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 AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS AND URGING AFFIRMANCE

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QUESTION PRESENTED

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF *AMICUS CURIAE*[1]

The American Bar Association ("ABA") as *amicus curiae* respectfully submits this brief in support of Respondents. The ABA requests the Court to hold that Respondents' use of admissions policies that take race into account as merely one of a myriad of factors is consistent with the principles enunciated in this Court's precedents, including *Grutter v. Bollinger*, 539 U.S. 306 (2003), and furthers the compelling interest of diversity in undergraduate colleges and universities, which is essential for diversity in law schools and the legal profession.

The ABA is the largest voluntary professional membership organization and the leading national membership organization for the legal profession. Its nearly 400,000 members practice in all 50 States, the District of Columbia, and the U.S. Territories, and include attorneys in private firms, corporations, non-profit organizations, and government agencies. They also include judges, legislators, law professors, law students, and non-lawyer "associates" in related fields.[2]

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae* or their counsel made a monetary contribution to its preparation or submission. The parties have filed blanket waivers with the Court consenting to the submission of all *amicus* briefs.

[2] Neither this brief nor the decision to file it should be interpreted as reflecting the views of any judicial member of the ABA. No member of the ABA Judicial Division Council

The ABA has worked for decades to ensure that members of all racial and ethnic groups in the United States are well represented in our legal profession, judicial system, and political and business institutions. In 1967, the ABA endorsed the development of a national program to encourage and assist qualified but underprivileged persons from minority groups to enter law school and the legal profession. In 1972, the ABA formally adopted a policy reaffirming this position.[3] In 1974, based on this position, the ABA filed an *amicus* brief in *De Funis v. Odegarard*, 416 U.S. 312 (1974), in support of the University of Washington School of Law's admissions program.[4]

The ABA also filed an *amicus* brief in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), in which the ABA noted that in 1976 African Americans accounted for only two percent of the

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participated in this brief's preparation or in the adoption or endorsement of the positions in it.

[3] Resolutions become ABA policy only after adoption by vote of the ABA's House of Delegates (HOD). The HOD now has 560 delegates, representing States and Territories, state and local bar associations, affiliated organizations, sections and divisions, individual ABA members, and the Attorney General of the United States, among others. *See* ABA General Information, *available at* http://www.abanet.org/leadership/delegates.html (last visited Aug. 9, 2012).

[4] Brief of Am. Bar Ass'n as Amicus Curiae in Support of Respondents, De Funis v. Odegaard, 416 U.S. 312 (1974), 1974 WL 185633.

bar.[5] In anticipation of this Court's opinion, the ABA created a task force to analyze its implications for law schools and to develop recommendations for constructive implementation. In addition, public meetings and conferences were held by the ABA's Section on Legal Education and Admission to the Bar. This Section was formed by the ABA in 1879, and its Council has been approved by the (now) U.S. Department of Education since 1952 as the national agency for accrediting programs leading to the Juris Doctor degree. The Section's work following *Bakke* resulted in the adoption of Standard 212 of the ABA Standards and Procedure for Approval of Law Schools.[6] As adopted in 1980, this Standard 212 stated in pertinent part:

> Consistent with sound educational policy and the Standards, the law school shall demonstrate, or have carried out and maintained, by concrete action, 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

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[5] Brief of Am. Bar Ass'n as Amicus Curiae in Support of Respondents, Regents of the University of California v. Bakke, 438 U.S. 265 (1974), 1977 WL 188006, at *1-2 n.*

[6] Information on the Section on Legal Education and Admission to the Bar and the current version of the Standards are available at http://www.americanbar.org/groups/legal_education/resources/standards.html (last visited Aug. 9, 2012).

> have been victims of discrimination in various forms.[7]

Subsequently, the ABA filed an *amicus* brief in *Grutter v. Bollinger*, 539 U.S. 306 (2003), in support of the University of Michigan Law School's use of race and ethnicity as one factor in making admissions decisions.[8] The ABA also asserted that ensuring full minority participation in the legal profession is a compelling state interest.[9] In 2006, consistent with *Grutter,* Standard 212 was amended; it continues to state, in pertinent part:

> Consistent with sound legal educational policy and the Standards, a law school shall demonstrate by concrete action a commitment to providing full opportunities

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[7] Am. Bar. Ass'n, *Standards and Rules of Procedure for Approval of Law Schools*, 16, Standard 212 (1980). Standard 212 was based on the ABA's firmly-held "belief that diversity in the student body and the legal profession is important both to a meaningful legal education and to meet the needs of a pluralistic society and profession." Lawrence Newman, Am. Bar Ass'n Section of Legal Education and Admissions to the Bar, Recommendation on Standard 212 (1980), *available at* http://www.americanbar.org/content/dam/aba/publications/syllabus/1998_vol29_no1_syllabus.authcheckdam.pdf (last visited Aug. 9, 2012).

