one kind of student from the other.

We try to meet this challenge by examining the entire record of applicants. We hope to identify individual qualities like curiosity, flexibility, judgment,

responsiveness, and the ability to move easily between so-called big picture concerns and detailed analysis. We have found these traits to be most useful in predicting the future success of students and graduates. Test scores and grades do not capture these essential qualities.

Numbers alone do not reveal character. They do not reveal the drive or determination to become a leader or to use the advantages of one's education to give back to society. Harvard and Yale Law Schools can accept only a small number of applicants, and we each feel responsible to accept students who are committed to preserving and advancing the practice and study of law, as well as to the provision of justice.

In other countries, elite institutions may select students entirely by standardized test scores. But this has never been true of post-graduate institutions in the United States. We know of no American law school that selects students merely on the basis of numerical scores.[8] In America, we understand the relationship between moral fiber and ability.

Character matters, because it is relevant to the prediction of future achievements. Character, which includes integrity, compassion, tenacity, courage, and resilience, is most tellingly revealed in how persons respond to the challenges they face. We use a holistic review process because we seek to discern the

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[8] Indeed, the American Bar Association's accreditation standards explicitly state that schools should "not use the LSAT score as a sole criterion for admission." Am. Bar Ass'n, *2011-2012 Standards and Rules of Procedure for Approval of Law Schools* 169 (2011). The ABA warns that "while LSAT scores serve a useful purpose in the admission process, they do not measure, nor are they intended to measure, all the elements important to success at individual institutions." *Id.* Much less can those scores indicate how an individual will perform after graduation.

character of applicants, which can shine out in circumstances like military service; prior success in business, nonprofit advocacy, journalism, or engineering; overcoming disadvantage or disappointment; or a demonstrated ability to engage and interact successfully with people from different communities and backgrounds (*e.g.*, racial, religious, political, class). The individualized assessment of character is our best hope for identifying applicants whom we believe to be most meritorious.

B. Holistic Consideration Is Necessary To Create The Best Educational Environment.

The individual assessment of each applicant is also necessary to create the best possible educational atmosphere. This is true for two reasons.

1. Student Body Diversity Has Significant Pedagogic Value.

"The atmosphere of 'speculation, experiment and creation'—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body." *Bakke,* 438 U.S. at 312 (opinion of Powell, J.). This Court has accordingly held that a public law school has "a compelling interest in attaining a diverse student body." *Grutter*, 539 U.S. at 328.

A diverse student body is as important today as it was a decade ago. There is now even more evidence to support this conclusion. In deciding this case, therefore, the Court should in no way retreat from affirming the fundamental importance of a diverse student body.

Our experience as educators at Harvard and Yale Law Schools confirms the wisdom of Justice Powell's

conclusion in *Bakke*. Our schools value diversity along a number of dimensions, including, *inter alia*, veteran status, geographical origin, undergraduate institution, work experience, political and cultural perspective, nationality, gender, race, and sexual orientation.[9] A diverse student body contributes to the quality of discussion, both inside and outside the classroom, on topics like interracial adoption; freedom of expression and hate speech; environmental justice; marriage regulation; and employment discrimination. Students from different backgrounds will bring different presumptions and aspirations to bear on these and innumerable other equally important and provocative topics. The clash of these perspectives will enrich the educational experience of all.

The educational environment of Harvard and Yale Law Schools is immeasurably enhanced because we select students so as to facilitate hard discussions of controversial topics. We structure our admissions processes to maximize the diversity of views and experiences that our students will encounter. It almost certainly would be mutually beneficial for students raised in Catholic schools and Yeshivas to encounter one another, because each will come away with an enlarged perspective on the law and on themselves. A national leader of the American bar

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[9] This approach also comports with the accreditation requirements of the American Bar Association, which "[s]ince 1980 . . . has required all law schools to demonstrate 'a commitment to providing full opportunities for the study of law and entry into the profession by qualified members of groups, notably racial and ethnic minorities, which have been victims of discrimination in various forms.'" Brief of Amici Curiae American Bar Association at 2, *Grutter* v. *Bollinger*, 539 U.S. 306 (2002) (No. 02-241).

ought to know what life looks like from the perspective of those who have grown up in the South, in South Dakota, in Harlem, or in Delhi.

