No. 14-981

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 FORTUNE-100 AND OTHER LEADING AMERICAN BUSINESSES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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American Express Company

Apple Inc.

ArcelorMittal USA LLC

Ariel Investments, LLC

Caterpillar Inc.

CBS Corporation

Cisco Systems, Inc.

Cummins Inc.

Deloitte LLP

Eastman Kodak Company

eBay Inc.

Entergy Corporation

Exelon Corporation

Gap Inc.

General Electric Company

Illinois Tool Works Inc.

Johnson & Johnson

Johnson Controls, Inc.

Kaiser Foundation Hospitals

Marriott International, Inc.

Merck & Co., Inc.

Microsoft Corporation

Northern Trust Corporation

Northrop Grumman Corporation

PayPal Holdings, Inc.

PepsiCo Inc.

Pfizer Inc.

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Seton Family of Hospitals

Shell Oil Company

Sprint Corporation

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The Procter & Gamble Company

Union Pacific Railroad Company

United Airlines, Inc.

United Technologies Corporation

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INTEREST OF *AMICI CURIAE*

Amici are several of America's largest companies.[1] A similar group of significant businesses filed a brief with this Court in *Grutter v. Bollinger*, 539 U.S. 306 (2003), which the Court cited and relied upon in its decision, *see id.* at 330. Another group of businesses, including many of the *amici* here, filed a brief with this Court in *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013) [hereinafter *Fisher I*].[2] *Amici*'s interests in the case remain much the same: to reaffirm the value of diversity in higher education to America's largest companies, and to ensure that colleges and universities retain the ability to achieve diversity across multiple dimensions.

Amici recruit employees who are graduates of the University of Texas at Austin ("UT") or similar leading institutions of higher education. Indeed, *amici* — who collectively generate revenues in the trillions of dollars

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[1] All parties have consented to the filing of this *amicus curiae* brief. The parties' letters of consent have been filed with the Clerk of the Court. No portion of the brief was authored by counsel for a party. No person or entity other than the *amici* signing this brief or their counsel made a monetary contribution to the preparation or submission of this brief.

[2] The companies participating in this *amicus* brief came together through an informal, ad hoc process. The strongly held views set forth in this brief, approved at senior levels of each participant, likely are shared by many additional companies as well.

— hire thousands of graduates of UT and other major public universities every year.

As a result, *amici* have a vital interest in this case. *Amici* are directly affected by the admissions policies at UT and similar colleges and universities, and they care deeply about what kind of education and training those institutions offer their students.

Amici file this brief in support of the Court's continued recognition of diversity as a compelling state interest. In addition, although *amici* do not take a position on the constitutionality of the specific practices at issue here, *amici* do address certain troubling aspects of Petitioner's strict-scrutiny analysis that, if accepted, could threaten admissions programs encompassing the kind of individualized, holistic review previously sanctioned by the Court and employed by *amici* in their own hiring practices.

SUMMARY OF ARGUMENT

1. This Court should reaffirm its holdings in *Grutter* and *Fisher I* that the conscious pursuit of diversity in the admissions decisions of institutions of higher education — including diversity based upon race, religion, culture, economic background, and other factors — is a compelling state interest. The principles established in *Grutter* and *Fisher I* are more important today than ever. For *amici* to succeed in their businesses, they must be able to hire highly trained employees of all races, religions, cultures, and economic backgrounds. It also is critical to *amici* that *all* of their university-trained employees have had the opportunity to share ideas, experiences, viewpoints, and approaches

with a broadly diverse student body. To *amici*, this is a business and economic imperative.

Today even more than when *Grutter* was decided, *amici* operate in country and world economies that are increasingly diverse. *Amici* have found through practical experience that a workforce trained in a diverse environment is critical to their business success. *Amici* are dedicated to promoting diversity as an integral part of their business, culture, and planning. But *amici* cannot reach that goal on their own. The only means of obtaining a properly qualified group of employees is through diversity in institutions of higher education, which must be allowed to recruit and instruct the best qualified minority candidates and create an environment in which *all* students can meaningfully expand their horizons.

2. *Amici* recognize that strict scrutiny must be applied in assessing the constitutionality of the specific practices employed at UT. *Amici* are not in a position to evaluate the legality of specific admissions procedures of UT or any other particular university. But two principles are important to *amici* as the Court evaluates the specific issues in this case.

