

In The
Supreme Court of the United States

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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 FOR *AMICI CURIAE* SMALL
BUSINESS OWNERS AND ASSOCIATIONS
IN SUPPORT OF RESPONDENTS**

—◆—
ANTHONY W. ROBINSON
4305 55th Avenue
Bladensburg, MD 20710
(202) 258-3815

SARAH C. VON DER LIPPE
1104 East Capitol Street, NE
Washington, DC 20002
(202) 543-3493

JOSEPH M. SELLERS
Counsel of Record
EMMY L. LEVENS
PETER ROMER-FRIEDMAN
COHEN MILSTEIN SELLERS
& TOLL PLLC
1100 New York Avenue, NW
Suite 500 West
Washington, DC 20005
(202) 408-4600
jsellers@cohenmilstein.com

Attorneys for Amici Curiae

[*Amici* Listed On Inside Cover]

This brief is filed on behalf of the following associations, businesses, and individuals:

Airport Minority Advisory Council	Ray Marshall
Gilbert Aranza	Minority Business Enterprise Legal Defense and Education Fund
Joseph M. Argrette	Minority Business RoundTable
Paulette R. Argrette Edwin Bowman	National Association of Small Disadvantaged Businesses
California Association for Micro Enterprise Opportunity	National Black Chamber of Commerce
Conference of Minority Transportation Officials	Aisha Y. Parson, CEO, Parson & Associates, LLC
Raul Espinosa, Founder and CEO of the Fairness in Procurement Alliance and Managing Partner of The Umbrella Initiative	Rickman Enterprise Group, LLC John Ricks, III
Hispanic American Growers' Association	Michael Steele
Jacobsen/Daniels Associates	Women First National Legislative Committee
Latin American Management Association	Women Impacting Public Policy

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INTEREST OF *AMICI CURIAE*

Amici comprise numerous small businesses and associations of small businesses, together representing hundreds of thousands of small businesses, as well as current and former small business owners and advocates.

Amici recruit employees who are graduates from, and are themselves graduates from, selective colleges and universities, including the University of Texas at Austin.

Small businesses have created nearly ten million net new jobs in the United States in the past two decades and have a vital interest in ensuring that the University of Texas, and similar colleges and universities, have flexibility to administer diversity programs that equip graduates with the kind of education and training most valuable to both *amici* and our society.

Amici submit this brief, with the consent of the parties,¹ in support of Respondents' argument that diversity in higher education is a compelling governmental interest and that the use of holistic, individualized higher education admissions programs, which

¹ Counsel for *amici* authored this brief in its entirety. No person or entity other than *amici*, their staff, or their counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

take into account many factors including race, satisfy strict scrutiny.



SUMMARY OF ARGUMENT

The signatories to this brief – representing hundreds of thousands of small businesses – believe diversity is increasingly essential to the success of small businesses in this country. Small businesses represent a dynamic engine of growth in the United States economy. Indeed, small businesses contribute more than half of the non-farm private Gross Domestic Product (“GDP”)² and account for about half of all private sector employment.³ Moreover, between 1993 and 2009, small firms were responsible for 65 percent of the 15 million net new jobs created in the U.S. economy,⁴ and, according to Federal Reserve Chairman Ben Bernanke, small businesses are vital to the

² U.S. Small Business Administration, Frequently Asked Questions, <http://www.sba.gov/sites/default/files/sbfaq.pdf> (last visited Aug. 8, 2012).

³ *Id.*; U.S. Census Bureau, Statistics About Business Size (including Small Business) from the U.S. Census Bureau, <http://www.census.gov/econ/smallbus.html> (last visited Aug. 1, 2012). In 2008, there were 27.5 million businesses in the United States. The latest available census data show that in 2008 there were 5.9 million small business employer firms and 21.4 million small business firms without employees. Further, of the 120.9 million nonfarm private sector workers in 2008, small firms employed 59.7 million. *See supra* note 2.

⁴ *See supra* note 2.

country's economic recovery as “[t]hey often offer a level of agility in bringing innovative products to the global marketplace that larger firms cannot match.”⁵ In an encouraging trend for all Americans, minority and women leaders from diverse backgrounds are helping to lead our nation's economic recovery, as they are increasingly joining the ranks of entrepreneurs and small business leaders.⁶

While small businesses have important qualities, such as nimbleness and flexibility, that increase their competitiveness, they also face unique challenges and have distinctive needs that differ from larger enterprises. Small business owners have unique perspectives about the role of diversity in our economy and the features of diversity programs that respond to the needs of the business community today. The ability of small businesses to adapt quickly to changing market conditions – including changes in the demographic make-up and global nature of the market – has proven a necessary component of their success. This distinctive feature of small business, however, requires continuing access to a workforce “trained

⁵ Luca Di Leo & Jamila Trindle, *Bernanke: Small Businesses Important to Economic Recovery*, WALL STREET JOURNAL (Nov. 10, 2011), <http://blogs.wsj.com/in-charge/2011/11/10/bernanke-small-businesses-important-to-economic-recovery/> (last visited Aug. 1, 2012).