The racial backgrounds and experiences of our students are without doubt relevant to this educational diversity. See *Seattle Sch. Dist. No. 1*, 551 U.S. at 798 (Kennedy, J., concurring in part and concurring in the judgment) (discussing "the important work of bringing together students of different racial, ethnic, and economic backgrounds."). An important benefit of racial diversity is its capacity to illuminate varied or conflicting viewpoints within given racial groups. Such diversity helps overcome stereotypes and superficial assumptions about human behavior, perception, and social meaning. *See Grutter*, 539 U.S. at 330.

Imagine for example a discussion about the constitutionality of statutes prohibiting cross burning. The different opinions in *Virginia* v. *Black*, 538 U.S. 343 (2003), explicitly invoked the historically distinct perspectives of different groups. *See, e.g., id.* at 388-95 (Thomas, J., dissenting) (explaining the cultural meaning of cross burning and why it is understood by African-Americans and other minority groups as "a threat and a precursor of worse things to come"). Discussion of this topic in a law school, whether in class or over coffee, would be impoverished were it not able to bring to bear the full spectrum of relevant perspectives. Analogously, debate over environmental waste disposal would be enlivened and enriched if those participating in the discussion included students with prior experience as environmental engineers; students with prior experience in municipal zoning; and students raised in poor communities situated near waste disposal sites.

2. Student Body Diversity Is Important In Preparing Students For The Practice Of Law.

A diverse student body also provides important practical benefits in legal training. As this Court recognized in 1950:

> [A]lthough the law is a highly learned profession, we are well aware that it is an intensely practical one. The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned.

Sweatt v. *Painter*, 339 U.S. 629, 634 (1950).[10]

The intellectual ferment fostered by a diverse student body is valuable not only in training students to become excellent advocates, but also in preparing future lawyers for the practical challenges that they will undoubtedly face in their careers. Alumni from Harvard and Yale Law Schools include not only federal and state judges and legislators, but also, *inter alia*, senior military officers, mayors, foreign heads of state, leaders of global law firms and corporate executives of Fortune 500 companies. We have concluded that it is necessary to expose students "to widely diverse people, cultures, ideas, and

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[10] It is interesting to note, in light of the context of this case, that *Sweatt* also arose from the University of Texas system. At the time, an African-American student was denied admission to the law school because of his race.

viewpoints," *Grutter*, 539 U.S. 330 (internal quotation marks and citations omitted), so that we can properly train them for these remarkable careers. We have also found that exposure to a diverse student body is highly advantageous for more traditional legal practice.

The Court in *Grutter* cited evidence submitted by various educational and business *amici* showing that exposing students "to widely diverse people, cultures, ideas, and viewpoints" "better prepares students for an increasingly diverse workforce and society," and that it confers "skills needed in today's increasingly global marketplace." *Id.* (internal quotation marks omitted). The increasing globalization of legal practice demands that our alumni be able to work with clients and peoples who are themselves increasingly diverse. Even putting aside the demands of internationalization, the 2010 Census demonstrates that the U.S. population has itself become substantially more racially and ethnically diverse. *See* Karen R. Humes et al., 2010 Census Briefs, *Overview of Race and Hispanic Origin: 2010*, at 22 (Mar. 2011), *available at* http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf.

One study prepared by the Boston Consulting Group found that "continued economic progress hinges on the ability to effectively integrate minority consumers into the mainstream of American business—both as employees as well as entrepreneurial partners." Bos. Consulting Grp., *The New Agenda for Minority Business Development* 7 (June 2005), *available at* http://www.kauffman.org/uploadedfiles/minority_entrep_62805_report.pdf. In another study conducted by the management consulting firm McKinsey & Company,

> The findings were startlingly consistent: for companies ranking in the top quartile of executive-board diversity, [returns on equity] were 53 percent higher, on average, than they were for those in the bottom quartile. . . . [and earnings before interest and taxes] margins at the most diverse companies were 14 percent higher, on average, than those of the least diverse companies . . . .

