

IN THE
Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,

v.

PRESIDENT AND FELLOWS
OF HARVARD COLLEGE,
Respondent.

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,

v.

UNIVERSITY OF NORTH CAROLINA *et al.*,
Respondents.

**ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS
OF APPEALS FOR THE FIRST AND FOURTH CIRCUITS**

**BRIEF FOR THE AMERICAN BAR ASSOCIATION AS
AMICUS CURIAE IN SUPPORT OF RESPONDENTS**

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QUESTIONS PRESENTED

1. Should this Court overrule *Grutter v. Bollinger*, 539 U.S. 306 (2003), by holding that institutions of higher education cannot use race as a factor in admissions?

2. Is Harvard violating the Equal Protection Clause and Title VI of the Civil Rights Act by penalizing Asian American applicants, engaging in racial balancing, overemphasizing race, and rejecting workable race neutral alternatives?

3. May the University of North Carolina reject a race-neutral alternative because the composition of its student body would change, without proving that the alternative would cause a dramatic sacrifice in academic quality or the educational benefits of overall student body diversity?

TABLE OF CONTENTS

	<u>Page</u>
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT.....	5
ARGUMENT	7
I. Diverse Educational Institutions Are Needed So That All the Lawyers They Produce Are Better Able to Administer Justice and Public Policy Without Bias	7
A. Implicit Racial Bias and Stereotypes Taint the Administration of Justice and Public Policy	8
B. Admissions Policies That Consider Race as Only One of Many Factors Help Produce Lawyers Who Can Overcome Racial Bias and Stereotypes	13
II. Admissions Policies That Consider Race as One Factor Among Many Help Provide the Racial Diversity in the Legal Profession That Is Essential to the Legitimacy of Our Legal and Democratic Institutions.....	18

TABLE OF CONTENTS

	<u>Page</u>
A. Diversity in the Legal Profession Is Important for the Legitimacy of Our Legal and Democratic Institutions ...	18
B. Admissions Policies That Consider Race as Only One of Many Factors Help to Increase Minority Representation in the Legal Profession.....	23
CONCLUSION	31

TABLE OF AUTHORITIES

	<u>Page(s)</u>
Cases	
<i>Fisher v. Univ. of Texas at Austin</i> , 570 U.S. 297 (2013).....	13, 31
<i>Fisher v. Univ. of Texas at Austin</i> , 579 U.S. 365 (2016).....	13, 27, 31
<i>Grutter v. Bollinger</i> , 539 U.S. 306 (2003).....	<i>passim</i>
<i>Korematsu v. United States</i> , 584 F. Supp. 1406 (N.D. Cal. 1984).....	22
<i>Ramos v. Louisiana</i> , 140 S. Ct. 1390 (2020).....	5
<i>Regents of the University of California</i> <i>v. Bakke</i> , 438 U.S. 265 (1978).....	2, 4, 7, 13
<i>Students for Fair Admissions, Inc. v.</i> <i>President & Fellows of Harvard</i> <i>College</i> , 397 F. Supp. 3d 126 (D. Mass. 2019)	29
<i>Students for Fair Admissions, Inc. v.</i> <i>Univ. of N.C.</i> , No. 14-CV-954, 2019 WL 4773908 (M.D.N.C. Sept. 30, 2019).....	29
<i>Sugarman v. Dougall</i> , 413 U.S. 634 (1973).....	8

TABLE OF AUTHORITIES

	<u>Page(s)</u>
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Rules	
Sup. Ct. Rule 37.6	1
Other Authorities	
1844, <i>176 Years Later: Real Life Stories of Black Male Lawyers in Corporate America</i> (Oct. 2020)	16
ABA, <i>2020 ABA Model Diversity Survey</i> (2021).....	26
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ABA, <i>ABA Policy Related to Education</i> (2020).....	3
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ABA, <i>ABA Survey of Civic Literacy</i> (2022).....	19
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TABLE OF AUTHORITIES

	<u>Page(s)</u>
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TABLE OF AUTHORITIES

	<u>Page(s)</u>
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TABLE OF AUTHORITIES

	<u>Page(s)</u>
Asian Am. Bar Ass'n of New York, <i>A Rising Tide of Hate and Violence Against Asian Americans in New York During COVID-19: Impact, Causes, Solutions</i> (2021).....	24
Ass'n of Am. L. Schs., <i>Highlights from the American Law School Dean Study</i> (2022).....	26
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TABLE OF AUTHORITIES

	<u>Page(s)</u>
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Br. of Univ. of North Carolina at Chapel Hill as Amicus Curiae in Supp. of Resp'ts, <i>Fisher II</i> , No. 14-981 (S. Ct.), 2015 WL 6748809 (Oct. 30, 2015).....	14
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Cynthia E. Jones, “Give Us Free”: <i>Addressing Racial Disparities in Bail Determinations</i> , 16 N.Y.U. J. Legis. & Pub. Pol’y 919 (2013).....	10
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TABLE OF AUTHORITIES

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TABLE OF AUTHORITIES

	<u>Page(s)</u>
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TABLE OF AUTHORITIES

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TABLE OF AUTHORITIES

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TABLE OF AUTHORITIES

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TABLE OF AUTHORITIES

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Richard Acello, ABA, <i>Bilingual Lawyers Have a Leg Up in Many Niche Practice Groups</i> (Mar. 1, 2013).....	22, 23
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INTEREST OF AMICUS CURIAE¹

The American Bar Association (“ABA”) is the largest voluntary association of attorneys and legal professionals in the world. Its members come from all fifty States, the District of Columbia, and the U.S. territories. Its members include attorneys in law firms, corporations, nonprofit organizations, and local, state, and federal governments, as well as judges, legislators, law professors, law students, and associates in related fields.²

This case addresses the continuing validity of admissions policies of higher educational institutions that consider race as only one of many factors in their admission decisions. The ABA has a profound interest in the use of such policies by these educational institutions that are the training ground for students who will eventually enter the legal profession. The ABA has worked for decades to ensure that members of all racial and ethnic groups in the United States are

¹ Pursuant to Rule 37.6, amicus curiae affirms that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amicus curiae or their counsel, made any monetary contributions intended to fund the preparation or submission of this brief. Petitioners and Respondents granted blanket consent for amicus curiae briefs. Letters of consent by the parties to the filing of this brief have been lodged with the Clerk of this Court.