⁶ U.S. Census Bureau, *Preliminary Estimates of Business Ownership by Gender, Ethnicity, Race and Veteran Status: 2007* (July 2010), <http://www.census.gov/econ/sbo/> (last visited Aug. 8, 2012) (providing comprehensive data).

through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 (1978) (opinion of Powell, J.) (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

Because small businesses have more limited resources to recruit, train, and manage a diverse workforce, small businesses often depend heavily on public institutions like the University of Texas at Austin ("University of Texas") to provide not only the knowledge and skills that small business leaders need to excel, but also access to the business and social networks that are critical to succeeding in business. Given the important role of public education to small businesses, it is crucial that flagship public universities like the University of Texas have the flexibility to voluntarily implement admissions programs to promote diversity within their academic programs that reflect the myriad cultures, races, ethnicities, and perspectives of our great nation.

Nine years ago, this Court held that "student body diversity is a compelling state interest that can justify the use of race in university admissions." *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003). While many large businesses filed *amicus* briefs in *Grutter* and its companion case touting the importance of diversity to the business community, the unique perspective of small businesses was not squarely presented to the Court. As this Court again prepares to consider the role that race may appropriately play in higher

education admissions, the signatories to this brief highlight the importance of diversity to the success of small businesses and the vital role that flexible, holistic decision-making plays in achieving diversity in both higher education and small business.

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ARGUMENT

I. PROMOTING DIVERSITY AND CROSS-CULTURAL COMPETENCE IN AMERICA'S EDUCATIONAL INSTITUTIONS IS CRITICAL TO KEEPING AMERICA'S SMALL BUSINESSES COMPETITIVE.

A. Diversity Plays an Integral Role in the Success of Small Businesses.

Our nation's population, workforce, and business leaders have become increasingly diverse. During the brief period since this Court decided *Grutter*, the nation's minority population grew from 31.9 percent to 37.3 percent, with Hispanics/Latinos and Asians experiencing the highest levels of population growth of all demographic groups.⁷ Reflecting this rapid growth in the diversity of America, minority workers constitute an increasing share of the American workforce, growing from 26.1 percent of the civilian labor force

⁷ See U.S. Census Bureau, *Overview of Race and Hispanic Origin: 2010* (March 2011), <http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf> (last visited Aug. 8, 2012).

in 1998 to 31.8 percent in 2008, and likely rising to 36.0 percent by 2018.⁸

Minorities have also contributed an outsized share of the recent growth in American business and entrepreneurship. In fact, between 2002 and 2007, the number of minority-owned businesses grew 45.6 percent while the overall population of American firms only grew 18 percent during that period.⁹ By 2007, minority-owned businesses employed about 5.9 million workers and accounted for nearly \$1 trillion in gross receipts.¹⁰ Fueling this growth, minority-owned businesses have focused on hiring and developing diverse workforces.

Growing diversity from the shop floor to the boardroom is not merely a consequence of emerging population trends. American businesses large and small promote diversity and cultural awareness throughout their ranks because, in their experience, it makes them more successful, whether they operate in a single locale, across the nation, or globally. In this

⁸ See Mitra Toossi, Bureau of Labor Statistics, *Employment Outlook: 2008-18*, MONTHLY LAB. REV. 32 (Nov. 2009).

⁹ U.S. Census Bureau, *Census Bureau Reports Minority Business Ownership Increasing at More than Twice National Rate* (July 13, 2010), http://www.census.gov/newsroom/releases/archives/economic_census/cb10-107.html (last visited Aug. 7, 2012).

¹⁰ *Supra* note 7; see also U.S. Census Bureau, *Preliminary Estimates of Business Ownership by Gender, Ethnicity, Race and Veteran Status: 2007* (July 2010), <http://www.census.gov/econ/sbo/> (providing comprehensive data) (last visited Aug. 8, 2012).

century, characterized by an increasingly interconnected world economy and a highly heterogeneous American society, diversity has become an indispensable part of cultivating customers, forging business partnerships, and fostering a competitive workforce.¹¹ In a growing and persistent trend, more small businesses are seeking to develop, and are benefiting from, diverse workforces, as they increasingly engage in international trade and commerce. Small business leaders have learned that global commerce is not solely the domain of big business and that penetrating global markets is increasingly critical to the continued growth of their businesses. Small businesses are engaging in global commerce at record rates, and by 2018 at least half of all American small businesses will be involved in international trade.¹² A recent federal government study found that minority-owned

¹¹ See, e.g., Cedric Herring, *Does Diversity Pay?: Race, Gender, and the Business Case for Diversity*, 74 AM. SOCIOLOGICAL REV. 208, 219 (April 2009) (finding that in businesses, greater racial and gender “diversity is associated with increased sales revenue, more customers, greater market share, and greater relative profits.”); Nancy R. Lockwood, *Workplace Diversity: Leveraging the Power of Difference for Competitive Advantage*, 2005 SHRM RESEARCH QUARTERLY (2005), <http://www.shrm.org/Research/Articles/Articles/Documents/0605RQ.pdf> (last visited Aug. 6, 2012) (“One of the major drivers behind the business case [for diversity] is the demographic changes that directly affect the labor pool and available talent. These changes are significant.”).