[8] Brief of Am. Bar Ass'n as Amicus Curiae in Support of Respondents, Grutter v. Bollinger, 539 U.S. 982 (2003), a*vailable at* http://www.americanbar.org/content/dam/aba/migrated/amicus/grutterfinal.authcheckdam.pdf (last visited Aug. 9, 2012).

[9] *Id.* at 7-30.

> for the study of law and entry into the profession by members of underrepresented groups, particularly racial and ethnic minorities, and a commitment to having a student body that is diverse with respect to gender, race and ethnicity.

Standard 212 thus urges law schools to "take concrete actions to enroll a diverse student body that promotes cross-cultural understanding, helps break down racial and ethnic stereotypes, and enables students to better understand persons of different races, ethnic groups and backgrounds."[10]

The ABA has taken other steps to promote diversity in the legal profession. In 2010, for example, the ABA Presidential Initiative Commission on Diversity completed its assessment of the state of diversity in the legal profession and issued its report.[11] That report found that while there has been some progress, "the lack of genuine diversity remains a disappointment" and racial and ethnic groups "continue to be vastly underrepresented in the legal profession."[12]

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[10] Am. Bar Ass'n, Standards and Rules of Procedure for Approval of Law Schools, 17, Interpretation 212-2 (2011-12 ed.).

[11] Am. Bar Ass'n, *Diversity in the Legal Profession: The Next Steps*, 25 (2010), *available at* http://www.americanbar.org/content/dam/aba/administrative/diversity/next_steps_2011.authcheckdam.pdf (last visited Aug. 9, 2012) (hereinafter *Next Steps*).

[12] *Id.* at 5.

The ABA has also worked to encourage the development and strengthening of the educational pipeline necessary for a diverse and inclusive legal profession. For example, the ABA Council for Racial and Ethnic Diversity in the Educational Pipeline, which provides services to increase diversity among students in the educational pipeline, is housed in the ABA Center for Racial and Ethnic Diversity.[13] The ABA has also adopted educational pipeline policies, including one in 2006 that urges state, territorial, and local bar associations to work with national, state, and territorial bar examiners, law schools, universities, and secondary and even elementary schools to address the problems facing minorities within the pipeline to the profession.[14]

As this long history demonstrates, the ABA is convinced that increased participation by our nation's racial and ethnic minorities in its legal and leadership positions remains critical today and that undergraduate institutions are an important part of the pipeline to law schools and the legal profession.

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[13] The Center is comprised of three entities, the ABA Commission on Racial and Ethnic Diversity in the Profession, the ABA Coalition on Racial and Ethnic Justice, and the ABA Council for Racial and Ethnic Diversity in the Educational Pipeline. Information on the Center is available at http://www.americanbar.org/groups/diversity.html (last visited Aug. 9, 2012).

[14] Am. Bar Ass'n, *House of Delegates Report No. 113* (2006), *available at* http://www.americanbar.org/groups/diversity/pages/DiversityRelatedResolutions.html (last visited Aug. 9, 2012).

The ABA accordingly urges this Court to affirm the decision of the court below.

SUMMARY OF ARGUMENT

This case requires the Court to consider whether its decisions, including *Grutter*, permit the University of Texas at Austin to use race-conscious procedures in making undergraduate admissions decisions. The University's admissions program takes race into account as one of many factors in a holistic consideration of an applicant, and was designed to reap the benefits of diversity that the Court held in *Grutter* to be a compelling state interest. The ABA supports the University and believes that its merits brief persuasively shows that the admissions policies in question comport with the Court's precedent.

The ABA submits this brief as *amicus curiae* to urge the Court to continue to endorse the use of such race-conscious admissions policies at institutions of higher learning. The ABA is convinced that such policies, which have been used in reliance on the Court's precedent by both public and private colleges and universities for many decades, remain important tools for the achievement of diversity in higher education, which in turn is necessary for diversity in law schools and the legal profession, and essential to our democracy. The ABA accordingly addresses two points that the ABA believes should be included in the Court's consideration of the use of race in admissions decisions.