² Neither this brief nor the decision to file it should be interpreted to reflect the views of any member of the judiciary associated with the ABA. No inference should be drawn that any member of the ABA Judicial Division Council has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

adequately represented in the legal profession. In 1967, the ABA endorsed the development of a national program to encourage and assist qualified persons from minority groups to enter law school and the legal profession. Since then, the ABA Center for Diversity and Inclusion has continued to advance these goals.³ The ABA also adopted as one of its four main goals to “[p]romote full and equal participation in the association, our profession, and the justice system by all persons” and to “[e]liminate bias in the legal profession and the Justice System.”⁴

In response to *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), an ABA Task Force was convened to study the continuing underrepresentation of minorities in the bar and how that problem should be remedied.⁵ Since then, the ABA, as the primary accrediting agency for U.S. law schools, has required all accredited U.S. law schools to:

demonstrate by concrete action a commitment to diversity and inclusion by providing full opportunities for the study of law and entry into the profession by members of underrepresented groups,

³ See, e.g., ABA, *Center for Diversity and Inclusion in the Profession High-Level Overview: 2021-2022 Bar Year* (2021), <https://www.americanbar.org/content/dam/aba/administrative/diversity-inclusion-center/2021-aba-diversity-high-level-overview.pdf>.

⁴ ABA, Resolution 08A121 (Aug. 11-12, 2008), https://www.americanbar.org/content/dam/aba/directories/policy/annual-2008/2008_am_121.pdf.

⁵ See, e.g., generally, ABA, *Report of the Task Force on the Bakke Decision* (1978).

particularly racial and ethnic minorities, and a commitment to having a student body that is diverse with respect to gender, race, and ethnicity.⁶

The ABA Standards urge law schools to take concrete actions to enroll a diverse student body, which “promotes cross-cultural understanding, helps break down racial, ethnic, and gender stereotypes, and enables students to better understand persons of different backgrounds.”⁷

The ABA also has worked to increase diversity, equity, and inclusion in the educational pipeline to the legal profession, including urging state, territorial, and local bar associations to work with national, state, and territorial bar examiners, law schools, universities, and elementary and secondary schools to address the problems facing minorities in the pipeline to the profession.⁸

⁶ ABA, *ABA Standards and Rules of Procedure for Approval of Law Schools: 2021-2022*, Standard 206, at 14-15 (2021), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2021-2022/2021-2022-aba-standards-and-rules-of-procedure.pdf.

⁷ *Id.*, Interpretation 206-2 at 15.

⁸ See, e.g., Jo Ann Engelhardt, ABA, *Re-Imagining Legal Education—the Crucial Role of Pipeline Programs* (Aug. 6, 2021), <https://www.americanbar.org/groups/diversity/DiversityCommission/publications/the-innovator/vol5-issue2/feature/>; Council for Diversity in the Educational Pipeline, ABA, https://www.americanbar.org/groups/diversity/diversity_pipeline/ (last visited July 29, 2022); ABA, *ABA Policy Related to Education 10* (2020), <https://www.americanbar.org/content/dam/aba/administrative/crsj/education.pdf>.

Since the Court's decision in *Bakke*, the ABA also has filed amicus briefs in all cases in which this Court has considered the use of race and ethnicity by institutions of higher education in admissions decisions. In each instance, the ABA has supported admissions programs that encourage a diverse student body and academic environment, which is critical to promoting diversity in the legal profession and to diminishing the influence of racial bias on the important decisions that lawyers make in the many pivotal roles they play in society.

SUMMARY OF ARGUMENT

Eliminating race-conscious admissions policies would inflict great harm on the legal profession and the nation. Such policies play a vital role in eliminating the taint of racism from our justice system and from other areas where lawyers perform vital functions. These admissions policies also ensure a more racially diverse legal profession and judiciary, which are essential to the legitimacy of our legal system and to the legal profession's ability to better serve the needs of our diverse society. The ABA therefore urges the Court to reject Petitioner's request that *Grutter v. Bollinger*, 539 U.S. 306 (2003) be overturned and that the use of race in admissions be banned.

The impact of race and racism on this country and its laws cannot be denied. *See, e.g., Ramos v. Louisiana*, 140 S. Ct. 1390, 1394 (2020) (reversing Louisiana's and Oregon's laws that permitted non-unanimous verdicts motivated by race and the legacy of racism). There is considerable evidence that the decisions of and actions by lawyers today are influenced by implicit bias and stereotypes that contribute to the denial of equal justice under the law. Admissions policies that consider race as one of many factors are an important tool to help eliminate these racial biases and stereotypes from the legal profession and our judicial system. As this Court has long recognized, diverse educational environments help break down racial biases and stereotypes by exposing all students to people with varied backgrounds and experiences. In so doing, they help train budding lawyers at a formative stage to be influenced less by biases and stereotypes and to be more open to

different perspectives. Diverse educational student bodies improve the capacity of all the future lawyers they produce to fulfill their critical role in the fair implementation of justice, without the distorting influence of racial bias.

Admissions policies that consider race as only one factor among many also help to increase the number of qualified, racially diverse students in the educational pipeline to the legal profession. Adequate representation of qualified racially diverse lawyers in the legal profession is necessary to maintain the legitimacy of and trust in our legal and democratic institutions. Diversity in the legal profession and in the judicial, legislative, and other leadership roles that lawyers play demonstrates that the laws are being created and administered for the benefit of the nation as a whole and not for the benefit of only a select group. Moreover, by helping break down racial biases and stereotypes among lawyers in their roles as (mostly white) employers and mentors of other lawyers, these admissions policies also help to address factors that inhibit the retention and advancement of minority lawyers in the legal profession.