¹² Matthew Bandyk, *Small Businesses Go Global*, U.S. NEWS & WORLD REPORT (Feb. 22, 2008) (describing an Institute for the Future study).

businesses that export goods tend to be larger than their non-minority counterparts in the size of their workforces and average receipts.¹³

Diversity plays a critical role in implementing a global business plan for any small business. To compete effectively in global markets, small businesses must be prepared to interact, communicate, negotiate, and partner with people from every ethnic, racial, gender, socio-economic, and cultural background.¹⁴ By promoting and managing diverse workforces and drawing on talented students trained by outstanding, diverse public institutions, small businesses foster the conditions that allow minority and non-minority leaders alike to navigate the complex demands of a global economy.

As this Court correctly recognized in 2003, “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 (citing Brief for 3M et al. as *Amici Curiae* 5, and Brief for General Motors Corp. as *Amicus Curiae* 3-4). Nine years later, this observation is even more profound, as the explosion of

¹³ U.S. Census Bureau, *Ownership Characteristics of Classifiable U.S. Exporting Firms: 2007* (June 2012), <http://www.census.gov/econ/sbo/export07/>.

¹⁴ Yash Gupta, *Understand the Importance of Diversity*, BLOOMBERG BUSINESSWEEK (Jan. 12, 2011), http://www.businessweek.com/smallbiz/tips/archives/2011/01/understand_the_importance_of_diversity.html (last visited Aug. 8, 2012).

the Internet has connected individuals and small businesses more than at any time in human history. As the Dean of Johns Hopkins Business School recently explained, “[s]mart small businesses today understand diversity is . . . crucial to doing business in a world whose populations, by virtue of speedy air travel and even speedier Internet service, become more interconnected by the day.”¹⁵

As our nation’s population increasingly reflects the racial, cultural, and linguistic diversity of the rest of the world, the same strategic considerations that have long made diversity critical to succeeding in global commerce are now a vital part of operating a small business in domestic markets. Having diverse workforces and diverse leaders provides small businesses with many different perspectives and enhanced problem-solving capacities that are vital to competing effectively with businesses of all sizes. Such diversity helps ensure that a “company and its products are attuned to consumers’ demands and desires”¹⁶ and reaches a wider customer base. Thus, it comes as no surprise that small firms with significantly greater diversity within their leadership have reported stronger financial performance,

¹⁵ *Supra* note 14.

¹⁶ *Id.*

reflected by their revenue, net income, and book-to-market equity.¹⁷

Gilbert Aranza, a successful owner of an airport concessions business in Texas, recently explained how his business has benefitted from embracing diversity. He stated that:

Here in Texas 90 percent of my hourly workers are minorities and women. I have worked to ensure that two-thirds of my managers are minorities and women. This is a higher percentage than my competitors and it sets us apart and makes us better. We win the customer services awards at Dallas/Fort Worth International Airport just about every year. My employees are happier and more productive working with people who are themselves diverse and who care about diversity. Moreover, my work depends upon maintaining good relationships with the increasingly diverse

¹⁷ See Quinetta M. Roberson & Hyeon Jeong Park, *Examining the Link Between Diversity and Firm Performance: The Effects of Diversity Reputation and Leader Racial Diversity*, DigitalCommons, Cornell University ILR School (Apr. 1, 2006); see also, e.g., Linda S. Hartenian & Donald E. Gudmundson, *Cultural Diversity in Small Business: Implications for Firm Performance*, J. OF DEVELOPMENTAL ENTREPRENEURSHIP (Dec. 1, 2000) (finding a correlation between workforce diversity and firm income in small businesses working in the American service industry); David Smallbone, John Kitching & Rosemary Athayde, *Ethnic Diversity, Entrepreneurship and Competitiveness in a Global City*, 28 INT'L SMALL BUS. J. 174 (2010) (finding evidence to support the conclusion that ethnic and linguistic diversity may be a potential asset to small firms in London).

political and community leaders who are responsible for our airports. These leaders care a lot about diversity, as they should. I think my efforts to have a workforce that really reflects Texas helps in that context as well.¹⁸

Today, diverse small businesses and minority-owned businesses are demonstrating they have the ingenuity, entrepreneurial spirit, and drive to create the goods and services that are demanded by an increasingly diverse population at home and an interconnected global economy. These same small businesses depend heavily upon the availability of diverse student populations in America's colleges and universities to supply their workforces.