First, full representation of racial and ethnic minorities in the legal profession is essential to the legitimacy of our legal and political systems, and

therefore constitutes a compelling state interest. As the Court has recognized, the legal profession plays a critical role in American society. Lawyers formulate and implement our laws, resolve disputes and protect the rights of citizens. Drawing on their training and talents, they serve as judges and as leaders in national, state and local government affairs. Diversity in the profession shows that the path to leadership is open to all citizens and demonstrates that the justice system serves the public in a fair and inclusive manner. Moreover, such diversity improves the quality of legal services and judicial decisions, and is necessary for successful competition in the global marketplace.

Second, to date race-conscious admissions policies have helped to make law schools and, consequently, the legal profession more inclusive of racial and ethnic minorities. The constitutionality of such policies was endorsed by the Court more than 30 years ago in *Bakke* and sanctioned again in *Grutter* only nine years ago, and such policies are used on a widespread basis today, reflecting the experience and expertise of educators across the nation. Nevertheless, African American and Latino representation in the legal profession remains inadequate and is not keeping pace with the nation's demographic trends. The ABA submits that now is not the time to restrict institutions of higher education from considering race in admissions decisions as they pursue the benefits of diversity, and that doing so would also present a serious risk that the progress made so far would be lost. Indeed, in the nine years since *Grutter* was decided, nothing

has happened in our nation's colleges and universities, in the legal profession or in American society at large, that would support a conclusion that race-conscious admissions procedures no longer remain valuable—and constitutionally permissible—tools for achieving diversity.

For these reasons, the ABA urges the Court to reaffirm that admissions policies that take race into account as merely one factor out of many, consistent with the principles espoused in *Grutter,* further the compelling interest of diversity in higher education, and therefore satisfy the requirements of the Equal Protection Clause.

ARGUMENT

Diversity in the legal profession is a compelling state interest, and race-conscious admissions policies are essential to increasing minority representation in the legal profession. Simply put, without the promotion of diversity in undergraduate colleges and universities, it would be impossible to achieve advancements in diversity in the profession.

I. THERE IS A COMPELLING STATE INTEREST IN A DIVERSE LEGAL PROFESSION

As advisers, advocates, judges and arbitrators, lawyers are central to the implementation of the rule of law. Lawyers help individual, corporate and government clients abide by the law and achieve their goals within legal frameworks. They defend individual rights and liberties. As judges and

arbitrators, they resolve disputes and dispense justice.

Lawyers owe duties not only to their clients, but also to the justice system and the public. To be a lawyer is to accept a charge to advance democratic ideals and institutions.[15] Lawyers have historically had a "unique cultural position in American society, not only [of] administering but reflecting ideals of fairness and justice."[16] As stated in the Preamble to the ABA Model Rules of Professional Conduct:

> As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice

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[15] *See also* Albert P. Blaustein & Charles O. Porter, *The American Lawyer: A Summary of the Survey of the Legal Profession*, vi (1954) ("Under a government of laws the lives, the fortunes, and the freedom of the people are wholly dependent upon the enforcement of their constitutional rights by an independent judiciary and an independent bar. The legal profession is a public profession. Lawyers are public servants.").

[16] *Next Steps, supra* note 11, at 25.

> system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.

American Bar Association, Model Rules of Prof'l Conduct Preamble (2010).[17]

Lawyers often serve as our nation's political and civic leaders, "perform[ing] functions that go to the heart of representative government." *Sugarman v. Dougall,* 413 U.S. 634, 647 (1973). As legislators, government officials, and judges, lawyers craft and interpret our laws and our national, state and local governmental policies. Twenty-five of our nation's forty-four presidents have been lawyers; lawyers have long been the single largest occupational group in the U.S. Congress; and virtually every judge is a lawyer.[18]

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[17] The Model Rules are developed by task forces composed of members of the ABA and national, state and local bar organizations; they are then reviewed by academicians, practicing lawyers and the judiciary before presentation to the ABA House of Delegates for adoption as ABA policy. The Model Rules have been adopted in all but a handful of jurisdictions, and are available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html (last visited Aug. 9, 2012).

[18] *See generally* Kenneth M. Rosen, *Lessons on Lawyers, Democracy, and Professional Responsibility*, 19 Geo. J. Legal Ethics 155, 169-76 (2006) (discussing the historic role of lawyers in the development of American government and democracy); Blaustein et al., *supra* note 15, at 97-119 (discussing historic contributions of lawyers in public service).