Over the past half-century, admissions programs like those at issue here have enabled diversity in the pipeline to the legal profession and in educational environments that help dismantle racial bias and stereotypes. This in turn has produced lawyers who are better able to administer justice and public policy without bias, and helped create a more diverse legal profession, which is essential to the legitimacy of our legal and democratic institutions. Nevertheless, much progress remains to be made.

Overruling *Grutter* and banning the use of race-conscious admissions policies would not only hamper further progress, but would also threaten the gains made in the more than four decades since *Bakke*.

Accordingly, the ABA urges the Court to reaffirm that admissions policies that take race into account as one factor out of many are consistent with the principles espoused for many years in the Court's jurisprudence and further the compelling interest of diversity in higher education.

ARGUMENT

I. Diverse Educational Institutions Are Needed So That All the Lawyers They Produce Are Better Able to Administer Justice and Public Policy Without Bias

It is undeniable that racial bias and stereotypes adversely affect the justice system and other areas of public policy in which lawyers play essential roles. This Court has long recognized that a principal benefit of admissions policies that consider race as one factor among others for admission to colleges and universities is the creation of diverse student bodies that help break down such racial biases and stereotypes. It is therefore vital that colleges and universities have the flexibility to use admissions policies that ensure that the future lawyers they train are less likely to be influenced by racial bias and stereotypes. Overturning *Grutter* would deprive the legal system of this important tool to address racial bias and put at risk the benefits of diversity resulting from admissions policies that consider race as one of many factors.

A. Implicit Racial Bias and Stereotypes Taint the Administration of Justice and Public Policy

Lawyers are central to the fair implementation of law and public policy. Lawyers enforce the law, defend and advocate for individual rights and liberties, resolve disputes, and mete out justice.⁹ Lawyers also 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).

In performing these vital roles, lawyers, like other members of society, are at times influenced by implicit racial bias: attitudes or stereotypes that affect our understanding, decision-making, and behavior without our even realizing it.¹⁰ Implicit biases held by lawyers have the potential to influence their decision-making in ways that adversely affect the fair administration of justice and public policy.

As an example, prosecutors exercise substantial discretion in deciding whether to file charges—and which ones—against a potential defendant, whether to offer a plea bargain, and what

⁹ See Albert P. Blaustein & Charles O. Porter, *The American Lawyer: A Summary of the Survey of the Legal Profession* vi (1954).

¹⁰ Jerry Kang, Nat’l Ctr. for State Cts., *Implicit Bias: A Primer for Courts* 1-2 (Aug. 2009), https://www.ncsc.org/__data/assets/pdf_file/0025/14875/kangibprimer.pdf; see also generally Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 *UCLA L. Rev.* 1124 (2012).

sentences they recommend.¹¹ This discretion rests overwhelmingly with white attorneys who comprise 95% of elected prosecutors,¹² over 80% of Assistant U.S. Attorneys,¹³ and over 80% of lawyers at federal agencies overall.¹⁴

Prosecutorial decisions influenced by implicit racial bias can negatively affect individual defendants and their families.¹⁵ Studies have shown that African

¹¹ See, e.g., Dep't of Justice, *Justice Manual*, Section 9-27.110: Purpose, <https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution#9-27.110> (last updated Feb. 2018); see also Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 Seattle U. L. Rev. 795, 796-797 (2012); Reflective Democracy Campaign, *Tipping the Scales: Challengers Take on the Old Boys' Club of Elected Prosecutors* (Oct. 2019), <https://wholeads.us/wp-content/uploads/2019/10/Tipping-the-Scales-Prosecutor-Report-10-22.pdf>.

¹² *Tipping the Scales*, *supra* note 11, at 1-2; Reflective Democracy Campaign, *Justice for All: Who Prosecutes in America?* 1 (July 2015), <https://wholeads.us/research/justice-for-all-report-elected-prosecutors/>; Nicholas Fandos, *A Study Documents the Paucity of Black Elected Prosecutors: Zero in Most States*, N.Y. Times (July 7, 2015), http://www.nytimes.com/2015/07/07/us/a-study-documents-the-paucity-of-black-elected-prosecutors-zero-in-most-states.html?_r=2.

¹³ Eric Chung et al., Yale L. Sch. & Nat'l Asian Pac. Am. Bar Ass'n, *A Portrait of Asian Americans in the Law* 20-23 (2017), https://static1.squarespace.com/static/59556778e58c62c7db3f84/t/596cf0638419c2e5a0dc5766/1500311662008/170716_PortraitProject_SinglePages.pdf.

¹⁴ *Id.* at 22.

¹⁵ See Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 Notre Dame L. Rev. 1195, 1222 (2009) (discussing that, if prosecutors harbored anti-Black preferences,

American and Hispanic/Latino defendants—even when controlling for factors such as arrest circumstances, seriousness of the charge, and prior record—are more likely than similarly situated white individuals to be “detained, to receive a custodial plea offer, and to be incarcerated”; substantially more likely to be “held in pretrial detention” for misdemeanor offenses; and more likely to face significant disparities in custodial sentence offers in drug offenses for which they received “especially punitive outcomes.”¹⁶ A recent study found that Black Americans are “incarcerated in state prisons at nearly 5 times the rate of white Americans,” with “one in 81 Black adults” serving “time in state prison.”¹⁷ These disparities are attributable at least in part to “[m]isperceptions about people of different races or ethnicities” and “[r]acialized assumptions by key justice system decision makers” that “unfairly

there would be “limited safeguards to protect [B]lack defendants from bias” in the criminal justice system).

¹⁶ Besiki Luka Kutateladze & Nancy R. Andiloro, Vera Inst. of Justice, *Prosecution and Racial Justice in New York County: Technical Report* ii–iii (2014), <https://www.vera.org/downloads/publications/race-and-prosecution-manhattan-technical.pdf>; see also Ashley Nellis, The Sentencing Project, *The Color of Justice: Racial and Ethnic Disparity in State Prisons* 5 (Oct. 2021), <https://www.sentencingproject.org/wp-content/uploads/2016/06/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf> (“Latinx individuals are incarcerated in state prisons at a rate that is 1.3 times the incarceration rate of whites.”); see generally Cynthia E. Jones, “Give Us Free”: *Addressing Racial Disparities in Bail Determinations*, 16 N.Y.U. J. Legis. & Pub. Pol’y 919 (2013).