Thomas Barta et al., *Is there a payoff from top-team diversity*, McKinsey Quarterly (Apr. 2012), https://www.mckinseyquarterly.com/Is_there_a_payoff_from_top-team_diversity_2954.[11]

In our educational judgment, law students who pursue careers both within and outside the legal profession will inevitably interact with increasingly diverse clients, managers, and colleagues. Our commitment as educators is to create the educational environment best suited to prepare our students to succeed in this new world. In our view, diversity is associated with better educational outcomes.[12]

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[11] *See* Orlando C. Richard et al., *Cultural Diversity In Management, Firm Performance, and the Moderating Role of Entrepreneurial Orientation Dimensions*, 47 Acad. Mgmt. J. 255, 263 (2004). *See also* Cedric Herring, *Does Diversity Pay?: Race, Gender, and the Business Case for Diversity*, 74 Am. Soc. Rev. 208, 219 (2009) ("diversity is associated with increased sales revenue, more customers, greater market share, and greater relative profits"); Alison Kenney Paul et al., *Diversity As An Engine of Innovation*, 8 Deloitte Rev. 108, 111 (2011) ("Regardless of the group, it is hard to form a brand relationship unless you have people that come from those cultures and ethnicities that can connect.").

[12] Patricia Gurin et al., *Diversity and Higher Education: Theory and Impact on Educational Outcomes*, 72 Harv. Edu. Rev. 330 (2002). *See also* Samuel R. Sommers et al., *Cognitive effects of racial diversity: White individuals' information*

Diverse teams are better at solving a variety of problems when compared with homogeneous groups, even when rated higher on standard ability measures.[13]

II. AN EFFECTIVE, HOLISTIC, AND INDIVIDUALIZED EVALUATION CANNOT SUPPRESS THE RACE OF AN INDIVIDUAL.

As we have explained, our schools have concluded that holistic, individualized assessments are essential to assembling the best possible student body for the advancement of our educational missions. We have likewise concluded that it is neither feasible nor desirable to suppress the race of applicants while conducting such assessments.

The racial background of a person is not like a hat that can be taken on or off. It is frequently woven into the very fabric of identity and character. It matters to us to understand a candidate's journeys and strengths. To evaluate an applicant, we need to appreciate his or her unique experience of socio-

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processing in heterogeneous groups, 44 J. Experimental Soc. Psychol. 1129 (2008) (white individuals who expected to discuss a race-relevant topic with a racially diverse group exhibited better comprehension of topical background readings than whites assigned to all-white groups).

[13] *See generally* Scott E. Page, *The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools, and Societies* 319-28 (2007). *See also* Katherine W. Phillips et al., *Surface Level Diversity and Decision-Making in Groups: When Does Deep-Level Similarity Help*, 9 Group Processes & Intergroup Rel. 467, 469 (2006) (diversity "serves to legitimize the surfacing of unique information."); Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. Personality & Soc. Psychol. 597, 606 (2006) (heterogeneous mock juries "deliberated longer and considered a wider range of information" than racially homogenous groups).

economic disadvantage or advantage, early familial circumstances, or particular medical condition. It matters to us whether an applicant did not speak English until middle school or grew up in a neighborhood in which no one attended college. Race can be no less important a dimension of individual experience; it can be no less essential to a careful evaluation of an applicant's achievements and prospects.

Were we to be compelled to ignore race, we would be prevented from evaluating all that racial identity might mean to any individual person. To some applicants, race may not matter much at all. To others, however, it may be urgently salient. We do not prejudge this issue. We affirm only that enforced colorblindness will both undermine the capacity of our admissions processes fully to assess many applicants and severely injure our efforts to ensure that our classrooms and study groups will generate the robust debate that is surely essential to much legal and policy analysis.

As a practical matter, moreover, it is not clear to us how admissions officers and faculty reviewers can ignore race and yet still conduct holistic evaluations. Essays are a critical component of the application process at law schools such as Yale and Harvard, and it is not uncommon for the personal statement of minority applicants to explain the ways in which race has shaped their lives or perspectives. Applicants' references are an essential component of their admissions files, and reference letters frequently mention race in explaining how an applicant has demonstrated positive qualities and skills. We do not understand how such discussion could possibly be suppressed.

Consider the practical alternatives. We might instruct applicants not to mention their race in their personal essays; we might redact any explicit or implicit references to race that nevertheless appear in applicant essays; we might advise reviewers to ignore race in their letters of recommendation. We might direct faculty to ignore any inferences they might draw from an application file about the relevance of race.