B. Small Businesses Face Unique Challenges and Need Flexible Approaches to Increase Diversity.

While small businesses depend upon diversity in their workforces to succeed in an increasingly diverse and global economy, small businesses often face unique challenges in pursuing and achieving diversity among their workers. Many small businesses lack the substantial resources of large companies to recruit and retain a diverse workforce.¹⁹ Indeed,

¹⁸ Phone Interview with Gilbert Aranza, August 4, 2012 (interview notes on file with counsel of record).

¹⁹ See G. Beaver & K. Hutchings, *Training and Developing an Age Diverse Workforce in SMEs: The Need for a Strategic Approach*, 47 J. OF EDUCATION & TRAINING 592 (2005) ("Though
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according to recent U.S. Census data, of those small businesses that employ more than one person, over 91 percent employ fewer than 20 employees.²⁰ Given these numerical limitations, many small businesses cannot create a diverse environment through hiring alone. Nor can small businesses respond to unexpected demographic shifts or market changes simply by hiring additional employees with relevant backgrounds. Instead, many small businesses must take a more nuanced and individualized approach to recruiting and retaining employees, focusing on candidates who have been exposed to a variety of people, ideas, perspectives, and cultures through their educational experiences, prior business experiences, and personal networks.

Darryl Daniels, the managing partner of Jacobsen/Daniels Associates, a nationally recognized transportation and strategic planning business, offered a useful illustration of the unique challenges that small businesses face in responding to demographic shifts:

We have to be responsive to our customers and our customers are looking for firms with workforces that reflect themselves and their

lacking the resources of large corporations to develop affirmative action policies, the smaller organisation may, however, utilise its flexibility to take short- and long-term advantage of the strengths offered by diverse sectors of the workforce.”).

²⁰ U.S. Small Business Administration, *The Small Business Economy, 2011 Data Tables*, Table A.7, <http://www.sba.gov/advocacy/849/6282> (last visited Aug. 1, 2012).

broader communities. We have recently seen a real increase in the number of airports that are based in predominately Hispanic communities and run by Hispanic executives and managers. We have to be flexible enough to be responsive to that and we want to be. But we need the best colleges and universities to be educating the engineers and the business and finance experts that we need. Those colleges and universities need to be doing more to attract and educate racially diverse scientists – a lot more.²¹

Additionally, many small businesses cannot afford to hire full-time diversity officers or fund robust recruitment efforts to identify and recruit diverse applicants. Instead, they often promote diversity within their firms by tapping into the diverse networks of their employees, often created or enhanced by exposure to diverse student populations at institutions of higher education. Moreover, while some smaller businesses do not have the resources to implement diversity training programs,²² they can markedly

²¹ Phone Interview with Darryl H. Daniels, August 6, 2012 (interview notes on file with counsel of record).

²² See National Urban League, *Diversity Practices that Work: The American Worker Speaks* (2004), http://nul.iamempowered.com/sites/nul.iamempowered.com/files/attachments/Diversity_Practices_That_Work_2005.pdf (last visited Aug. 6, 2012) (finding that less than 30 percent of surveyed workers at smaller firms believe their firms have effective diversity training programs); see also, e.g., Brief of General Motors Corp. as *Amicus Curiae* in Support of Respondents, filed in *Grutter v. Bollinger*, Nos. 02-241 and 02-516, at 20 (explaining that many large businesses such as
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improve the performance of their firms by hiring employees who have previously been exposed to diverse educational and working environments.

Small businesses must also adapt quickly to changing market conditions, and their ability to do so requires ready access to a workforce already equipped with the necessary skill sets. As small businesses generally have fewer resources and less time to cultivate these skills than large businesses, it is even more imperative that small businesses be able quickly to hire qualified candidates from different backgrounds, races, ethnicities, and cultures. As Michael Steele, a small business owner, former Maryland Lieutenant Governor, and former Republican National Committee Chairman explains,

Any business ultimately wants to be a reflection of its community and the community with which it is doing business. And the color of communities here, and around the world, is changing. Being responsive to that is an indispensable part of a good business plan. But small businesses do not have unlimited resources to devote to diversity consultants. They need employees and managers who leave college already well-prepared to excel

General Motors provide diversity training to their workers but that this training cannot substitute for the training and experiences employees should have received earlier).

in a world filled with people of different races with different ideas and experiences.²³

Small businesses face competition from larger firms with greater resources to attract candidates with *both* the necessary skill sets and educational backgrounds rich in diversity. According to small business owner Darryl Daniels, small businesses in particular face difficulty recruiting employees who possess both educational backgrounds with significant exposure to diversity and training in certain key programs. As he explained,

It is critical that there be more minority students – of all races – in the top flight science and technical programs at selective colleges and universities. Right now, the top schools have very, very few minority students in the technical fields and that makes it really hard on small businesses. We are based in Michigan and have superb public universities, but we can't compete with GM and Ford for the few minority engineers, architects, and technology experts who are coming out of the University of Michigan and Michigan State. We have just over 20 employees – most of the time we don't have the staff or the resources to go toe-to-toe with the big guys in recruitment. We just need to be educating more minorities and women in science and engineering at our flagship colleges and universities so

²³ Phone Interview with Michael Steele, August 3, 2012 (interview notes on file with counsel of record).

that small businesses also have access to top flight talent of every race.²⁴

Because of these unique challenges, small businesses must be flexible in their approaches to cultivating diversity in their workforces and must often depend to a greater degree than large businesses on pre-existing networks and prior educational and business experiences to achieve desired levels of workplace diversity. Critically, many small businesses rely heavily on public colleges and universities to produce workers who are equipped with the skills and knowledge to be successful in different areas of commerce and who have been exposed to a range of perspectives as varied as the communities and the nation in which they operate.