¹⁷ Nellis, *supra* note 16, at 5.

influence outcomes for people who encounter the system.”¹⁸

Defense lawyers, including public defenders and others who represent indigent defendants, also exercise discretion in “determining which clients merit attention and which do not.”¹⁹ As with prosecutors, if these lawyers harbor implicit or unconscious racial biases, those biases will adversely affect the fair administration of justice.

Judges are also not immune from bias. An implicit association test study revealed a “strong white preference” among white judges—87.1% of white judges gave harsher sentences to defendants if the judges had been shown a set of Black-associated words (such as black, negro, rap, mulatto, and afro) rather than neutral words (such as baby, stress, trust, and laughter).²⁰ In Florida, where “fewer than 7 percent of sitting judges are [B]lack,” white defendants convicted of felony drug possessions were sentenced on average to five months behind bars

¹⁸ *Id.* at 12.

¹⁹ L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 *Yale L.J.* 2626, 2632 (2013).

²⁰ Rachlinski, *supra* note 15, at 1210, 1214-1215, 1225-1226 (“[J]udges might be overconfident about their abilities to control their own biases. In recently collected data, we asked a group of judges attending an educational conference to rate their ability to ‘avoid racial prejudice in decisionmaking’ relative to other judges who were attending the same conference. Ninety-seven percent . . . of the judges placed themselves in the top half and fifty percent . . . placed themselves in the top quartile, even though by definition, only fifty percent can be above the median, and only twenty-five percent can be in the top quartile.”).

whereas Black defendants received sentences of more than a year.²¹

Further, in their capacity as public officials and legislators, lawyers make myriad decisions related to the development and implementation of public policy, and to the allocation of public resources. Lawyers playing these roles and who are influenced by implicit bias and stereotypes can exacerbate racially disparate outcomes. Lawyers sitting on local school or zoning boards may make decisions that perpetuate residential segregation and racial disparities in public education.²² This can inflict enormous harm on racial minorities. A recent study found that, as a result of racial housing segregation—and current failures to address that segregation and its impacts—Black individuals are “more likely to live in communities where there are higher concentration[s] of pollutants and toxic uses” and “live closer to freeways and high traffic roadways, and have longer commutes to jobs and school.”²³

²¹ Josh Salman et al., *Florida’s Broken Sentencing System: Designed for Fairness, It Fails to Account for Prejudice*, Herald Tribune (Dec. 12, 2016), <http://projects.heraldtribune.com/bias/sentencing/>.

²² See Melissa McCardle & Susan Bliss, *Digging Deeper: The Relationship Between School Segregation and Unconscious Racism*, 89 *Smith Coll. Stud. Soc. Work* 114, 118-119 (2019); Michelle Wilde Anderson & Victoria C. Plaut, *Property Law: Implicit Bias and the Resilience of Spatial Colorlines*, in *Implicit Racial Bias Across the Law* 25, 30-38 (Justin D. Levinson & Robert J. Smith, eds., 2012).

²³ Brittney Drakeford & Ras Tafari Cannady II, *City Planners Need to Talk About Race. The Lives of Our Residents Depend on It*, Greater Greater Washington (Mar. 12, 2019), <https://>

It is therefore essential that educational institutions in the pipeline to the legal profession adopt policies that help diminish racial bias and stereotypes held by students destined to become lawyers.

B. Admissions Policies That Consider Race as Only One of Many Factors Help Produce Lawyers Who Can Overcome Racial Bias and Stereotypes

As the Court recognized in *Grutter*, admissions policies that consider race as only one factor among many produce racially diverse educational environments that “promote[] ‘cross-racial understanding,’ help[] to break down stereotypes, and ‘enable[] [students] to better understand persons of different races. These benefits are ‘important and laudable,’ because ‘classroom discussion is livelier, more spirited, and simply more enlightening and interesting’ when the students have ‘the greatest possible variety of backgrounds.’” *Grutter*, 539 U.S. at 330 (citations omitted).²⁴ These benefits are all the

ggwash.org/view/71256/why-are-city-planners-so-afraid-to-talk-about-race.

²⁴ See also *Fisher v. Univ. of Texas at Austin*, 579 U.S. 365, 382 (2016) (“*Fisher II*”); *Fisher v. Univ. of Texas at Austin*, 570 U.S. 297, 308 (2013) (“*Fisher I*”) (a diverse student body serves to “lessen[] racial isolation and stereotypes”); *Bakke*, 438 U.S. at 306-309 (Powell, J., plurality opinion) (observing that the “education benefits that flow from an ethnically diverse student body” constitute “a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin”); Judge Edward M. Chen, *The Judiciary, Diversity, and Justice for All*,

more important in educational institutions, which are the “training ground[s] for a large number of our Nation’s leaders” and the legal profession. *Grutter*, 539 U.S. at 332.

Academic research has documented the positive effects of diverse student populations on student development and understanding among different racial and ethnic groups in colleges and universities. “Cross-racial interaction increases students’ professional competency by improving their ability to see the world from others’ perspectives, fostering openness to opposing viewpoints, reducing prejudice, increasing tolerance of others with different beliefs, improving their ability to negotiate controversial issues, and enhancing their social self-confidence.”²⁵ Thus, “American higher education prepares young people to function as workers and citizens in a highly diverse society,” and by breaking down racial stereotypes promotes better understanding and “communication across racial lines,” which is “essential to America’s future.”²⁶

91 Cal. L. Rev. 1109, 1116 (2003) (“The visibility of diversity contributes to dispelling long-held stereotypes.”); Br. of Harvard Univ. as Amicus Curiae in Supp. of Resp’ts, *Fisher II*, No. 14-981 (S. Ct.), 2015 WL 6735848, at *12 (Nov. 2, 2015).

