

Nos. 20-1199 & 21-707

In The
Supreme Court of the United States

—◆—
STUDENTS FOR FAIR ADMISSION, INC.,

Petitioner,

v.

PRESIDENT AND FELLOWS OF HARVARD COLLEGE,

Respondent.

—◆—
STUDENTS FOR FAIR ADMISSION, 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 *AMICUS CURIAE*
HR POLICY ASSOCIATION
IN SUPPORT OF RESPONDENTS**

JACQUELYN L. THOMPSON
FORD HARRISON LLP
2000 M St. NW, Suite 505
Washington, DC 20036
(202) 719-2064
jthompson@fordharrison.com

G. ROGER KING
Counsel of Record
HR POLICY ASSOCIATION
1001 19th St. N., Suite 1002
Arlington, VA 22209
(614) 582-3939
rking@hrpolicy.org

TIMOTHY J. BARTL
HR POLICY ASSOCIATION
1001 19th St. N., Suite 1002
Arlington, VA 22209

GREGORY HOFF
HR POLICY ASSOCIATION
1001 19th St. N., Suite 1002
Arlington, VA 22209

Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, *amicus* HR Policy Association states that it has no parent corporation and no publicly held corporation that holds 10% or more of its stock.

TABLE OF CONTENTS

	Page
CORPORATE DISCLOSURE STATEMENT	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
INTEREST OF <i>AMICUS CURIAE</i>	1
SUMMARY OF ARGUMENT	1
ARGUMENT	4
I. A Diverse Workforce is Essential for Successful Business Outcomes	4
A. Diverse Companies are More Competitive, Innovative, and Profitable	4
B. Fostering Diverse and Inclusive Workplaces Attracts and Maintains Talent and Investment	7
C. American Companies are Committed to Diversity and Inclusion	9
1. Increased Transparency	9
2. Linking Executive Pay to Diversity	10
3. Recruiting and Outreach	11
4. Fostering Inclusive Cultures	14
II. American Businesses Need Diversity-Conscious Admissions Programs to Recruit and Retain Diverse Talent	17
A. Minorities Remain Underrepresented in the American Workforce and in Corporate Leadership Positions	17

TABLE OF CONTENTS – Continued

	Page
B. Diversity-Conscious Admissions Programs are Critical to Creating a Pool of Diverse Qualified Individuals from Which Employers Can Recruit and Hire and Promote to be Future Leaders	20
C. The Court Should Not Prohibit Diversity-Conscious Admissions Programs	23
1. Narrowly Tailored Diversity-Conscious Admissions Programs Can Survive Strict Scrutiny	26
CONCLUSION.....	29

TABLE OF AUTHORITIES

	Page
CASES	
<i>Fisher v. Univ. of Tex.</i> , 579 U.S. 365 (2016)	1, 26
<i>Grutter v. Bollinger</i> , 539 U.S. 306 (2003)	<i>passim</i>
<i>Regents of the Univ. of Cal. v. Bakke</i> , 438 U.S. 265 (1978)	26
RULES	
Sup. Ct. R. 37.6	1
OTHER AUTHORITIES	
3M, 2021 GLOBAL DIVERSITY, EQUITY & INCLUSION REPORT (2021)	10
Abbianca Makoni, <i>The Fortune 500 List Has A ‘Record Number’ Of Black CEOs – But There Are Still Only 6 Of Them</i> , PEOPLE OF COLOR IN TECH (May 31, 2022), https://peopleofcolorintech.com/front/the-fortune-500-list-has-a-record-number-of-black-ceos-but-theres-still-only-6-of-them/#:~:text=6%20Of%20Them-,The%20Fortune%20500%20List%20Has%20A%20'Record%20Number'%20Of%20Black,businesses%20on%20the%202022%20ranking	19
Adam Liptak, <i>On the Bench and Off, the Eminently Quotable Justice Scalia</i> , N.Y. TIMES (May 11, 2009), https://www.nytimes.com/2009/05/12/us/12bar.html	20
ADVANCE AUTO PARTS, 2021 CORPORATE SUSTAINABILITY & SOCIAL REPORT (2021)	13