Given the leadership role lawyers play throughout our democratic system, diversity in the legal profession is needed to generate and sustain trust in our government. "In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." *Grutter,* 539 U.S. at 332. Indeed, "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized." *Id.* at 332.

Racial and ethnic diversity in the legal profession is necessary to demonstrate that our laws are being made and administered for the benefit of all persons. Because the public's perception of the legal profession often informs impressions of the legal system, a diverse bar and bench create greater trust in the rule of law. If the legal profession is not racially inclusive, the public may conclude that the justice system is unfairly controlled by one racial group and does not represent the interests of the population as a whole.[19] Judge Edward M. Chen, the first Asian American appointed to the United States District Court for the Northern District of California, has observed:

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[19] *See Romer v. Evans*, 517 U.S. 620, 633 (1996) ("Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance.").

> The case for diversity is especially compelling for the judiciary. It is the business of the courts, after all, to dispense justice fairly and administer the laws equally. It is the branch of government ultimately charged with safeguarding constitutional rights, particularly protecting the rights of vulnerable and disadvantaged minorities against encroachment by the majority. How can the public have confidence and trust in such an institution if it is segregated—if the communities it is supposed to protect are excluded from its ranks?

Judge Edward M. Chen, *The Judiciary, Diversity, and Justice for All*, 91 Cal. L. Rev. 1109, 1117 (2003).[20]

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[20] *See also* Justice Ming W. Chin, *Looking Ahead on the Journey for Diversity*, Am. Bar Ass'n Judges' Journal, Vol. 48, No. 3, at 20 (Summer 2009) ("[T]he public's respect for judgments and the courts, and the importance of judicial integrity, are reasons why increasing diversity on the bench is so imperative. With diversity on the bench at all levels, we are seeking to improve the quality of our justice system and to enhance the public perception of courts as fair, impartial, and independent."); Judge Michael B. Hyman, *What the Blindfold Hides*, Am. Bar Ass'n Judges' Journal, Vol. 48, No. 4, at 33 (Fall 2009) ("Greater diversity demonstrates a commitment to equality in all areas of the law and provides assurance to litigants that the judicial system is attentive to issues of racial discrimination, language barriers, cultural norms, and economic factors that may have an effect on the legal issues in the case.").

Racial and ethnic diversity in the legal profession also improves the quality of legal services and judicial decisions. The ABA firmly believes, based on the experience of its members and on the research it has conducted, that "a diverse legal profession is more just, productive and intelligent because diversity, both cognitive and cultural, often leads to better questions, analyses, solutions, and processes."[21] As Justice Ruth Bader Ginsburg recognized: "A system of justice is the richer for the diversity of background and experience of its participants. It is the poorer, in terms of evaluating what is at stake and the impact of its judgments, if its members—its lawyers, jurors, and judges—are all cast from the same mold." Justice Ruth Bader Ginsburg, *The Supreme Court: A Place for Women*, 32 Sw. U. L. Rev. 189, 190 (2003).

Lawyers who are members of racial minority groups often provide valuable perspectives to those who are not members of those groups by imparting their personal histories and unique experiences, challenging stereotypes, and breaking down cultural barriers. As Justice Sandra Day O'Connor said of former Justice Thurgood Marshall:

> Although all of us come to the Court with our own personal histories and experiences, Justice Marshall brought a special perspective . . . . At oral arguments and conference meetings, in opinions and dissents, Justice Marshall imparted not only

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[21] *Next Steps, supra* note 11, at 5.

> his legal acumen but also his life experiences, constantly pushing and prodding us to respond not only to the persuasiveness of legal argument but also to the power of moral truth.

Justice Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 Stan. L. Rev. 1217 (1992). Similarly, Judge Arthur L. Burnett Sr., who in 1969 became the first African American U.S. magistrate judge, attributed his judicial philosophy in part to his experience growing up in the segregated South of the 1940s and 1950s: "My life in a segregated society and my initial educational and professional experiences were the influences that led me to approach the law much as a scientist approaches the task of looking through a microscope." Judge Herbert B. Dixon Jr., An Interview with Judge Arthur L. Burnett Sr., Am. Bar Ass'n Judges' Journal, Vol. 48, No. 4, at 6 (Fall 2009).[22]