²⁵ Br. of President & Chancellors of the Univ. of Cal. as Amici Curiae in Supp. of Resp’ts, *Fisher II*, No. 14-981 (S. Ct.), 2015 WL 6735847, at *11 (Nov. 2, 2015); *see also* Br. of Univ. of North Carolina at Chapel Hill as Amicus Curiae in Supp. of Resp’ts, *Fisher II*, No. 14-981 (S. Ct.), 2015 WL 6748809, at *8 (Oct. 30, 2015).

²⁶ Douglas Laycock, *The Broader Case for Affirmative Action: Desegregation, Academic Excellence, and Future Leadership*, 78 Tul. L. Rev. 1767, 1772 (2004).

Diversity in higher education is all the more important for dismantling racial bias and stereotypes because of de facto racial segregation in K-12 public schools. Because of racial segregation, many K-12 white students rarely have associations with nonwhite students. In the 2018-2019 school year, 17.6% of white K-12 public school students attended a school that was 90% to 100% white, and 47% attended a school that was at least 75% white.²⁷ So too, many K-12 Black students have little contact with white students.²⁸ For southern states, 37% of Black students are in schools where the population is 90-100% non-white.²⁹ So too in New York, the average Black student attends a school “with only 15% [w]hite students and 64% of Black students are in intensely segregated schools with 90-100% non-[w]hite students.”³⁰ College may be the first time that

²⁷ Katherine Schaeffer, Pew Research Center, *U.S. Public School Students Often Go to Schools Where at Least Half of Their Peers Are the Same Race or Ethnicity* (Dec. 15, 2021), <https://www.pewresearch.org/fact-tank/2021/12/15/u-s-public-school-students-often-go-to-schools-where-at-least-half-of-their-peers-are-the-same-race-or-ethnicity/>.

²⁸ *Id.*

²⁹ Gary Orfield & Danielle Jarvie, The Civil Rights Project, *Black Segregation Matters: School Resegregation and Black Educational Opportunity* 6 (Dec. 2020), <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/black-segregation-matters-school-resegregation-and-black-educational-opportunity/Black-Segregation-Matters-final-121820.pdf>.

³⁰ *Id.*

students educated in such segregated schools experience a diverse academic environment.³¹

Considering the central role that lawyers play in law and public policy and the ongoing impact of implicit biases, exposure to racially diverse educational environments is vital for preparing future lawyers. Lawyers educated in environments that provide meaningful diversity, which includes not only race but other qualities as well, are thus better enabled to provide legal services and administer justice and public policy in a fair and proper manner, less influenced by racial bias or stereotypes.

Diversity in higher education is also crucial for breaking down barriers that still persist for minorities in the legal profession, where mostly white lawyers serve as employers, supervisors, and mentors. For example, surveys have shown that 74% of Black lawyers face more scrutiny than their white peers for the same or similar mistakes.³² In a 2014 experiment, partners at five law firms provided harsher criticism and less favorable ratings on the exact same legal memorandum when told that the memorandum was prepared by a Black associate than when told it was prepared by a white associate.³³

³¹ Cf. Ann Owens et al., *The Segregation Index, Trends in Racial/Ethnic and Economic School Segregation, 1991-2020* (May 2022), https://socialinnovation.usc.edu/wp-content/uploads/2022/05/Trends-in-Racial-Ethnic-Segregation_Final.pdf.

³² 1844, *176 Years Later: Real Life Stories of Black Male Lawyers in Corporate America* (Oct. 2020), <https://aboutblaw.com/UoR>.

³³ Arin N. Reeves, *Written in Black & White: Exploring Confirmation Bias in Racialized Perceptions of Writing Skills* (2014), <https://www.ncada.org/resources/CLE/WW17/Materials/>

Women of color also report less access to assignments and fewer opportunities for promotion.³⁴ Beyond individual assignments, men and women of color report biases in all stages of their legal career such that they must go “above and beyond” to receive the same recognition and respect as their white colleagues.³⁵

* * *

The legal system has made significant progress over the last several decades, due in no small part to the increased diversity in the legal profession resulting from admissions policies that consider race as one of many factors. However, implicit racial bias among lawyers may account for a significant part of racial injustices that continue to taint and divide our society. The Court should not ban race-conscious admissions policies that address this evil directly.

Wegner%20_%20Wilson--Confirmation%20Bias%20in%20Writing.pdf.

³⁴ ABA & Minority Corp. Counsel Ass’n, *You Can’t Change What You Can’t See: Interrupting Racial & Gender Bias in the Legal Profession* 9 (2018), <https://mcca.com/wp-content/uploads/2018/09/You-Cant-Change-What-You-Cant-See-Executive-Summary.pdf>.

³⁵ Destiny Peery et al., ABA, *Left Out and Left Behind* ix (2020), <https://www.americanbar.org/content/dam/aba/administrative/women/leftoutleftbehind-int-f-web-061020-003.pdf>.

II. Admissions Policies That Consider Race as One Factor Among Many Help Provide the Racial Diversity in the Legal Profession That Is Essential to the Legitimacy of Our Legal and Democratic Institutions

Promoting full representation of racial and ethnic minorities in the legal profession and its leadership is important for the legitimacy of our legal and political systems. A diverse legal profession helps to demonstrate that the path to leadership is open to all and that the justice system serves the public in a fair and inclusive manner. Undergraduate admissions programs like the ones here, which consider not just race but many other qualities, help to sustain that diversity by increasing the number of qualified minority students in the pipeline to the legal profession.