C. Higher Education Provides a Foundation for Small Business Success; Promoting Diversity in These Institutions is Critical to This Success.

Education in America serves, among other things, to promote the most fundamental of American ideals. Indeed, “[t]he Nation’s schools strive to teach that our strength comes from people of different races, creeds, and cultures uniting in commitment to the freedom of all.” *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701,

²⁴ Phone Interview with Darryl H. Daniels, August 6, 2012 (interview notes on file with counsel of record).

782 (2007) (Kennedy, J., concurring). The vitality of this lesson has never been more apparent than now as more and more small businesses come to recognize that embracing diversity strengthens their businesses. However, as businesses seek to increase diversity throughout their enterprises, they rely heavily on America's schools, and especially America's colleges and universities, to facilitate this effort.

All businesses – including small businesses – depend on colleges and universities to furnish their future employees with the knowledge and skills necessary to meet the needs of the marketplace in our increasingly diverse and globally-connected society. Indeed, colleges and universities play an indispensable role in ensuring both that our labor force is visibly open to a cross-section of America and that minority and non-minority students alike are “trained through wide exposure’ to the ideas and mores of students as diverse as this Nation of many peoples.” *Bakke*, 438 U.S. at 313 (opinion of Powell, J.) (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)). It is therefore imperative that a diverse population has access to this invaluable training and education in order to be ready and able to contribute successfully to American small businesses.

Higher education provides still other benefits that small businesses value greatly. Attending a selective institution exposes students to cutting-edge technologies, scientific breakthroughs, and groundbreaking research in every field. Small businesses reap the benefits of this experience when they hire

students already exposed to new ideas and able to understand and embrace the latest industry innovations. Too often attending a flagship university such as the University of Texas is the *only* way students become exposed to the latest technologies and research, as most research funding goes to selective universities. Steele provides some useful context in this area:

As Lieutenant Governor I worked hard to try to improve math, science and technology education for minority students in Maryland. This problem requires a multi-faceted approach. Part of the solution is to provide better resources for HBCUs [Historically Black Colleges and Universities] especially by providing endowed chairs and research and development dollars. We have to resist the powerful interests that say ‘just make the science investments in the flagship schools and let the HBCU students visit to take science classes.’ I heard those arguments in 2006, but to me they sounded more like 1956. But providing more resources to HBCUs is simply not enough. Minority students deserve to have unfettered access to an excellent education wherever they choose to go to school. And if they want to attend flagship universities, they deserve to have real access in real numbers. If they want to attend HBCUs they deserve fully funded schools

with excellent science and technology programs. We can and must do both.²⁵

Additionally, the opportunity to receive an education and be members of student bodies at selective colleges or universities, such as the University of Texas, provides graduates with access to extensive networks of individuals. These networks, in turn, provide business owners with access to information, advice, customers, suppliers, and capital. Not surprisingly, small businesses with greater access to a wide range of networks are more likely to be successful. The scholarship supports our experience:

Effective networking helps business owners accelerate the rate of growth and creation of wealth through additional connections with distributors and suppliers, increased innovation in terms of products, methods of production and markets, synthesizing of ideas and suggestions, and increased learning regarding product and process. Social networks serve to expand business owners' boundaries in terms of knowledge and information which can result in increased new venture ideas and more opportunities.²⁶

²⁵ Phone Interview with Michael Steele, August 3, 2012 (interview notes on file with counsel of record).

²⁶ Cheryl Luczak, *et al.*, *National Culture, Market Orientation and Network-Derived Benefits: Conceptual Model for Service SME's*, 16 *ACADEMY OF ENTREPRENEURSHIP J.* 1 (July 2010); *see also* Sylvie Laforet, *A Framework of Organisational Innovation and Outcomes in SMEs*, 17 *INT'L J. OF ENTREPRENEURIAL BEHAVIOUR*

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As an illustration of this point, Chairman Steele recounted that his college roommate became the founder and owner of a very successful dot-com company. “Because I went to Johns Hopkins, that guy is now part of my business network. When I need to do work that involves technology or Wall Street, I can call him and run things by him. You can’t tell me that I would have those same connections if I had not gone to a highly selective college. Those connections matter in business.”²⁷

Small business owner John L. Ricks benefitted from the networks he established in college and graduate school in another unique way. Mr. Ricks went to school with two astronauts. As a result of this association, Mr. Ricks learned about some of the technological opportunities within NASA, equipping him with the knowledge needed to submit a proposal for an air tight hatch door for the International Space Station.²⁸

& RESEARCH 380 (2011) (“Networking can lead to positive innovation outcomes. . . . A network can bring numerous advantages for firms. The companies get access to enhanced resources, the risk can be shared and costs reduced. Innovation also requires the convergence of many sources of knowledge and skills, usually linked in the form of a network (*e.g.*, by forming an alliance with universities or research center, [Small and Medium Enterprises] can get access to up-to-date information.”).