First, the strict-scrutiny test must not be applied in such a way as to be inevitably "fatal in fact" in the context of the pursuit of diversity in higher education. Within the confines of a rigorous constitutional analysis, there must be room for a university to decide that a particular approach to admissions is necessary to achieve important educational goals. For instance, a university should be able to evaluate whether students enrolled in particular subsets of the university are

realizing the educational benefits of diversity. A university may have a business college or engineering department — both particularly important to *amici* — lacking a "critical mass" of underrepresented minorities and therefore requiring an admissions plan that considers race along with applicants' other personal characteristics. Without such a critical mass, none of the business or engineering students, whether they are minorities or not, are likely to have the kinds of diversity-related academic experiences that *amici* believe will help prepare them for success in the corporate world.

Second, higher-education diversity must not be treated as a simplistic numbers game. Focusing solely on percentages of minorities in an entering class, and determining that a certain percentage vitiates any justification for consideration of race in furtherance of broader or more nuanced diversity aims — as Petitioner suggests here — harkens back to the very quota systems expressly rejected in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), and *Grutter*.

Amici urge the Court to reaffirm that diversity should not be treated in purely numerical terms. *Amici* themselves do not attempt to reach some numerical quota of minority employees; they would not be satisfied, for instance, by simply hiring a certain *number* of "diverse" employees. Rather, *amici* seek to hire the most qualified group of employees, while taking into account all of the characteristics of those employees that will enrich the *amici*'s workplaces and strengthen their businesses.

ARGUMENT

I. The Pursuit Of Diversity In Higher Education Remains A Compelling State Interest.

In *Grutter v. Bollinger*, 539 U.S. 306, this Court held that "student body diversity is a compelling state interest that can justify the use of race in university admissions." *Id.* at 325; *see also id.* at 328. In so doing, the Court relied in part on the views of "major American businesses," which filed a brief making 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." *Id.* at 330 (citing Brief for 3M et al. as *Amici Curiae*).

Petitioner now asks the Court to retreat from *Grutter* and hold that an interest in diversity may lack sufficient "clarity" to withstand strict scrutiny. *See* Pet'r Br. at 26. The Court rejected a similar entreaty in *Fisher I*, remanding the case to the Court of Appeals only to "assess whether the University has offered sufficient evidence that would prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity." *Fisher I*, 133 S. Ct. at 2421. The leading American businesses that are signatories to this brief urge the Court to reaffirm once again that diversity in university admissions is a compelling state interest. *See Fisher v. Univ. of Texas at Austin*, 758 F.3d 633, 642-43 (5th Cir. 2014) [hereinafter *Fisher II*].

1. As many of the *amici* here explained in the briefs they filed in *Grutter* ten years ago and in *Fisher I* more recently, people who have been educated in a diverse setting make valuable contributions to the workforce in

several important ways. Such graduates have an increased ability to facilitate unique and creative approaches to problem-solving by integrating different perspectives and moving beyond linear, conventional thinking; they are better equipped to understand a wider variety of consumer needs, including needs specific to particular groups, and thus to develop products and services that appeal to a variety of consumers and to market those offerings in appealing ways; they are better able to work productively with business partners, employees, and clients in the United States and around the world; and they are likely to generate a more positive work environment by decreasing incidents of discrimination and stereotyping. Brief for 3M et al. as *Amici Curiae* at 7 (*Grutter*, No. 02- 241); *see also, e.g.*, Brief for General Motors Corp. as *Amicus Curiae* at 2 (*Grutter*, No. 02-241).

In light of these advantages, the *Grutter* Court concluded that the only way to develop "the skills needed in today's increasingly global marketplace" is "through exposure to widely diverse people, cultures, ideas, and viewpoints." *Grutter*, 539 U.S. at 330; *cf. Sweatt v. Painter*, 339 U.S. 629, 634 (1950). The Court therefore endorsed Justice Powell's statement in *Bakke* that "nothing less than the '[N]ation's future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples.'" *Grutter*, 539 U.S. at 324 (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 (1978) (opinion of Powell, J.) (quoting *Keyishian v. Bd.*

of Regents of Univ. of State of N.Y., 385 U.S. 589, 603 (1967)) (internal quotation marks omitted)).