Experience has taught that the protection and advancement of the interests of persons who experience racial and ethnic discrimination is enhanced through representation by lawyers who have shared such challenges and can more easily generate the trust of such clients. It is crucial that

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[22] *See also* Judge Harry T. Edwards, *Race and the Judiciary*, 20 Yale L. & Pol'y Rev. 325, 329 (2002) ("[R]acial diversity on the bench can enhance judicial decision making by broadening the variety of voices and perspectives in the deliberative process. . . . A more diverse judiciary also reminds judges that all perspectives inescapably admit of partiality.").

clients of legal professionals have the ability to choose lawyers with whom they feel comfortable. *Trammel v. United States*, 445 U.S. 40, 51 (1980) (lawyers must be able to satisfy "the imperative need for confidence and trust" of their clients). This is not to say that it is necessary for minority clients to be represented by minority attorneys. Rather, the ABA recognizes that many marginalized members of society understandably put their trust more readily in lawyers who possess a shared background because a shared background can improve communication, comfort level, trust, decision-making and advocacy in the attorney-client relationship.[23]

The availability of minority lawyers may also help to determine whether certain clients seek legal assistance at all. "Effective access to legal representation not only must exist in fact, it must also be perceived by the minority law consumer as existent so that recourse to law for the redress of grievance and the settlement of disputes becomes a realistic alternative to him."[24]

Not surprisingly, attorneys who are members of minority groups have historically taken on some of the most challenging legal issues in an effort to bring justice to their communities. From the Asian American lawyers who reopened the Japanese

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[23] *Next Steps, supra* note 11, at 3.

[24] Erwin N. Griswold, *Some Observations on the DeFunis Case*, 75 Colum. L. Rev. 512, 517 (1975).

internment case of *Korematsu v. United States*, 323 U.S. 214 (1944) to the African American attorneys who were at the forefront of the struggle for civil rights, attorneys from racial minority groups have contributed to some of the most important legal, social and political reforms in American history.[25] One study of the career choices of University of Michigan Law school graduates reported that graduates who were African American, Latino, and Native American were more likely to begin their careers in public service, and those who entered private practice tended to do more pro bono work, than their white counterparts. Moreover, the study reported minority graduates provided "considerably more service to minority clients than white alumni d[id]."[26]

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[25] Eric K. Yamamoto, *The Color Fault Lines: Asian American Justice from 2000*, 8 Asian L.J. 153, 154 (2001); Rosen, *supra* note 18, at 185-87 (discussing the extensive contributions of Justice Thurgood Marshall and Judge Constance Baker Motley to civil rights causes).

[26] David L. Chambers, Richard O. Lempert & Terry K. Adams, *Michigan's Minority Graduates in Practice: The River Runs Through Law School*, 25 Law & Soc. Inquiry 395, 401 (2000); *see also* Michelle J. Anderson*, Legal Education Reform, Diversity, and Access to Justice*, 61 Rutgers L. Rev. 1011, 1016 (Summer 2009) ("Of course, addressing the justice gap should not solely be minority attorneys' responsibility, nor should they be saddled with repairing the consequences of historical injustice against people of color. Nevertheless, it appears that attorneys of color do more to address the justice gap than do white attorneys.").

A diverse legal profession is also required for the United States to remain competitive in the global economy. As the Court observed in *Grutter,* the educational benefits of diversity are valued by "major American businesses [that] have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." *Grutter,* 539 U.S. at 330. In the years since that case was decided, the amount of U.S. legal services that are provided to clients outside the U.S. each year has grown dramatically.[27]

Finally, it is beyond doubt that diversity in educational environments encourages "more enlightening and interesting" classroom discussions, "promotes learning outcomes," and "better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals." *Id.* As one law school dean recently put it: the concept that "diversity among the students in a law school generally contributes to a better legal education than that offered by a more homogeneous student body . . . has become the conventional wisdom that is warmly embraced by the vast

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[27] The export of U.S. legal services generated $7.3 billion in receipts in 2010, a nearly 40 percent increase over 2006. Bureau of Econ. Analysis, *Detailed Statistics for Cross-Border Trade*, Table 1. Trade in Services, 1999-2010, *available at* http://www.bea.gov/international/international_services.htm #detailedstatisticsfor (last visited Aug. 9, 2012).

majority of leaders in higher education today."[28] The ABA is convinced that it remains critical for undergraduate and law students to reap the "substantial, . . . important and laudable benefits" of diversity on campus and in the classroom. *Grutter,* 539 U.S. at 330.