TABLE OF AUTHORITIES – Continued

	Page
Brookings, <i>What the 2020 Census Will Reveal about America</i> (Jan. 11, 2021), https://tinyurl.com/y64xfx9p	18
Bureau of Labor Statistics, U.S. Dep’t of Labor, <i>Labor Force Statistics from the Current Population Survey</i> (2021) https://www.bls.gov/cps/cpsaat11.htm	19
<i>Business Resource Groups</i> , UPS, https://www.jobs-ups.com/diversity (last accessed July 26, 2022)	14
Chang-Tai Hsieh et al., <i>The Allocation of Talent and U.S. Economic Growth</i> , 87 <i>ECONOMETRICA</i> 1439 (Sept. 2019).....	19
Dieter Holger, <i>The Business Case for More Diversity</i> , <i>WALL ST. J.</i> (Oct. 28, 2019, 8:00 AM), https://www.wsj.com/articles/the-business-case-for-more-diversity-11572091200	5
Emma Hinchcliffe, <i>The Number of Women Running Fortune 500 Companies Reaches a Record High</i> , <i>Fortune</i> (May 23, 2022), https://fortune.com/2022/05/23/female-ceos-fortune-500-2022-women-record-high-karen-lynch-sarah-nash/	19
Frank Dobbin & Alexandra Kalev, <i>Frank Dobbin & Alexandra Kalev Explain Why Diversity Training Does Not Work</i> , <i>The Economist</i> (May 21, 2021), https://www.economist.com/by-invitation/2021/05/21/frank-dobbin-and-alexandra-kalev-explain-why-diversity-training-does-not-work	15

TABLE OF AUTHORITIES – Continued

	Page
Frank Dobbin & Alexandra Kalev, <i>Why Doesn't Diversity Training Work? The Challenge for Industry and Academia</i> , 10 ANTHROPOLOGY NOW 48 (Sept. 2018)	12, 15
FRESHFIELDS, TRENDS AND UPDATES FROM THE 2022 PROXY SEASON (July 2022).....	8
Gender Equality in the Workplace, https://www.accenture.com/us-en/about/inclusion-diversity/gender-equality (last visited July 22, 2022).....	10
Global Corporate Governance Guidelines and Engagement Principles, BLACKROCK (Jan. 2019), https://www.blackrock.com/corporate/literature/fact-sheet/blk-responsible-investment-engprinciples-global.pdf	7
Guidance on Diversity Disclosures and Practices, STATE STREET GLOBAL ADVISORS (Jan. 2022), https://www.ssga.com/library-content/pdfs/asset-stewardship/racial-diversity-guidance-article.pdf	8
INCLUSION & DIVERSITY, https://www.apple.com/diversity/ (last visited July 22, 2022)	10
Jamie Gullen, <i>Colorblind Education Reform: How Race-Neutral Policies Perpetuate Segregation and Why Voluntary Integration Should be Put Back on the Reform Agenda</i> , 15 J. L. & SOCIAL CHANGE 251 (2012).....	24
JOHNSON & JOHNSON, 2021 DIVERSITY, EQUITY & INCLUSION IMPACT REVIEW (2021)	12

TABLE OF AUTHORITIES – Continued

	Page
Joni Hersch, <i>Affirmative Action and the Leadership Pipeline</i> , TUL. L. REV. (Dec. 2021)	22, 24
Korn Ferry, <i>The Black P&L Leader</i> (2019).....	19
Liliana M. Garces, <i>Understanding the Impact of Affirmative Action Bans in Different Graduate Fields of Study</i> , Am. Educ. Rsch. J. (Jan. 2013)	24, 25
MCKINSEY & CO., RACE IN THE WORKPLACE: THE BLACK EXPERIENCE IN THE US PRIVATE SECTOR (2021)	19
MONDELEZ INT’L, 2021 ESG REPORT (2021)	13
<i>Our Commitment to Diversity, Equity, & Inclusion</i> , Charles River, https://www.criver.com/about-us/about-us-overview/our-commitment-equality?region=3701 (last accessed July 25, 2022)	16
Prabhdeep Singh et al., <i>When Affirmative Action Disappears: Unexpected Patterns in Student Enrollments at Selective U.S. Institutions, 1990-2016</i> , 7 J. SOCIOLOGY RACE & ETHNICITY 543 (2021)	24
Prudential Financial, Inc., 2022 Proxy Statement (DEF 14A) (Mar. 22, 2022)	11
Rocio Lorenzo et al., <i>How Diverse Leadership Teams Boost Innovation</i> , BOSTON CONSULTING GROUP (Jan. 23, 2018), https://www.bcg.com/publications/2018/how-diverse-leadership-teams-boost-innovation	5, 6