2. *Amici*'s interest in and need for diversity — and, by extension, the state's interest in diversity in higher education — has become even more compelling as time has passed. American corporations must address the needs of an increasingly diverse U.S. population and a growing global market, and they need a workforce trained in a diverse environment in order to succeed in these arenas. *Amici* have also found over time that the benefits of diversity are particularly important to their business success in a challenging economic environment.

First, the U.S. population is increasingly diverse, and it is important to *amici* to be able to hire the best-educated and best-trained students of all backgrounds. Since *Grutter* was decided, minority populations have grown at a significantly faster rate than the non-minority population. The population of those who reported their race as "white" grew only 1% between 2000 and 2010.[3] In that same period, the Hispanic population grew by 43%, increasing from 35.3 million people to 50.5 million people, and the African-American population grew by 12%, increasing from 34.7 million

[3] *See* U.S. Census Bureau, *Overview of Race and Hispanic Origin: 2010*, 2010 Census Briefs, at 3 (Mar. 2011), http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf.

people to 38.9 million people.[4] This trend is particularly pronounced in Texas. Growth in the Hispanic and African-American communities drove rapid population growth between 2000 and 2010. *See, e.g.*, Ross Ramsey et al., *Minorities Drove Texas Growth, Census Figures Show*, Tex. Trib., Feb. 18, 2011. And between 2010 and 2014, the "white alone" population decreased from 45.3% to 43.5%, whereas the "Black or African American alone" population increased from 11.8% to 12.5%, and the "Hispanic or Latino" population increased from 37.6% to 38.6%.[5]

Current census projections anticipate a continuation of this population trend. The U.S. Census bureau projects that by 2060, the population of those who identify as "Non-Hispanic White" will have decreased by 8.2%; the population of those who identify as "Black or African American" will have increased by 42%; and the population of those who identify as Hispanic will have increased by 114.8%.[6] The U.S. Census bureau

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[4] *See id.* at 4; *see also* U.S. Census Bureau, *The Black Population: 2010*, 2010 Census Briefs, at 3 (Sept. 2011), http://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf.

[5] *See* U.S. Census Bureau, *Profile of General Population and Housing Characteristics: 2010, 2010 Demographic Profile Data*, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk (last visited Nov. 2, 2015); U.S. Census Bureau, *State & County QuickFacts, Texas*, http://quickfacts.census.gov/qfd/states/48000.html (last visited Nov. 2, 2015).

[6] U.S. Census Bureau, *Projections of the Size and Composition of the U.S. Population: 2014 to 2060*, at 9 (March 2015),

further projects that more than half of all Americans will belong to a minority group by 2044, at which point "no group will have a majority share of the total and the United States will become a 'plurality' of racial and ethnic groups."[7]

Given these changes in the population as a whole, it is not surprising that the U.S. workforce has also grown more diverse in recent years. In 2002, 71.3% of the workforce in the United States was "White non-Hispanic"; by 2012, that percentage had decreased to 65.7%.[8] The Bureau of Labor Statistics projects that in 2022, that percentage will have further decreased to 60.8%.[9]

Now more than ever, then, *amici*'s employees need to be able to work successfully with a diverse group of co-workers, supervisors, subordinates, counterparts at other U.S. businesses (including distributors, suppliers, and competitors), and U.S. customers. The rich variety of ideas, perspectives, and experiences to which both minority and nonminority students are exposed in a diverse university setting, and the cross-cultural

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http://www.census.gov/content/dam/Census/library/publications/2015/demo/p25-1143.pdf.

[7] *Id.*

[8] Bureau of Labor Statistics, U.S. Dep't of Labor, Employment Projections – Civilian labor force by age, sex, race, and ethnicity, Table 3.4, http://www.bls.gov/emp/ep_table_304.htm (last visited Nov. 2, 2015).

[9] *See id.*

interactions that they experience, are essential to the students' ability to function in and contribute to the increasingly diverse community in the United States. *See, e.g.*, William J. Holstein, *Diversity Is Even More Important in Hard Times*, N.Y. Times, Feb. 14, 2009, at B2 (stating that "[i]n the United States, the multicultural consumer today is over a third of the population, and 80 percent of the population growth"); Pfizer, Diversity & Inclusion: Business Purpose, http://www.pfizer.com/about/diversity/ purpose (last visited Nov. 2, 2015) ("Diverse colleagues offer a more personal understanding of our customers' needs and concerns.").