II. RACE-CONSCIOUS ADMISSIONS POLICIES ARE ESSENTIAL TO INCREASING MINORITY REPRESENTATION IN THE LEGAL PROFESSION

Racial and ethnic diversity in the legal profession cannot be produced without diversity in undergraduate institutions and law schools. Undergraduate institutions are the pipeline to law schools, and law schools are the portal to the legal profession. Public universities in particular are a primary source of law school applicants. For example, nine out of the top ten "feeder schools" for law school applicants for the 2009-10 school year were public universities.[29]

Admissions policies in higher educational institutions that take race into account as only one

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[28] Kevin R. Johnson, *The Importance of Student and Faculty Diversity in Law School: One Dean's Perspective*, 96 Iowa L. Rev. 1549, 1553 (2011); *see Grutter,* 539 U.S. at 329-33.

[29] *See* Law School Admission Council, *Top 40 ABA Applicant Feeder Schools for Fall Applicants*, *available at* http://www.lsac.org/LSACResources/Data/PDFs/top-240-feeder-schools.pdf (last visited Aug. 9, 2012).

of many factors remain essential to the achievement of diversity within the legal profession. To date, such policies have increased minority enrollment at law schools. From the time in 1965 when Dean Erwin Griswold of Harvard Law School called attention to the need for diversity at law schools until today, African American enrollment at law schools has grown from barely one percent to more than seven percent.[30] Nevertheless, neither African American nor overall minority representation in the legal profession is keeping pace with the national demographic trends toward a more diverse population.

During the decade from 2000 to 2010, the percentage of Americans who identified themselves as Latino, black, Asian/Pacific Islander, American Indian/Alaska Native, or having multiple racial backgrounds increased from 30.9 to 36.3.[31] This

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[30] William G. Bowen & Derek Bok, *The Shape of the River* 5 (1998); Law School Admission Council, *LSAC Volume Summary: Matriculants by Ethnic and Gender Group*, *available at* http://www.lsac.org/lsacresources/data/vs-ethnic-gender-matrics.asp (last visited Aug. 9, 2012).

[31] U.S. Census Bureau, U.S. Dep't of Commerce, *Overview of Race and Hispanic Origin: 2010* Table 1 (Mar, 2011), *available at* http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf (last visited Aug. 9, 2012). A substantial portion of this increase is attributable to a sharply rising Latino population, which experienced a 43 percent increase, from 12.5 percent of the total population in 2000, to 16.3 percent in 2010, and accounted for more than half of the growth in the total population of the United States during this period. U.S. Census Bureau, U.S. Dep't of Commerce, *The Hispanic Population: 2010*, Table 1 (May 2011), *available at*

trend toward an increasingly diverse American society is expected to continue. The Census Bureau recently announced that, during the 12-month period ending July 2011, racial and ethnic minority births represented a majority of births, 50.4 percent, for the first time in the country's history.[32] It is projected that during the next three or four decades, racial and ethnic minorities will together make up a majority of the U.S. population.[33]

Today, however, members of racial and ethnic minority groups remain vastly underrepresented in America's legal institutions. Last year, Asian, African American, and Latino lawyers made up only 20 percent of associates at law firms, and a drastically smaller portion—less than seven

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http://www.census.gov/prod/cen2010/briefs/c2010br-04.pdf (last visited Aug. 9, 2012).

[32] Press Release, U.S. Census Bureau, U.S. Dep't of Commerce, Most Children Younger Than Age 1 Are Minorities, Census Bureau Reports (May 17, 2012), *available at* http://www.census.gov/newsroom/releases/archives/population/cb12-90.html (last visited Aug. 9, 2012).

[33] *See* Press Release, U.S. Census Bureau, U.S. Dep't of Commerce, An Older and More Diverse Nation by Midcentury (Aug. 14, 2008), *available at* http://www.census.gov/newsroom/releases/archives/population/cb08-123.html (last visited Aug. 9, 2012); *see also* Jeffrey Passel & D'Vera Cohn, *U.S. Population Projections 2005-2050*, Pew Research Center (Feb. 11, 2008), *available at* http://www.pewhispanic.org/2008/02/11/us-population-projections-2005-2050/ (last visited Aug. 9, 2012).

percent—of partners at law firms.[34] Minorities are also underrepresented among lawyers who practice outside of law firms. Minority lawyers made up an estimated 16 percent of corporate legal departments in 2010.[35] Fewer than nine percent of the lawyers serving as general counsel at Fortune 500 companies in 2010 were members of minority groups.[36] Similarly, only 13 percent of members of