²⁷ Phone Interview with Michael Steele, August 3, 2012 (interview notes on file with counsel of record).

²⁸ Phone Interview with John L. Ricks, III, July 25, 2012 (interview notes on file with counsel of record).

Not only does promoting diversity in higher education provide our nation's business leaders with access to critical networks, it also provides important opportunities for previously underrepresented minorities to start and grow successful small businesses. Business scholars have explained that “[a]cquiring appropriate educational credentials, skills, and applicable work experience, accessing financial capital, and exploiting market opportunities have traditionally been more challenging for minorities than for aspiring white entrepreneurs.”²⁹

Promoting opportunities for minorities to attend flagship universities such as the University of Texas, while not a panacea, is one step to overcoming this historical imbalance. Indeed,

[t]he minority business community in the United States is profoundly different today than it was 50 years ago. The median business owner is college-educated. Declining restrictive barriers have expanded access to educational and employment opportunities, permitting aspiring minority entrepreneurs to acquire expertise in many fields that were traditionally closed. This greater base of entrepreneurial expertise is perhaps the most important single force driving the growth of

²⁹ Timothy Bates, *Minority Entrepreneurship*, 7 FOUNDATIONS AND TRENDS IN ENTREPRENEURSHIP 151, 153 (2011).

[minority business enterprises] of greater size and scope in a wide range of industries.³⁰

The rise in minority entrepreneurship benefits everyone. Not only has minority-owned business ownership grown dramatically in recent years but, according to a recent survey of small businesses, more small businesses plan to add workers in the coming year than cut workers and those small businesses owned by African Americans were the most likely to have plans to hire additional employees.³¹ As America draws more broadly from its diverse, culturally rich population, the opportunities for innovation and competition expand as well.

The critical role of diversity in education was aptly characterized by Ray Marshall, holder of a chair in Economics and Public Affairs at the University of Texas, former United States Secretary of Labor, a former small business owner, and a long-time student of the challenges confronting small businesses and businesses led by minorities and women. Secretary Marshall explained:

³⁰ *Supra* note 28 at 246; *see also, e.g.*, Stacy Dale & Alan Krueger, *Estimating the Return to College Selectivity over the Career Using Administrative Earning Data*, Nat'l Bureau of Economic Research Working Paper No. 17159 (June 2011).

³¹ GazelleIndex, 2012 Economic Outlook for Minority, Women and Nonminority Small Businesses at 5, 13-14 (2012), <http://www.gazelleindex.com/wp-content/uploads/2012/06/1st-Minority-Business-and-Economic-Report-2012.pdf> (last visited July 27, 2012).

Colleges and universities have to focus on diversity for many reasons. But four aspects of diversity in education may be the most important. First, teaching students about diversity is fundamental to democracy and social cohesion. Second, diversity is an essential component of an excellent education and diversity in the classroom facilitates critical thinking. Third, diversity is key to fostering creativity and creativity is essential to our economy. And fourth, in the context of a flagship university like the University of Texas, diversity is an important tool of public diplomacy. It demonstrates to future world leaders, many of whom come here to be educated, that America practices what it preaches when it comes to equality and opportunity.³²

Importantly, business leaders are often among the most prominent civic and community leaders in American society. Ensuring that our institutions of higher education are fully accessible to all segments of our society will help ensure our leadership is similarly accessible to all members of our diverse society. As this Court correctly observed,

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

³² Phone Interview with Ray Marshall, August 2, 2012 (interview notes on file with counsel of record).

every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training.

Grutter, 539 U.S. at 332.