Second, in the years since *Grutter* was decided, American businesses have continued their rapid expansion into the global marketplace. U.S. companies increasingly sell their goods and services abroad and manage extensive operations in foreign countries. Indeed, "[i]n 2009, worldwide American companies in the Standard & Poor's 500 (S&P 500) had more than 55 percent of total income earned outside the United States." Business Roundtable, Taxation of American Companies in the Global Marketplace: A Primer, at 4 (Apr. 2011) (emphasis omitted), http://businessroundtable.org/uploads/studies-reports/downloads/Taxation_of_American_Companies.pdf.[10]

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[10] *See also, e.g.*, Prepared for the Joint Economic Committee by the Council of Economic Advisers, 114th Cong., 1st Sess., Economic Indicators, at 35 (Sept. 2015) (value of U.S. exports grew from $913.0 billion in 2005 to $1,632.6 billion in 2014),

More and more, *amici* operate and compete in a global environment, and therefore need employees who can effectively serve and work together with people from many different cultures. For example, *amicus* 3M, a science-based company with a culture of creative collaboration that inspires powerful technologies, employs 90,000 people worldwide and has operations in more than 70 countries. Similarly, *amicus* Deloitte LLP works with affiliated Deloitte entities in over 150 different countries and territories. Hundreds of American-trained employees work for Deloitte in those countries. "As companies do more and more business around the world, diversity isn't simply a matter of doing what is fair or good public relations. It's a business imperative." Carol Hymowitz, *The New Diversity*, Wall St. J., Nov. 14, 2005, http://www.wsj.com/articles/SB113164452069493749 (last visited Nov. 2, 2015).

Finally, *amici* have found that the benefits they realize from a workforce educated in a diverse university setting are particularly critical in difficult economic times. In that kind of economic environment, competition becomes more intense, and there is a greater need to think creatively and develop innovative approaches. Those are exactly the skills that students

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http://www.gpo.gov/fdsys/pkg/ECONI-2015-09/pdf/ECONI-2015-09.pdf; *see also* Press Release, U.S. Dep't of Commerce, U.S. Census Bureau News, *Preliminary Profile of U.S. Exporting Companies, 2014*, at 1-2 (Oct. 6, 2015), https://www.census.gov/foreign-trade/Press-Release/edb/2014/2014prelimprofile.pdf.

hone in a diverse and vibrant university environment. *See Grutter*, 539 U.S. at 330; *Bakke*, 438 U.S. at 312-14 (opinion of Powell, J.). Particularly when economic times are tight, "[i]t's difficult, if not impossible, for homogenous" groups "to challenge and offer different perspectives, unique experiences, and the broad-based wisdom" that makes all levels of a company "as effective as they can be." Holstein, *supra*, at B2. In contrast, "[m]ultiple and varied voices have a wide range of experiences, and this can help generate new ideas about products and practices." Forbes Insights, *Global Diversity and Inclusion: Fostering Innovation Through a Diverse Workforce* 5 (July 2011), http://images.forbes.com/forbesinsights/StudyPDFs/Innovation_Through_Diversity.pdf.

All of this is not just a matter of abstract ideas, but of dollars and cents as well. *Amici* seek to strengthen their businesses and to grow; they seek to increase their revenue and the return to their shareholders. *Amici* support the findings of extensive research that indicates that a commitment to diversity, with all of its attendant benefits, is "associated with increased sales revenue, more customers, greater market share, and greater relative profits." Cedric Herring, *Does Diversity Pay?: Race, Gender, and the Business Case for Diversity*, 74 Am. Soc. Rev. 208, 219 (2009).[11]

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[11] *See also, e.g.*, Joann S. Lublin, *New Report Finds a "Diversity Dividend" at Work*, Wall St. J., Jan. 20, 2015, http://blogs.wsj.com/atwork/2015/01/20/new-report-finds-a-diversity-dividend-at-work/tab/print/ (last visited Nov. 2, 2015) (reporting study finding of "a statistically significant relationship

Thus, it continues to be true that — as the Court observed in *Grutter* — the benefits of diversity in the university setting are "not theoretical but real." 539 U.S. at 330-31. *Amici* have found, through practical experience, that a workforce trained in a diverse environment is important to their business success — and that a critical means of obtaining a properly qualified group of employees is through diversity in institutions of higher education, which recruit and