TABLE OF AUTHORITIES – Continued

	Page
Ross Kerber, <i>Allstate Among Large Firms Linking CEO Pay to Diversity Gains</i> , <i>Ins. J.</i> (July 27, 2021), https://www.insurancejournal.com/news/national/2021/07/27/624459.htm	11
Susana Arellano, <i>How to Attract, Recruit, and Retain Diverse Talent</i> , <i>ADVANTIS GLOBAL</i> (Feb. 20, 2021), https://www.advantisglobal.com/blog/how-to-attract-recruit-retain-diverse-talent	6
Tony Mauro, <i>Shut Out: SCOTUS Law Clerks Still Mostly White and Male</i> , <i>N.Y. L.J.</i> (Dec. 11, 2017), https://www.bloomberglaw.com/document/X5LPFU1K000000?jsearch=gml45imjh#jcite	21
U.S. BUREAU OF LABOR STATISTICS, <i>LABOR FORCE CHARACTERISTICS BY RACE AND ETHNICITY, 2020</i> (Nov. 2021).....	18
U.S. Census Bureau, <i>Demographic Turning Points for the United States: Population Projections for 2020 to 2060</i> (Feb. 2020).....	18
U.S. Department of Labor, <i>Equal Employment Opportunity Commission Host HIRE Roundtable on Making Workplaces More Inclusive</i> , <i>EEOC</i> (June 29, 2022), https://www.eeoc.gov/newsroom/us-department-labor-equal-employment-opportunity-commission-host-hire-roundtable-making	21
Uma Mazyck Jayakumar & Scott E. Page, <i>Cultural Capital and Opportunities for Exceptionalism: Bias in University Admissions</i> , 92 <i>J. HIGHER EDUC.</i> 1109 (2021).....	24
UPS, 2020 GRI CONTENT INDEX (2020).....	15

TABLE OF AUTHORITIES – Continued

	Page
Vivian Hunt et al., <i>Diversity Wins: How inclusion matters</i> , MCKINSEY & CO. (2020), https://www.mckinsey.com/~/media/McKinsey/Featured%20Insights/Diversity%20and%20Inclusion/Diversity%20wins%20How%20inclusion%20matters/Diversity-wins-How-inclusion-matters-vF.pdf	4, 5

INTEREST OF *AMICUS CURIAE*¹

HR Policy Association (“HRPA” or “Association”) is a public policy advocacy organization that represents the chief human resource officers of more than 400 of the largest corporations doing business in the United States and globally. Collectively, their companies employ more than 10 million employees in the United States, nearly nine percent of the private sector workforce. Since its founding, one of HRPA’s principal missions has been to ensure that laws and policies affecting human resources are sound, practical, and responsive to labor and employment issues arising in the workplace.

**SUMMARY OF ARGUMENT**

This matter presents yet again the question of whether – and in what circumstances – colleges and universities may consider the use of race in the admissions process. Since the Court last considered this issue in *Fisher v. University of Texas*, at least three significant developments have occurred. First, a clear and overwhelming consensus has developed in the business community that diversity, equity, and inclusion initiatives are a critical component of a company’s culture and business strategy. Second, unfortunately,

¹ Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, or their counsel made a monetary contribution intended to fund its preparation or submission. All parties have consented to the filing of this brief.

the “needle” has not moved significantly regarding the diversity of corporate leadership. Third, the composition of the Court has changed such that the current Court is reexamining *Grutter v. Bollinger*.

Amicus stresses that its members have a strong and continuing commitment to diversity, equity, and inclusion in the workplace and there is a vital need for a continuing pipeline or pool of highly educated and diverse candidates for employment from our nation’s colleges and universities. Indeed, *amicus* are not aware of any credible argument that such commitment to diversity, broadly understood, should not be vigorously pursued. Diversity in the C-suite and management ranks, however, needs to improve – much more needs to be done. Accordingly, *amicus* respectfully submits that the Court not overrule the central holding in *Grutter*, and permit universities and colleges a degree of flexibility to utilize race among other diversity factors in the admissions process. *Amicus* is not advocating that race alone, or any particular race, be given greater weight in such processes over other diversity criteria. *Amicus* does not endorse, nor does it ask the Court to endorse, admissions programs that unduly weight certain diversity factors over others or that engineer student classes based on specific desired levels of students from one background or another. Rather, colleges and universities must be able to weigh several different diversity criteria, such as race, gender, ethnicity, culture, experiences, veteran status, geographical background, and socio-economic status, among others, with equal consideration as part of an overall

holistic admissions process. Such diversity factors are equally important in developing a qualified pool of graduates.

Specifically, the increasing demand of American companies for educated, trained, diverse talent necessitates a continuous pipeline of such talent from college campuses around the United States. *Amicus* member companies rely heavily on American colleges and universities to provide the pool of diverse talent from which they can recruit and hire, particularly for higher-level jobs or those that require specialized degrees. Creating this pool of diverse talent requires admissions processes that provide opportunities for students of all backgrounds to achieve a higher education. Accordingly, *amicus* members are most concerned that the availability of such a pool of qualified candidates as a whole not be diminished.

In summary, for the reasons outlined in this brief, *amicus* urge the Court to affirm the basic principles established in *Grutter*, and if the Court modifies such holding, it should only do so in a least-intrusive manner that would not completely prohibit the use of race among other diversity factors in the admissions process.