Promoting diversity at selective institutions is, indeed, a key step in promoting diversity throughout our nation's leadership in both the public and private sectors. Mr. Steele – himself a graduate of Johns Hopkins University and Georgetown University Law Center – served as the first African American Chairman of the Republican National Committee during the run up to the Republicans' extraordinary success in the 2010 mid-term elections. He believes that the RNC's efforts to harness diversity contributed to its success. According to Chairman Steele, as a result of his efforts:

There was more diversity in the [RNC headquarters] building while I was there than at any other time. We worked to make sure that there were diverse voices in the room – African Americans, Hispanics, and others. We also invested real dollars during the 2010 election cycle in the coalitions department. We gave them budget, staff and real responsibility for the first time and charged them with building real partnerships and identifying diverse leaders. All you have to do is look at the significantly more diverse Republicans who won election during

that cycle – in so many different jurisdictions
– to understand that our emphasis paid off.³³

II. THE UNIVERSITY OF TEXAS'S PROCESS OF PROMOTING DIVERSITY SERVES SMALL BUSINESSES' INTERESTS.

Small businesses depend on colleges and universities to educate and graduate classes of students who are themselves diverse and have been exposed to a diversity of cultures and views. Achieving this ambitious goal is far from simple: “Fifty years of experience since *Brown v. Board of Education*, should teach us that the problem before us defies so easy a solution.” *Parents Involved*, 551 U.S. at 788 (Kennedy, J., concurring) (citations omitted).

Given both the critical importance of, and inherent challenges in, promoting diversity in higher education, it is imperative that schools be permitted the flexibility to voluntarily devise and implement diversity initiatives that take into account the many facets of the whole person – including special skills, socioeconomic background, unique experiences, culture, ethnicity, and race. This flexibility should permit use of the admissions programs employed by the University of Texas, which couple race-neutral selection criteria with a supplemental, holistic approach to individual candidates.

³³ Phone Interview with Michael Steele, August 3, 2012 (interview notes on file with counsel of record).

A. Universities Need the Flexibility to Supplement Diversity Initiatives With Programs That Consider the Whole Person.

The case at hand aptly demonstrates the need for such a blended approach. In the wake of judicial decisions that rejected diversity programs used in the past by the University of Texas,³⁴ the Texas State legislature enacted a law under which Texas students who ranked in the top ten percent of their high school classes would be admitted automatically to any Texas state university.³⁵ Following this Court's decision in *Grutter*, the University of Texas chose to conduct a comprehensive examination into whether it was enrolling a "critical mass of underrepresented minorities." *Fisher v. Univ. of Texas*, 631 F.3d 213, 225 (5th Cir. 2011). That study found that in classes of "participatory size," 89 percent of those classes had either one or zero African American students, and 41 percent had one or zero Asian American students or Hispanic students. *Id.* Moreover, a survey revealed that a majority of students believed that there was "insufficient minority representation" in the classrooms for "the full benefits of diversity to occur." *Id.*

The University ultimately concluded that, while the ten-percent law boosted minority enrollment

³⁴ See *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996).

³⁵ Tex. Educ. Code § 51.803 (1997). This law was later amended to cap the number of students guaranteed admission pursuant to the law to 75 percent of available seats at the University of Texas at Austin. See *id.* § 51.803(a-1) (2010).

generally, the program should be supplemented with an approach that considers the many facets of the whole person, including race, in order to promote diversity across the University's academic programs.³⁶ The University's whole-person approach allows "serious consideration to all the ways an applicant might contribute to a diverse educational environment," *Grutter*, 539 U.S. at 337, and impact the lives of other students who may become leaders in business and government.

The ten-percent law alone is insufficient to serve the legitimate and compelling pedagogic needs of the University of Texas. In *Grutter*, for example, the Court noted that programs like the ten-percent law "preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along the qualities valued by the university." 539 U.S. at 340. Without the ability to supplement the effects of the ten-percent law with a model that takes into account the whole person, the University's ability to promote many facets of diversity and provide educational opportunities would be unduly limited, hindering its ability to help produce a workforce that reflects and advances America's many cultures, races, ethnicities, and perspectives and, critically, a

³⁶ See Supplemental Joint Appendix, Tab A, *Proposal to Consider Race and Ethnicity in Admissions* (June 25, 2004).

workforce that is essential to the success of small businesses in today's global economy.

Employees bring more to a business than just their grade point average. Their skills and experiences are often equally, if not more important, to a small business. The student who works a part-time job throughout high school comes to a future employer with maturity and useful business experience; the high-school musician who devotes hours to practicing the violin brings dedication and creativity; and the star soccer player comes with perseverance and the ability to work with a team. These students may or may not graduate in the top ten percent of their high school classes, but they certainly contribute useful perspectives to college campuses and small businesses. As the experience of the University of Texas demonstrates, the ten-percent law alone, without a supplemental whole-person approach, is a blunt instrument that limits the University's ability to take into consideration an applicant's unique skills and experiences. Drawing upon more than 50 years' experience in higher education, Secretary Marshall aptly explained: "The ten percent rule is not adequate because there are lots of really talented students who are not in the top ten percent for all sorts of reasons. We want those students. And the nation needs us to

educate them for the good of our democracy and our place in the global marketplace.”³⁷

Moreover, application of the ten-percent law without a supplemental holistic, individualized admissions program, inhibits the University’s ability to ensure diversity within the various schools and programs that confer specialized skills upon graduates integral to the success of many small businesses. Experience has shown that flexible diversity programs, like the one in place at the University of Texas, are more likely to promote diversity in certain key programs such as business and science.