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between companies with women and minorities in their upper ranks and better financial performance as measured by earnings before interest and tax, or EBIT"); Lisa H. Nishii & David M. Mayer, Ctr. for Advanced Human Res. Studies, ILR School, Cornell Univ., *Paving the Path to Performance: Inclusive Leadership Reduces Turnover in Diverse Work Groups*, Feb. 2010 (emphasizing the importance of managers who are adept at leveraging the benefits of diversity); Stanley F. Slater et al., *The Business Case for Commitment to Diversity*, 51 Bus. Horizons 201 (2008) (concluding that a true commitment to diversity throughout an organization fosters better board decisions, increases connections with customers, and leads to innovation); Scott E. Page, *The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools, and Societies* (2007) (collecting studies demonstrating that diversity leads to more productive and innovative solutions); Jill Dutt, *Taking an Engineer's Approach at Lockheed Martin*, Wash. Post, May 1, 2006, at D1 (describing how Lockheed Martin has created a "diversity maturity model" to foster diversity in order to compete better); Carol Hymowitz, *The New Diversity*, Wall St. J., Nov. 14, 2005, at R1 (describing how PepsiCo, IBM, and Harley-Davidson are leveraging diverse workforces to come up with new ideas to attract a more diverse customer base); Marcus Robinson et al., *Business Case for Diversity with Inclusion*, WetWare, Inc., 2003 (explaining the importance of diversity in business to respond to increasingly diverse customer bases).

instruct the best qualified minority candidates and create an environment in which students of all backgrounds can meaningfully expand their horizons.

3. *Amici*'s own actions attest to the importance they place on a workforce trained in a diverse environment. *Amici* have devoted substantial financial and human resources to create and maintain a diverse workforce — efforts that have only intensified in the years since this Court decided *Grutter*. These extensive efforts are part of *amici*'s core values, are implemented and overseen by senior managers, and are supported at the very highest levels of each company participating in this brief.

Amici are hiring an increasingly diverse group of employees. *Amici* have also intensified their own internal diversity programs and their efforts to enhance the success of minority students and employees. Each *amicus* has an internal diversity program and works to support minority employees. *Amici* also partner with universities like UT to reach out to aid minority students. Indeed, the foundation of *amicus* Illinois Tool Works ("ITW") pledged $1.1 million for renovations of science and engineering laboratories at the University of Illinois at Chicago in an effort to improve the access of a diverse student population to a top-quality science education. *See* ITW, *Supporting Collegiate Science Education—Where Innovation Begins*, http://www.itw.com/social-responsibility/community-affairs/supporting-collegiate-science-education-where-innovation-begins/ (last visited Nov. 2, 2015).

Amici are reaping the benefits of their diverse workforces, too. *Amicus* Merck drew on the diversity of its employees in order to broaden access to Gardasil, a vaccine that protects against the virus that causes cervical cancer. Recognizing that some populations might not use the vaccine for religious reasons, Merck sought the assistance of its Muslim employees in obtaining Halal certification in order to improve its acceptability and use under Islamic guidelines. Merck has formed and supported many groups of employees who bring their specific cultural, ethnic, religious, gender, and other demographic knowledge and understanding to bear on business challenges and opportunities.

In short, *amici* are dedicated to promoting diversity as an integral part of their business, culture, and planning. *Amici* need the talent, creativity, and flexibility of a workforce that is as diverse as the world around them.

But *amici* cannot reach that goal on their own. University admission decisions, and the education and training to which a student gains access when admitted to UT and similar institutions, play a crucial role in determining who will ultimately gain the necessary qualifications for the positions *amici* need to fill. When *amici* make decisions about hiring and promotion, it is critical that they be able to draw from a superior pool of candidates — both minority and non-minority — who have realized the many benefits of diversity in higher education. There can be no question that "[t]he Nation's future" does indeed continue to "depend[] upon leaders" — including business leaders — "trained

through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples." *Bakke*, 438 U.S. at 312-13 (opinion of Powell, J. (internal quotation marks omitted)).

Thus, contrary to Petitioner, *see* Pet'r Br. at 25-27, *amici* see quite clearly the significant "benefits of a student body diversity that 'encompasses a . . . broa[d] array of qualifications and characteristics of which racial or ethnic origin is but a single though important element,'" *Fisher I*, 133 S. Ct. at 2421 (quoting *Bakke*, 438 U.S. at 315) (alteration in original). Amici therefore urge the Court to confirm that such diversity in higher education remains a compelling state interest.