These censorial approaches are deeply unattractive. They would not only deprive us of valuable and relevant information, but they would also stifle applicants, recommenders, and faculty. To take such steps would seem fundamentally at odds with our nation's traditions of freedom of expression and academic freedom.

III. THE FOURTEENTH AMENDMENT DOES NOT PROHIBIT CONSIDERING RACE AS PART OF A HOLISTIC, INDIVIDUALIZED ASSESSMENT.

It has frequently been observed that at "'the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial [or] sexual . . . class.'" *J.E.B.* v. *Ala. ex rel. T.B.*, 511 U.S. 127, 152-53 (1994) (Kennedy, J., concurring) (quoting *Metro Broad., Inc.* v. *FCC*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting)). See also *Missouri* v. *Jenkins*, 515 U.S. 70, 120-121 (1995) (Thomas, J., concurring) ("At the heart of this interpretation of the Equal Protection Clause lies the principle that the government must treat citizens as individuals, and not as members of racial, ethnic, or religious groups."). "One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and

worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities." *Rice* v. *Cayetano*, 528 U.S. 495, 517 (2000). See also *Seattle Sch. Dist. No 1*, 551 U.S. at 746 (opinion of Roberts, C.J.).

The holistic, individualized assessments that this Court endorsed in *Bakke* and *Grutter*—and that our law schools assiduously undertake—exemplify the treatment of applicants as individuals. A rule that forbids any consideration of race in the admissions process, by contrast, would demean the dignity of individual applicants by denying the relevance of their voices and their experiences.

A. Consideration Of Race As Part Of A Holistic, Individualized Evaluation Is Consistent With The Dignity Of Each Applicant.

This Court has recognized that race is "'one element in a range of factors that a university properly may consider in attaining the goal'" of a diverse student body "essential to its educational mission." *Grutter*, 539 U.S. at 324, 328 (quoting *Bakke*, 438 U.S. at 314). Such consideration of race is permissible if it is not used to "'insulat[e] the individual from comparison with all other candidates for the available seats,'" and is instead "used in a flexible, nonmechanical way" as part of a "truly individualized consideration." *Id.* at 334 (quoting *Bakke*, 438 U.S. at 317). An individualized admissions process does not use race as a quota or set-aside. In no way does it treat applicants as mere "components of a racial . . . class." *J.E.B.*, 511 U.S. at 152-53 (Kennedy, J., concurring) (internal quotation marks omitted). The whole point of an individualized application process is to use essays, references and test scores to understand fully each applicant in his or her own particularity. Such a

process seeks to overcome stereotypes and classifications.

It does not "demean[] the dignity and worth of" an applicant, *Rice*, 528 U.S. at 517, to listen to what he has to say when he believes that race is an important aspect of his own personal experience. There is nothing intrinsically stigmatizing or demeaning about one's racial identity. See *Jenkins*, 515 U.S. at 114 (Thomas, J., concurring). Race is relevant insofar as it enables us to hear each applicant's own story and to construct an entering class that is educationally optimal. Race is considered in the same way, and for the same purposes, as a multitude of other personal characteristics, such as prior work experience, civic service, athletic achievement, socioeconomic background, or geographic origin. In such a context, consideration of race does not offend the Equal Protection Clause.

B. An Individualized Admissions Process That Excluded Consideration Of Race Would Demean The Dignity Of Applicants.

The dignity of applicants would in fact be offended by a rule that prohibits consideration of race (and only race) from an otherwise fully individualized, holistic admissions process. Harvard and Yale Law Schools ask applicants to submit personal statements that discuss their circumstances and history. To refuse to recognize such discussions when, and only when, they pertain to an applicants' race disrespects the self-understandings of applicants.

We accord dignity to persons when we listen to what they have to say. It belittles applicants to invite their self-presentations and then deliberately ignore their personal accounts of their own lives. It

demeans them to suppress what they believe is important in evaluating their records and their potential contributions to our law schools. It is incompatible with the respect we owe our applicants to demand that they comply with the preconception that race ought not matter to them.

Of course some applicants may consider race to be insignificant in their lives. But we know from experience that many other students understand race as a fundamental dimension of their identities. If Title VI were to prohibit our schools from listening to and considering such intimate and personal perspectives on their own lives, it would be in serious tension with the "personal dignity and autonomy" that lies at the heart of "the liberty protected by the Fourteenth Amendment." *Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 851 (1992). The Equal Protection Clause, no less than the Due Process Clause, celebrates an individual dignity that cannot be consistent with such an outcome.