For example, in 2002 – before the University of Texas at Austin implemented a holistic approach to admissions that considers many factors including race – more than 80 percent of all undergraduate business classes of a certain size had one or fewer African American students and 40 percent of those classes had one or fewer Hispanic students. *See* Supplemental Joint Appendix, Ex. C at 77. That same year, the undergraduate Natural Sciences program reported that 88 percent of certain classes had one or fewer African American students and more than 40 percent of classes had one or fewer Hispanic students. *Id.* at 83.³⁸ These miniscule numbers are insufficient

³⁷ Phone Interview with Ray Marshall, August 2, 2012 (interview notes on file with counsel of record).

³⁸ *See also* William Kidder, *Misshaping the River: Proposition 209 and Lessons for the Fisher Case*, Working Paper for the Civil Rights Project at UCLA, at 45-49 (Aug. 3, 2012), <http://>
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to “ensure that these minority students do not feel isolated or like spokespersons for their race.” *Grutter*, 539 U.S. at 380. Nor do they “provide adequate opportunities for the type of interaction upon which the educational benefits of diversity depend.” *Id.* Indeed, tokenism cannot satisfy the interests of diversity and can even be counter-productive. Chairman Steele noted the problem of putting one or a very few members of minorities in the position of trying to represent or speak for an entire race – a problem with which he identifies as a black Republican.³⁹ Secretary Marshall likewise stated:

We have to continuously ask ourselves, have we moved beyond the token phase? Are your former students now referring your new students? This doesn’t work if it is all top down. There have to be enough minority students to ensure the demand for their inclusion comes from the bottom up. We have to institutionalize opportunity the way we formerly institutionalized discrimination. Until we do, we aren’t done.⁴⁰

ssrn.com/abstract=2123653 (noting that absent the ability to implement individualized admissions programs that took into account many factors including race, MBA programs experienced a market drop in minority enrollment).

³⁹ Phone Interview with Michael Steele, August 3, 2012 (interview notes on file with counsel of record).

⁴⁰ Phone Interview with Ray Marshall, August 2, 2012 (interview notes on file with counsel of record).

Small businesses depend on universities' continued ability to promote diversity in business and science programs whose graduates may have knowledge and skills particularly valuable to small businesses. Indeed, many small businesses will recruit employees who graduate from these programs. A race-neutral rule that results in a limited increase in minority enrollment generally, but fails to promote diversity in key academic programs critical to small businesses, should not be considered an adequate substitute for flexible, holistic admissions programs that permit consideration of race as one of many factors. High grade point averages, moreover, are hardly the only predictor of success in small business, making the whole-person program an especially valuable and important addition to the ten-percent law at the University of Texas.

Finally, programs like the ten-percent law fail to take into account small shifts in demographic changes – such as new, small immigrant populations or shifts in socioeconomic status – and thus may fail to include the perspectives and cultures from these populations within the student body. Small businesses must be flexible in their ability to respond to demographic and market changes and small businesses depend on universities and colleges to be equally flexible in responding to these changes, and educating student bodies that, to the greatest extent possible, reflect the varied perspectives of the community.

B. The University of Texas’s Blended Diversity Initiative Provides Much Needed Flexibility.

As a continuing need exists for race-conscious admissions programs, it is important that universities and colleges have the flexibility to adapt programs to their unique needs. In applying strict scrutiny to race-conscious admissions programs, this Court has emphasized the importance of both flexibility and a holistic approach to promoting diversity. Justice Powell wrote that the admissions process should 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.). Likewise, the *Grutter* Court emphasized that “truly individualized consideration demands that race be used in a flexible, non-mechanical way.” 539 U.S. at 334; *see also id.* at 392 (Kennedy, J., dissenting) (“individual assessment” must be “safeguarded through the entire process”).

Small business must be able to draw upon a diverse workforce equipped with the skills to address the demands of dynamic, diverse markets. This, in turn, requires that colleges and universities have the flexibility to adopt admissions programs that employ an individualized approach that takes into consideration the many attributes of an applicant that may

contribute to the student body and ultimately the workforce.

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CONCLUSION

For the foregoing reasons, this Court should reaffirm its prior holdings that the government has a compelling interest in achieving the educational benefits of diversity in higher education and that holistic, individualized admissions programs that take into consideration many factors including race are permissible under the United States Constitution.

Respectfully submitted,

ANTHONY W. ROBINSON
4305 55th Avenue
Bladensburg, MD 20710
(202) 258-3815

SARAH C. VON DER LIPPE
1104 East Capitol Street, NE
Washington, DC 20002
(202) 543-3493

JOSEPH M. SELLERS
Counsel of Record
EMMY L. LEVENS
PETER ROMER-FRIEDMAN
COHEN MILSTEIN SELLERS
& TOLL PLLC
1100 New York Avenue, NW
Suite 500 West
Washington, DC 20005
(202) 408-4600
jsellers@cohenmilstein.com
Attorneys for Amici Curiae

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