II. Petitioner's Application Of Strict Scrutiny Would Hamper Educational Institutions' Legitimate Efforts To Pursue Meaningful Diversity Consistent With Their Educational Missions And The Needs Of The Business Community.

Determining whether sufficient diversity has been achieved on campus to create the kind of educational environment that is so critical to graduates' — and *amici*'s — success is not an exact science. *Amici* recognize that strict scrutiny must be applied in assessing the constitutionality of the specific practices employed at UT. *Amici* further recognize, as this Court reiterated in *Fisher I*, that UT's practices must therefore be narrowly tailored to achieve the benefits of diversity. That is a detailed assessment that *amici* here are not in a position to make. *Amici* do feel compelled, however, to comment on certain troubling aspects of Petitioner's argument that, if accepted by the Court, could generally render the strict-scrutiny

test "fatal in fact" in the context of the pursuit of diversity in higher education.

The main problems with Petitioner's analysis, from *amici*'s point of view, flow from the fact that Petitioner places heavy reliance — as she did in *Fisher I* — on the proposition that there is no need for any admissions policy addressing diversity when a substantial percentage of minority applicants have been admitted in the recent past, regardless of the limited criteria through which they were admitted. *Compare* Pet'r Br. at 24, 46 *with Fisher I*, Pet'r Br. at 35. It is important to *amici* that diversity in educational institutions is not treated purely as a one-dimensional, top-level numbers game. Focusing solely on the percentages of minorities in an entering class, and determining that a certain percentage is necessarily "enough" as a matter of law, smacks of the kind of quota system that this Court so roundly rejected in *Bakke* and *Grutter*, and again in *Fisher I*. Just as "[a] university is not permitted to define diversity as 'some specified percentage of a particular group merely because of its race or ethnic origin,'" 133 S. Ct. at 2419 (quoting *Bakke*, 438 U.S. at 307), nor should it be foreclosed from defining diversity in broader and yet more nuanced terms because it has achieved "some specified percentage of a particular group." Either case would "amount to outright racial balancing, which is patently unconstitutional." *Id.* (quoting *Grutter*, 539 U.S. at 330); *cf. Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2512 (2015) ("Remedial orders that impose racial targets or quotas might raise difficult constitutional questions.").

Moreover, numbers alone do not indicate whether students on campus are receiving the benefits that make diversity such a compelling interest. *See Fisher II*, 758 F.3d at 653-54 (describing "search for students of unique talents and backgrounds who can enrich the diversity of the student body in distinct ways"). Indeed, the numbers required to reach a "critical mass" may well be different at different institutions. *See id.* at 656. *Amici* are concerned with the suggestion that there is some numerical benchmark that is automatically sufficient and permanently bars any consideration of race (along with applicants' other personal characteristics) in admissions decisions — an approach that *amici* believe would undercut the compelling diversity-related advantages discussed above. *See Grutter*, 539 U.S. at 330 (explaining that "the Law School's concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce").

For instance, contrary to Petitioner's argument, Pet'r Br. at 41-43, overall numbers do not reveal whether students enrolled in particular subsets of the university are realizing the educational benefits of diversity. A university may have a college of business or a school of engineering from which some of the *amici*'s recruiting efforts are particularly likely to draw, *see, e.g.*, Brief for IBM as *Amicus Curiae* at 9 (*Grutter*, No. 02-241) — and it may be that there will be no "critical mass" of underrepresented minorities within those areas of study unless administrators deploy an admissions plan that considers race along with applicants' other personal characteristics.

Without such a critical mass, none of the business or engineering students — whether they are minorities or not — are likely to have the kinds of diversity-related academic experiences that *amici* believe will help prepare them for success in the corporate world.

In addition, there must be some room for a university to decide that a particular approach to admissions is no longer workable for educational reasons and to take a different tack. It cannot be, as Petitioner suggests, *see, e.g.*, Pet'r Br. 46, that a university that has achieved certain numerical benchmarks of minority attendance under one approach is thereby foreclosed from ever approaching admissions in a different way — even a way that the university legitimately believes will better serve its educational goals and is equally or more likely to create a truly diverse student body. The Court should for these reasons reject the contention that "[t]he use of race as a factor in admissions . . . can serve only one goal — to boost quantitative racial diversity within the student body." Pet'r Br. at 37.