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[34] Press Release, Nat'l Ass'n for Law Placement, Law Firm Diversity Wobbles: Minority Numbers Bounce Back While Women Associates Extend Two-Year Decline (Nov. 3, 2011), *available at* http://www.nalp.org/2011_law_firm_diversity (last visited Aug. 9, 2012); *see also* Emily Barker, *Diversity Scorecard 2010: One Step Back*, The Am Law Daily (March 1, 2010), *available at* http://amlawdaily.typepad.com/amlawdaily/2010/03/onestepback.html (last visited Aug. 9, 2012).

[35] Minority Corporate Counsel Ass'n, *Sustaining Pathways to Diversity: A Comprehensive Examination of Diversity Demographics, Initiatives, and Policies in Corporate Legal Departments* 8-9 (2011), *available at* http://www.mcca.com/_data/global/images/Research/MCCA_CLDD_Book.pdf (last visited Aug. 9, 2012).

[36] Thomas Threlkeld, *2010 Fortune 1000 Minority General Counsel Survey*, Minority Corporate Counsel Ass'n, Diversity and the Bar, (Sept./Oct. 2010), *available at* http://www.mcca.com/index.cfm?fuseaction=page.viewPage&pageID=2129 (last visited Aug. 9, 2012); *see also* Alea Jasmin Mitchell, *Report on General Counsel of Color Leading Fortune 500 Companies*, Minority Corporate Counsel Ass'n, Diversity and the Bar, (May/June 2004), *available at* http://www.mcca.com/index.cfm?fuseaction=page.viewpage&pageid=747 (last visited Aug. 9, 2012).

the federal judiciary were minorities in 2009.[37] Among federal government lawyers, minorities accounted for only 17.6 percent of general attorneys.[38] And in the legal academy, minorities were only 13.6 percent of law professors and a similar percentage of law school deans in 2009.[39]

The ABA recognizes that the low percentage of minorities in the legal profession represents an improvement over the much lower historical figures. For example, the percentage of minority associates at law firms has increased by 50 percent since 2000, from almost 13 percent in 2000 to about 20 percent in 2011.[40] The percentage of minorities serving as general counsels of corporations in 2010 represents a near 200 percent increase since 2000 when only

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[37] Russell Wheeler, *The Changing Face of the Federal Judiciary*, Brooking Inst'n, 1 (2009), *available at* http://www.brookings.edu/~/media/research/files/papers/2009/8/federal%20judiciary%20wheeler/08_federal_judiciary_wheeler.pdf (last visited Aug. 9, 2012).

[38] Inst. for Inclusion in the Legal Profession, *IILP Review: The State of Diversity and Inclusion in the Legal Profession* 30 (2011), *available at* http://www.theiilp.com/resources/Documents/IILP2011_Review_final.pdf (last visited Aug. 9, 2012).

[39] *Id.* at 32.

[40] Nat'l Ass'n for Law Placement, *supra* note 34; Press Release, Nat'l Ass'n for Law Placement, Presence of Women and Attorneys of Color in Large Law Firms Continues to Rise Slowly (Nov. 15, 2000), *available at* http://www.nalp.org/2000presenceofwomenattorneysofcolor (last visited Aug. 9, 2012).

15, or 3 percent, of such corporations had general counsels who were minorities.[41] In addition, as of March 2012, 36 percent of the federal judges confirmed during the current presidential administration have been African American, Latino, or Asian American compared to 17 percent during President Bush's tenure in office and 24 percent during President Clinton's tenure.[42]

Nevertheless, the ABA believes the current state of diversity within legal institutions demonstrates that there remains substantial work to do to ensure diversity in the profession, particularly in light of the current and projected national demographic changes. The ABA is also mindful of the Court's guidance in *Grutter* that race-conscious admissions programs are anticipated to have a termination point: "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." *Grutter*, 539 U.S. at 342-343. The ABA respectfully submits that this point has not yet been reached.

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Race-conscious admissions policies are in widespread use throughout public and private colleges and universities. As one study reports,

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[41] Threlkeld, *supra* note 36; Mitchell, *supra* note 36.

[42] White House, Quick Facts: President Obama's Judicial Nominees: Historic Successes and Historic Delays (Mar. 13, 2012), *available at* http://www.whitehouse.gov/infographics/judicial-nominees (last visited Aug. 9, 2012).