If Title VI were to require Harvard and Yale Law Schools to purge all references to race in their admissions processes, the statute would in effect operate to censor the self-presentation of applicants. A statute effectively prohibiting applicants from discussing their own race would coerce silence in a manner that would potentially chill, if not infringe upon, the free speech rights of applicants.

The command of the Equal Protection Clause that government "must treat citizens as individuals, not as simply components of a racial . . . class," *J.E.B.*, 511 U.S. at 152-53 (Kennedy, J., concurring) (internal quotation marks omitted), should not be understood to forbid law schools from considering aspects of applicants' history or personal identity that they wish to communicate.

IV. A RULING THAT RACE CANNOT BE CONSIDERED IN A HOLISTIC ASSESSMENT OF APPLICANTS WOULD UPSET SETTLED RELIANCE INTERESTS AND HAVE UNTOWARD CONSEQUENCES.

A ruling that race can no longer be part of a holistic, individualized assessment of applicants to law schools would upset decades of practice by Harvard and Yale Law Schools, as well as by countless other educational institutions, that have built their admissions processes in reliance on the effective holding of *Bakke*. Such a ruling, moreover, would likely cause significant harm to both institutions.

A. Principles Of *Stare Decisis* Weigh Heavily Against A Rule Of Absolute "Color-blindness" In Admissions Processes.

Stare decisis "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact." *Vasquez* v. *Hillery*, 474 U.S. 254, 265-66 (1986). While *stare decisis* is not "an inexorable command," courts adhere to it as "the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne* v. *Tennessee*, 501 U.S. 808, 827-28 (1991). "[E]ven in constitutional cases, the doctrine carries such persuasive force that we have always required a departure from precedent to be supported by some special justification." *Dickerson* v. *United States*, 530 U.S. 428, 443 (2000) (internal quotations omitted)

(quoting *United States* v. *IBM Corp.*, 517 U.S. 843, 856 (1996)).

"*Stare decisis* has special force when legislators or citizens 'have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response.'" *Hubbard* v. *United States*, 514 U.S. 695, 714 (1995) (opinion of Stevens, J.) (quoting *Hilton* v. *S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991)).

This Court has long held that race can be a permissible criterion in schools' admissions decisions. Justice Powell's separate opinion in *Bakke*, issued more than three decades ago, set out the law regarding race-conscious admissions. See generally *Marks* v. *United States*, 430 U.S. 188, 193 (1977) ("[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds'"). As the Court recognized in *Grutter*, "[p]ublic and private universities across the Nation have modeled their own admissions programs on Justice Powell's views on permissible race-conscious policies." 539 U.S. at 323 (citations omitted).

For nearly 35 years, Harvard and Yale Law Schools have understood that they could, and believe that they should, employ admissions processes that "consider race or ethnicity . . . flexibly as a 'plus' factor in the context of individualized consideration of each and every applicant." *Id.* at 334 (discussing scope of Justice Powell's controlling opinion in *Bakke*). As recipients of federal funds subject to this Court's constitutional interpretations under title VI

of the Civil Rights Act,[14] Harvard and Yale Law Schools have relied on these principles in fashioning resource- and time-intensive processes designed both to identify students who possess the potential to become future leaders and to enrich their own institutional educational environments. Implementing these policies has required dozens of admissions officers and faculty reviewers, multiple rounds of evaluations, and significant expenditures of time and money. In undertaking such review processes, Harvard and Yale Law Schools have determined they cannot isolate race and exclude it from the otherwise comprehensive, individualized assessments necessary to fulfill their educational missions.

Thousands of other public and private educational institutions have similarly understood and relied upon *Bakke* and *Grutter*. Several other *amici* in this case demonstrate how the whole structure of our nation's higher education system has been built upon this Court's clear holdings about race-conscious admissions. See, *e.g.*, Brief of Brown University et al. (describing, on behalf of a coalition of 13 major universities, how undergraduate institutions have placed substantial reliance on *Bakke* and *Grutter* in shaping admissions policies). Indeed the modern

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[14] Title VI incorporates the standards that this Court has announced under the Equal Protection Clause.