A. Diversity in the Legal Profession Is Important for the Legitimacy of Our Legal and Democratic Institutions

Given the leadership role that lawyers play throughout our democracy, diversity in the legal profession is necessary “[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry.” *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.*

Diversity in the legal profession is especially necessary to demonstrate that our nation’s laws are created and administered for the benefit of all

persons. In a recent ABA survey of the public, 52% of survey respondents agreed or strongly agreed that “the justice system has racial biases built into its rules, procedures, and practices,” with mistrust particularly high among Black people.³⁶ While less than half of white people reported seeing racial bias, a large majority of Black people (75%) responded that there was racial bias in the justice system.³⁷ Only 55% of survey respondents—and only 46% of young people and 29% of Black people—believe “[t]he nation’s judicial system adheres to the rule of law, under which all individuals are treated equally in the eyes of the law.”³⁸

A diverse bench and a diverse bar are important for inspiring greater public faith in the rule of law because they help signal to a diverse citizenry that their perspectives and interests are being taken into account.³⁹ As Justice Elena Kagan has explained: “People look at an institution and they see people who are like them, who share their experiences, who they imagine share their set of values, and that’s a sort of natural thing and they feel more comfortable if that

³⁶ ABA, *ABA Survey of Civic Literacy* (2022), <https://www.americanbar.org/content/dam/aba/administrative/news/2022/04/survey-of-civic-literacy-2022.pdf>.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Cf.* Judge Mark W. Bennett, *Manifestations of Implicit Bias in the Courts*, in *Enhancing Justice: Reducing Bias* 63 (Sarah E. Redfield ed., 2017) (discussing how implicit biases lead judges, attorneys, and juries to favor individuals with shared racial and/or ethnic backgrounds); Judge Sophia H. Hall, *Combating Bias Through Judicial Leadership*, in *Enhancing Justice: Reducing Bias* 335, 336 (Sarah E. Redfield ed., 2017).

occurs.”⁴⁰ Judge Edward M. Chen, the first Asian American appointed to the United States District Court for the Northern District of California, has observed that “[t]he case for diversity is especially compelling for the judiciary”: “[h]ow 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?”⁴¹

Additionally, racial and ethnic diversity in the legal profession improves the quality of judicial decisions and legal services provided to litigants. Based on the experience of its members and on the research it has conducted and supported, the ABA Presidential Diversity Initiative has found “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.”⁴² 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

⁴⁰ Adam Liptak, *Sonia Sotomayor and Elena Kagan Muse Over a Cookie-Cutter Supreme Court*, N.Y. Times (Sept. 5, 2016), <https://www.nytimes.com/2016/09/06/us/politics/sotomayor-kagan-supreme-court.html>.

⁴¹ Chen, *supra* note 24, at 1117.

⁴² ABA Presidential Diversity Initiative, *Diversity in the Legal Profession: The Next Steps* 3 (2010), <https://www.americanbar.org/content/dam/aba/administrative/diversity-inclusion-center/next-steps-report.pdf>.

members—its lawyers, jurors, and judges—are all cast from the same mold.”⁴³

Racial and ethnic diversity further serve to improve the quality of legal services by giving clients the opportunity to choose lawyers with whom they feel comfortable and relatable. A 2020 study found that “disadvantaged defendants mistrusted lawyers because of cultural differences” and “Black working-class and poor defendants were particularly likely to report difficulty finding commonality with their lawyers, who are middle-class and mostly white.”⁴⁴ “[D]ifferences in race, gender, class, and other cultural identities can create barriers to communication” that can negatively impact communication between counsel and their clients.⁴⁵ It is also notable that attorneys from historically

⁴³ Justice Ruth Bader Ginsburg, *The Supreme Court: A Place for Women*, 32 Sw. U. L. Rev. 189, 190 (2003); see also Judge Carlton W. Reeves, *Defending the Judiciary: A Call for Justice, Truth, and Diversity on the Bench* 3 (Apr. 11, 2019), <https://lawprofessors.typepad.com/files/4-11-19-judge-reeves-speech.pdf> (“To find truth, we need all angles, all distances, all perspectives—what Judge A. Leon Higginbotham called ‘a multitude of different experiences.’ That is what justice requires.”).

⁴⁴ Matthew Clair, *Being a Disadvantaged Criminal Defendant: Mistrust and Resistance in Attorney-Client Interactions*, 100 *Social Forces* 194, 204 (2021); see also Jeff Adachi, *Public Defenders Can Be Biased, Too, and It Hurts Their Non-White Clients*, *The Washington Post* (June 7, 2016), <https://www.washingtonpost.com/posteverything/wp/2016/06/07/public-defenders-can-be-biased-too-and-it-hurts-their-non-white-clients>.

⁴⁵ See Alexis Hoag, *Black on Black Representation*, 96 *N.Y.U. L. Rev.* 1493, 1495-1497 (2021).

marginalized groups have taken on many of the most challenging legal issues in an effort to bring justice to their communities.⁴⁶

Diversity in the legal profession also is important because 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. A 2009 study found that more diverse firms were more financially successful even after controlling for hours, location, and firm size.⁴⁷ Diverse firms also are better positioned to acquire a larger pool of clients, as clients from different backgrounds have more confidence in their ability to connect with firms where diverse team members can relate to their language, culture, and interests.⁴⁸

⁴⁶ See, e.g., generally *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984) (Dale Minami, Ed Chen, and Eric Yamamoto representing Fred Korematsu, resulting in the overturning of his conviction for evading internment during World War II); *Trump v. Hawai’i*, 138 S. Ct. 2392, 2423 (2018) (Neal Katyal arguing for respondent Hawaii challenging the administration’s proclamation restricting entry from certain foreign nationals, resulting in the Court’s holding that “Korematsu was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—has no place in law under the Constitution” (citation omitted)).

⁴⁷ Douglas E. Brayley & Eric S. Nguyen, *Good Business: A Market-Based Argument for Law Firm Diversity*, 34 J. Legal Prof. 1, 21-24 (2009).

⁴⁸ Angelica Cesario, *The Benefits of Diversity in the Legal Profession*, Lawline (June 23, 2020), <https://blog.lawline.com/the-benefits-of-diversity-in-the-legal-profession>; see also Richard

The amount of U.S. legal services provided to clients outside of the United States each year has grown over the last decade: the export of U.S. legal services generated approximately \$16.3 billion in receipts in 2021, as compared to about \$9.7 billion in 2015 and about \$8.0 billion in 2010.⁴⁹ Diversity is thus more relevant and critical than ever for ensuring that the United States remains competitive in an increasingly global economy as that economy, and the legal sector in particular, increasingly demands lawyers capable of working with people of different backgrounds and cultures.