"[d]ata from more than 1,300 four-year colleges and universities in the United States" show that 45% of private institutions and 35% of public institutions consider minority status in admissions.[43] Educators across the country have determined that such race-conscious admissions policies are necessary for the advancement of racial and ethnic diversity at their institutions, as demonstrated by the groundswell of support from the education community nine years ago for the University of Michigan's admissions policies considered in *Grutter*, and again today for the University of Texas's admissions policies.[44]

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[43] William M. Chace, *Affirmative Inaction,* The American Scholar (Winter 2011), *available at* http://theamericanscholar.org/affirmative-inaction (last visited Aug. 9, 2012).

[44] In *Grutter*, over 90 public and private institutions of higher education filed such *amicus curiae* briefs supporting the University of Michigan Law School's consideration of race as a factor in admissions. *See Grutter v. Bollinger,* Docket No. 02-241 (S. Ct.). One such institution, the American Law Deans Society (formerly the American Law Deans Association) ("ALDS") filed an *amicus* brief on behalf of 171 individual law schools emphasizing their support, not only for affirmative action, but for "the explicit consideration of race" in law school admissions. Brief of Am. Law Deans Ass'n as Amicus Curiae in Support of Respondents, Grutter v. Bollinger, 539 U.S. 306 (2003), 2003 WL 399070, at *2. The ALDS emphasized that "if [law schools] could not consider race, they would have very few students from disadvantaged minority groups." *Id.* at *3. For this and other reasons, the ALDS asserted, "explicit consideration of race protects the compelling interest in selective admission standards." *Id.* at *2. In addition to the ALDS, the law school deans of Georgetown Law Center, Duke Law School, University of Pennsylvania Law School, Yale Law School, Columbia Law School, University of Chicago Law School, Stanford Law School, Cornell Law School, and

Moreover, the development of race-conscious accreditation standards and admissions policies that promote student body diversity at institutions of higher learning has been grounded in this Court's decisions, most significantly *Bakke* and *Grutter*.[45] The ABA is persuaded that in the nine years since *Grutter* was decided, there have been no changes in society or in the law that "dictate that the values served by *stare decisis* yield in favor of a greater objective." *Vasquez v. Hillery,* 474 U.S. 254, 266 (1986).[46] To the contrary, the need for race-conscious admissions policies in higher education is as compelling today, if not more so, given the rapid

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Northwestern University School of Law in their individual capacities, as well as numerous other professional and academic organizations, filed *amicus curiae* briefs supporting affirmative action. The ABA understands that many of these same institutions and organizations will file *amicus curiae* briefs supporting Respondents in this case.

[45] *See, e.g., supra* pp. 4-5 (discussion of Standard 212 of the ABA Section on Legal Education and Admission to the Bar, which requires law schools to demonstrate commitment to diversity by concrete action).

[46] "[A]ny departure from the doctrine of *stare decisis* demands special justification." *Arizona* v. *Rumsey*, 467 U.S. 203, 212 (1984); *see also Dickerson* v. *United States*, 530 U.S. 428, 443 (2000); *Adarand Constructors* v. *Pena*, 515 U.S. 200, 231 (1995); *Planned Parenthood* v. *Casey*, 505 U.S. 833, 864 (1992). To determine the existence of special justifications, the Court looks to reliance on the established rule, the workability of that rule and whether the law or the understanding of society has so changed that the rule is plainly indefensible. *See Dickerson*, 530 U.S. at 443-44; *Casey*, 505 U.S. at 854-55. No such special justifications exist here.

demographic changes taking place in the nation and the trend toward globalization sweeping the legal community.

The ABA therefore respectfully submits that this Court should once again affirm the constitutionality of admissions policies that use race as merely one of many factors. Adhering to the precedents set out in *Bakke* and *Grutter*, these admissions policies have been used throughout American institutions of higher education for more than three decades and reflect the experience and expertise of educators that such policies are necessary if diversity is to be fostered. Affirmance by this Court that such admissions policies satisfy the requirements of the Equal Protection Clause, moreover, would sustain the important progress that has been achieved in promoting diversity, not only in the nation's undergraduate colleges and universities, but also in its law schools and legal profession.

CONCLUSION

For the reasons set forth herein, the American Bar Association respectfully urges this Court to affirm the Fifth Circuit's ruling that the University of Texas at Austin's admissions policy is constitutional.

Respectfully submitted,

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