Finally, a focus solely on numbers is problematic when the numbers in question treat *all* underrepresented minorities as one undifferentiated group, rather than distinct individuals with different experiences and perspectives. That runs counter to this Court's rejection of such reductionist views of race. *See, e.g.*, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 723 (2007) (plurality op.) (rejecting "a limited notion of diversity" where race is viewed as a dichotomy between "white/nonwhite" or "black/'other'" in evaluating plans to increase diversity

in schools); *Gratz v. Bollinger*, 539 U.S. 244, 277 (2003) (O'Connor, J., concurring) (stating that "the type of individualized consideration the Court's opinion in *Grutter* . . . requires" includes "the contribution each individual's race or ethnic identity will make to the diversity of the student body, taking into account diversity within and among all racial and ethnic groups"). And those kinds of statistics simply may not tell the whole story of how students actually experience their university environment, and how that environment prepares them for the varied demands of their future careers.

For all of these reasons, it is *amici*'s considered view that Petitioner's rigid, quota-like approach to strict-scrutiny analysis will prevent universities from pursuing narrowly tailored admissions policies that ensure their graduates actually emerge with the experiences and training that *amici* value. *Amici* find an analogy in their own hiring decisions. Those decisions are not based solely on a candidate's academic achievement relative to others at his or her particular educational institution, but take into account the broader applicant pool and the many different ways that the particular candidate might be able to contribute to the organization. *Amici* are not attempting to reach some "quota" of minority employees; they would not be satisfied, for instance, by simply hiring the top ten percent of the graduating class from a range of diverse colleges, even if they could thereby capture a certain *number* of "diverse" employees. Rather, *amici* seek to hire the most qualified group of employees, while taking into account

all of the characteristics of those employees that will enrich the *amici*'s workplaces and strengthen their businesses.

In short, *amici*'s approach to their own hiring is not driven by a desire to reach some absolute number of minority employees. Similarly, a measure of flexibility at the point of university admissions (if permitted under state law) is important to ensure that universities achieve true and meaningful diversity, not simply some threshold overall number of minority students — and do so in a way consistent with their overarching educational objectives.

In the course of annunciating the strict scrutiny test applicable in this context, the Court confirmed that, following a "serious, good faith consideration of workable race-neutral alternatives," *Fisher I*, 133 S. Ct. at 2420 (quoting *Grutter*, 539 U.S. at 339-40), a university may adopt an admissions program that "ensures that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application," *id.* (quoting *Grutter*, 539 U.S. at 337). *Amici* respectfully suggest that the Court should reaffirm those principles in this case. As Justice Powell explained, the admissions process must be "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight." *Bakke*, 438 U.S. at 317 (opinion of Powell, J.). The *Grutter* Court agreed: "truly individualized consideration demands that race be used in a flexible,

nonmechanical way." 539 U.S. at 334; *see also id.* at 336-37 (stating that "a university's admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application"); *id.* at 392-93 (Kennedy, J., dissenting) ("individual assessment" must be "safeguarded through the entire process"); *Parents Involved*, 551 U.S. at 722 (plurality op.).

The *Grutter* Court also emphasized that, while strict scrutiny requires a rigorous examination of a university's admissions practices, such scrutiny cannot be "fatal in fact." *Grutter*, 539 U.S. at 326 (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995)). In order to ensure that the government achieves its compelling interest in enrolling a diverse group of university students, there must be circumstances in which admissions plans that involve individualized consideration of all of an applicant's many dimensions — including race — pass constitutional muster. Rather than a "classification that tells each student he or she is to be defined by race," *Parents Involved*, 551 U.S. at 789 (Kennedy, J., concurring in part and concurring in the judgment), such individualized review treats race as one of many factors that may provide a fuller understanding of an individual applicant and what he or she can bring to the table to enhance a university's educational environment — and, ultimately, contribute to businesses like the *amici* and to society as a whole. *See Grutter*, 539 U.S. at 337.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge that the Court reaffirm its holdings in *Grutter* and *Fisher I* that diversity in higher education is a compelling state interest, and resist calls to adopt a form of strict scrutiny that would make meaningful pursuit of that interest impossible in fact.

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