B. Admissions Policies That Consider Race as Only One of Many Factors Help to Increase 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 that serve as the pipeline to the legal profession.⁵⁰ In 2017,

Acello, ABA, *Bilingual Lawyers Have a Leg Up in Many Niche Practice Groups* (Mar. 1, 2013), https://www.abajournal.com/magazine/article/bilingual_lawyers_have_a_leg_up_in_many_niche_practice_groups.

⁴⁹ U.S. Dep't of Com., Bureau of Econ. Analysis, *U.S. International Services Tables*, at Table 2.1 "U.S. Trade in Services, by Type of Service" (last modified July 7, 2022), <https://apps.bea.gov/iTable/iTable.cfm?reqid=62&step=9&isuri=1&6210=4#reqid=62&step=9&isuri=1&6210=4>.

⁵⁰ See Law School Admission Council, *Top 240 ABA Applicant Feeder Schools for ABA Applicants: 2015-2017* (2018), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_

for instance, Harvard College was the 45th top feeder institution to law schools with 208 graduates applying to law schools and the University of North Carolina at Chapel Hill was the 17th top feeder institution with 308 graduates applying to law schools.⁵¹

The continuing need for increasing diversity in the legal profession is evident from the demographic changes and racial unrest in the country.⁵² As noted in the winning essay of the 2021 American Inns of Court Warren E. Burger Prize, the legal profession “is not representative of the population it serves.”⁵³ The resident population of the United States was 331,449,281 in the 2020 census,⁵⁴ of which 1,328,692

resolutions/May2018CouncilOpenSession/18_may_2015_2017_top_240_feeder_schools_for_aba_applicants.authcheckdam.pdf.

⁵¹ *Id.*

⁵² See Angela R. Gover et al., *Anti-Asian Hate Crime During the COVID-19 Pandemic: Exploring the Reproduction of Inequality*, 45 Am. J. of Crim. Just. 647, 661-663 (2020); Asian Am. Bar Ass’n of New York, *A Rising Tide of Hate and Violence Against Asian Americans in New York During COVID-19: Impact, Causes, Solutions* 22-24 (2021), https://cdn.ymaws.com/www.aabany.org/resource/resmgr/press_releases/2021/A_Rising_Tide_of_Hate_and_Vi.pdf.

⁵³ Davis G. Yee, *Promoting Diversity as Professionalism*, 73 S.C. L. Rev. 885, 924 (2022).

⁵⁴ *Id.* (citing Press Release, U.S. Census Bureau, CB21-CN.30, 2020 Census Apportionment Results Delivered to the President (Apr. 26, 2021), <https://www.census.gov/newsroom/press-releases/2021/2020-census-apportionment-results.html>).

were lawyers.⁵⁵ White lawyers are overrepresented in the legal profession compared with their presence in the overall U.S. population.⁵⁶ “In 2020, 86% of all lawyers were non-Hispanic whites, a decline from 89% a decade ago. By comparison, 60% of all U.S. residents were non-Hispanic whites in 2019.”⁵⁷

Conversely, non-white lawyers are underrepresented in the legal profession compared with their presence in the U.S. population. In 2020, 38.4% of our nation’s population of 331 million identified as either non-white or multiracial.⁵⁸ But non-white lawyers account for a much smaller percentage of the legal profession. At major law firms, non-white lawyers are 27% of associates and 10.75% of partners.⁵⁹ At Fortune 1000 companies, non-white lawyers are 18.7% of general counsels.⁶⁰ In legal

⁵⁵ *Id.* (citing ABA, *Profile of the Legal Profession* 30 (2020), <https://www.americanbar.org/content/dam/aba/administrative/news/2020/07/potlp2020.pdf>).

⁵⁶ *Id.*

⁵⁷ ABA, *Profile of the Legal Profession* 30 (2020), <https://www.americanbar.org/content/dam/aba/administrative/news/2020/07/potlp2020.pdf>.

⁵⁸ Nicholas Jones et al., U.S. Census Bureau, *2020 Census Illuminates Racial and Ethnic Composition of the Country* (Aug. 12, 2021), <https://www.census.gov/library/stories/2021/08/improved-race-ethnicity-measures-reveal-united-states-population-much-more-multiracial.html>.

⁵⁹ Nat’l Ass’n for Law Placement, *2021 Report on Diversity in U.S. Law Firms* 6-8 (Jan. 2022), <https://www.nalp.org/uploads/2021NALPReportonDiversity.pdf>.

⁶⁰ Minority Corp. Counsel Ass’n, *2020 MCCA Fortune 1000 GC Survey* 4 (2020), <https://mcca.com/wp-content/uploads/2022/03/2020-MCCA-Fortune-1000-GC-Survey.pdf>.

academia, non-white lawyers are 17.2% of faculty⁶¹ and 31% of law school deans.⁶² In the judiciary, non-white lawyers are less than 30% of Article III judges⁶³ and less than 20% of state judges.⁶⁴

There is also evidence that the problem of implicit bias, discussed in section I.A, *supra*, further exacerbates the already low rates of job recruitment and retention of minority lawyers. In 2019, the attrition rate at larger law firms was 2.5 times higher for African American lawyers and Hispanic lawyers than for white attorneys.⁶⁵ The attrition rate for Asian American attorneys was also higher than that for white attorneys.⁶⁶

Of course, the current representation of minorities in the legal profession is an improvement over much lower historical figures. In 2020, minority enrollment at law schools rose to 38%, a fourfold

⁶¹ Ass'n of Am. L. Schs., *Legal Education at a Glance: 2020* (Jan. 25, 2021), <https://www.aals.org/wp-content/uploads/2021/01/2020-Legal-Ed-at-a-Glance.pdf>.

⁶² Ass'n of Am. L. Schs., *Highlights from the American Law School Dean Study* (2022), <https://www.aals.org/wp-content/uploads/2022/04/DeansStudyHighlights.pdf>.

⁶³ See Chung et al., *supra* note 13, at 24.