Although Title VI does not mention a private right of action, our prior decisions have found an implied right of action, *e.g.*, *Cannon* v. *University of Chicago*, 441 U.S. 677, 703 (1979), and Congress has acknowledged this right in amendments to the statute, leaving it "beyond dispute that private individuals may sue to enforce" Title VI, *Alexander* v. *Sandoval*, 532 U.S. 275, 280 (2001).

Barnes v. *Gorman*, 536 U.S. 181, 185 (2002). *See also Guardians Ass'n* v. *Civil Serv. Comm'n*, 463 U.S. 582, 594 (1983) (plurality opinion) (citing *Cannon*).

legal profession itself rests on a foundation in schools and policies that depend, in no small part, upon decisions like *Bakke* and *Grutter*. See Brief of the American Bar Association (detailing the structural impacts of race-conscious admissions policy on the legal profession over several decades).

Bakke and *Grutter* have invited, and received, a high degree of reliance. To overrule or even modify these precedents now "would dislodge settled rights and expectations," *Hubbard*, 514 U.S. at 714 (opinion of Stevens, J.), upon which law schools and universities have come to depend. Departing from these longstanding holdings would effectively require Harvard and Yale Law Schools to develop new admissions policies and procedures. The risk that these new procedures will select inferior students, and create a less robust educational environment, is quite high. The principles of *stare decisis* strongly counsel against imposing any such risk.

Nothing has changed in the intervening decade since *Grutter* was decided that would give rise to a ""special justification,"" *Dickerson*, 530 U.S. at 443, for departing from traditional *stare decisis* requirements. To the contrary, the value of diversity has even stronger empirical support now than it did in *Grutter*. See *supra* at 16-18 (recent social science and business case studies). The growing complexity and interconnectedness of the world makes the case for diversity stronger even still. It would be especially unwarranted for the Court to revisit the holding of *Grutter* in a case where that issue is not even squarely posed.

B. Prohibiting Consideration Of Race Would Lead To Numerous Undesirable Consequences.

In addition to upsetting settled reliance interests, a ruling that the Equal Protection Clause bars considerations of race in admissions decisions would adversely affect the educational missions of institutions like the Harvard and Yale Law Schools.

As small, private institutions, neither school can employ the type of "top ten percent" plan that governs admissions at the University of Texas. As this Court recognized in *Grutter*, the use of "percentage plans" like the one used in Texas for undergraduate admissions can preclude professional schools "from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university." 539 U.S. at 340. Law schools like Harvard and Yale would thus be put to a choice: either admit "by the numbers" alone or engage in a truncated individualized consideration that forbade applicants and recommenders from discussing, and our faculty and staff from considering, important aspects of applicants' lives, experiences, and goals that happen to relate to race.

The effort to purge admissions processes of all references to race, on the other hand, would have the ironic effect of rendering a truly individualized assessment impossible for many applicants. Requiring schools to ignore a factor that is often inextricable from an applicant's formative life experiences would have the perverse effect of penalizing some applicants in the name of equal protection. It would uniquely preclude them from relying on an aspect of their lives that may be essential to a full appreciation of their

perspectives, personal accomplishments, and future potential.

For some students, being Caucasian may be an important part of their life story; as, for example, if a white applicant has chosen to focus on law because of the personal experience of participating in a school desegregation. A Cambodian student may submit a personal essay describing the difficulties of being typecast as a "model minority." The racial dimensions of personal identity might be especially salient for many African-American and Hispanic applicants who have experienced and overcome hurdles that others have not faced.

The ultimate effect of purging admissions processes of all reference to race will not be a colorblind Constitution; it will be a Constitution that disadvantages on the basis of race. The effort to cleanse admissions processes of all mention of race would also almost assuredly invite lawsuits from disappointed applicants who might claim that they had not been admitted because race had been inappropriately considered. Such suits will be difficult and costly to defend. They will thus create perverse incentives for schools to return to the legally safe harbor of admitting students entirely "on the numbers." It is hard to imagine a less attractive outcome for American higher education.

CONCLUSION

For the foregoing reasons, this Court should avoid any holding that would be inconsistent with the capacity of educational institutions to maintain admissions procedures that undertake individualized, holistic evaluation of applicants, including the race of applicants.

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