⁶⁴ *Id.* at 25 (citing Tracey E. George & Albert H. Yoon, Am. Const. Soc'y for L. & Pol'y, *The Gavel Gap: Who Sits in Judgment on State Courts?* (2016), <https://eduhelphub.com/blog/wp-content/uploads/2021/11/gavel-gap-report.pdf>).

⁶⁵ ABA, *2020 ABA Model Diversity Survey* 99 (2021), https://www.americanbar.org/content/dam/aba/administrative/racial_ethnic_diversity/aba/credp_2020_mds_report.pdf.

⁶⁶ *Id.* at 101 (Table of “2019 Overall Firm Attrition by Demographics”).

increase since 1978, and a 25% increase from 2011.⁶⁷ There have been more modest gains at law firms, among general counsel, and in the judiciary.⁶⁸

These diversity gains that have been made in the legal profession are in no small part attributable to admissions policies that consider race as one factor among many, which policies are in widespread use at colleges and universities throughout the country. The groundswell of support from the educational community in support of race-conscious admissions in *Fisher II*, 579 U.S. at 382, makes this plain.⁶⁹

⁶⁷ *Profile of the Legal Profession*, *supra* note 57, at 58.

⁶⁸ *Id.* (reporting on law firm diversity); Arriana McLymore, *GC Diversity Got a Boost in 2019 as More Women, Minorities Took Top Legal Roles*, Reuters (Sept. 1, 2020), <https://www.reuters.com/article/mcca-report-gc/gc-diversity-got-a-boost-in-2019-as-more-women-minorities-took-top-legal-roles-idUSL1N2FX17A>; compare *Biographical Directory of Article III Federal Judges: Export*, Federal Judicial Center, <https://www.fjc.gov/history/judges/biographical-directory-article-iii-federal-judges-export> (choose “Demographics” under “Format 2: Organized by Category (Relational Database)”) (last visited July 29, 2022) (showing 359 out of 1,610 living Article III judges who identify as a racial or ethnic minority), with Internet Archive, *Biographical Directory of Article III Federal Judges: Export*, Federal Judicial Center (as of Sept. 2020), <https://web.archive.org/web/20210319231354/https://www.fjc.gov/sites/default/files/history/demographics.csv> (last visited July 29, 2022) (showing that in September 2020, 320 out of 1,580 living Article III judges were from minority racial and ethnic groups at that time).

⁶⁹ Over 90 institutions of higher education in *Grutter*, 114 institutions of higher education and 40 education-focused organizations in *Fisher I*, and over 65 institutions of higher education and 40 education-focused organizations in *Fisher II*

Without the ability to continue race-conscious admissions in higher education, these diversity gains in the legal profession would be lost. When California banned race-conscious admissions policies in 1997, only one Black student and 14 Latino students matriculated at Berkeley Law.⁷⁰ Admissions of Black students at Berkeley Law and UCLA Law dropped by 80% and Latino admissions dropped by 50% and 25%, respectively.⁷¹ And despite gains in diversity since then, admissions of underrepresented minority groups and matriculation at Berkeley Law and UCLA Law have not returned to pre-1997 levels.⁷²

filed amicus curiae briefs supporting consideration of race as a factor in admissions.

⁷⁰ Danny Feingold, *Test Tube for a Changing Political Climate*, L.A. Times (Oct. 6, 1997), <https://www.latimes.com/archives/la-xpm-1997-oct-06-ls-51069-story.html>.

⁷¹ *Id.*

⁷² *Compare* Entering Class Profile, Berkeley Law, <https://www.law.berkeley.edu/admissions/jd/entering-class-profile/> (last visited July 29, 2022) (enrolling 35 African American and 68 Latino students in the Class of 2024 out of 385 total enrollments), and ABA, *2021 1L Enrollment by Gender & Race/Ethnicity* (Dec. 15, 2021), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/2021/2021-fall-fyclass-enrollment-gender-race-aggregate.xlsx, with Lujana Treadwell, *Boalt Hall Reports a Substantial Drop in Offers of Admission Made to Minority Applicants Other Than Asians*, Univ. of Cal. at Berkeley (May 14, 1997), <https://www.berkeley.edu/news/media/releases/97legacy/boalt2.html>, and Kenneth R. Weiss, *UC Law Schools' New Rules Cost Minorities Spots*, L.A. Times (May 15, 1997), <https://www.latimes.com/archives/la-xpm-1997-05-15-mn-58992-story.html> (21 African American and 73 Latino students admitted out of 983 total admissions in 1997 as

Both of the Respondents here presented evidence that they would not be able to achieve comparable levels of diversity without their present admissions policies that consider race as only one factor among many. The Massachusetts district court found that, after a careful review of studies presented by Harvard on potential race-neutral alternatives, removing Harvard’s ability to consider race as one factor among many and replacing it with theoretical geographic, place-based quota systems, or socio-economic alternatives—such as increasing financial aid packages—would not allow Harvard to “achieve comparable racial diversity.” *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 397 F. Supp. 3d 126, 200 (D. Mass. 2019). Similarly, the North Carolina district court, in denying summary judgment for the plaintiff, noted the University of North Carolina’s evidence that race-neutral alternatives “would not yield comparable levels of diversity and academic excellence.” *Students for Fair Admissions, Inc. v. Univ. of N.C.*, No. 14-CV-954, 2019 WL 4773908, at *9-10 (M.D.N.C. Sept. 30, 2019).

* * *

The ABA submits that the need for, and the ends sought by, race-conscious admissions policies remains as salient today as when *Grutter* was decided. Such policies are important for dismantling racial bias and stereotypes that lawyers may harbor, and that affect the many essential roles lawyers play in the administration of justice and public policy.

compared to 104 African American and 108 Latino students admitted in 1996).

These policies are equally important to further diversify our legal profession and justice system in order to support the perception, and reality, that our legal and political institutions fully reflect and represent all members of our society.

CONCLUSION

For the reasons set forth herein, the ABA respectfully urges this Court to affirm the judgments below and reaffirm that considerations of race may be used as one factor among many in admissions decisions, consistent with the principles set forth in *Grutter*, *Fisher I*, and *Fisher II*.

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