ARGUMENT

I. A Diverse Workforce is Essential for Successful Business Outcomes

Beyond the many moral and ethical justifications for promoting diversity in the workplace, a significant body of evidence suggests that a diverse workplace produces more successful business outcomes. Diverse teams constituting individuals from a wide variety of backgrounds and perspectives perform better than their homogenous counterparts, particularly in an increasingly global consumer market. Fostering a diverse and inclusive workplace is also important for attracting the type of talent and investment vital for a company to succeed. Consequently, the companies represented by *amicus* have committed significant resources to developing more diverse employee populations, and in particular to increasing diverse representation at the management level.

A. Diverse Companies are More Competitive, Innovative, and Profitable

The most successful workplaces are those that are diverse across race, ethnicity, gender, experience, and many other factors indicative of a variety of perspectives. “The business case for diversity, equity, and inclusion is stronger than ever” as “the likelihood of diverse companies outperforming industry peers on profitability has increased significantly.”² Indeed, the

² Vivian Hunt et al., *Diversity Wins: How inclusion matters*, MCKINSEY & CO. (2020), <https://www.mckinsey.com/~media/>

twenty most diverse companies in one study had an average annual stock return of nearly six percent more than the twenty least diverse companies.³ The link to profitability only grows stronger as you move up the corporate ladder: companies with greater diversity at the executive level are considerably more likely to achieve above-average profitability than those in the lower percentiles for executive diversity.⁴ The likelihood of such outperformance is even higher for executive teams with diversity in race and ethnicity.⁵

Additionally, diverse teams “have been shown to be more likely to radically innovate and anticipate shifts in consumer needs and consumption patterns, helping their companies gain a competitive edge.”⁶ Companies with greater diversity report nearly fifty percent “average innovation revenue”, while companies lacking in diversity report only twenty-six percent.⁷ In other words, “nearly half the revenue of companies with more diverse leadership comes from

McKinsey/Featured%20Insights/Diversity%20and%20Inclusion/Diversity%20wins%20How%20inclusion%20matters/Diversity-wins-How-inclusion-matters-vF.pdf.

³ Dieter Holger, *The Business Case for More Diversity*, WALL ST. J. (Oct. 28, 2019, 8:00 AM), <https://www.wsj.com/articles/the-business-case-for-more-diversity-11572091200>.

⁴ Hunt, *supra* note 2.

⁵ *Id.*

⁶ *Id.*

⁷ Rocio Lorenzo et al., *How Diverse Leadership Teams Boost Innovation*, BOSTON CONSULTING GROUP (Jan. 23, 2018), <https://www.bcg.com/publications/2018/how-diverse-leadership-teams-boost-innovation>.

products and services launched within the past three years.”⁸ This type of innovative capability and creativity is increasingly valuable in the ever-changing, fast-paced, and dynamic business environment of the 21st century, where transformation has further accelerated in the wake of the COVID-19 pandemic. Being able to adapt to a rapidly-changing environment is more critical than ever, and companies with more diverse teams are proven to be best equipped for this new reality.

Finally, more diverse companies are more competitive, particularly in an increasingly heterogeneous and global marketplace. The majority of *amicus*’s member companies operate in a wide variety of markets both around the United States and globally. Meeting the needs of such a diverse consumer population requires employees that are representative of the markets they serve. Unsurprisingly, diverse companies are seventy percent more likely to capture new markets.⁹ To put it succinctly, having more diverse teams allows a company to better meet the needs of its consumers, as well as its partners and suppliers.

⁸ *Id.*

⁹ Susana Arellano, *How to Attract, Recruit, and Retain Diverse Talent*, ADVANTIS GLOBAL (Feb. 20, 2021), <https://www.advantisglobal.com/blog/how-to-attract-recruit-retain-diverse-talent>.

B. Fostering Diverse and Inclusive Workplaces Attracts and Maintains Talent and Investment

The next generation of American workers will be the most diverse in the nation's history – a trend that has grown steadily over the preceding decades and will only continue to grow in the future. Accordingly, companies seeking to recruit and retain the best available talent must be able to demonstrate a diverse workforce inclusive of people of all backgrounds. Companies that lack sufficient diversity or an inclusive culture will be unable to attract or retain the top talent from the next generation of American workers.

Further, companies are increasingly required to demonstrate their commitments to diversity and inclusion in order to attract top-level investments. Institutional investors such as Blackrock and Vanguard are now viewing company-wide diversity levels as an essential consideration when making investment decisions and in voting for directors.¹⁰ For example, State Street Global Advisors, the fourth largest asset manager in the world, expects portfolio companies to offer five different types of comprehensive diversity, equity, and inclusion disclosures. If companies fail to meet

¹⁰ See, e.g., Global Corporate Governance Guidelines and Engagement Principles, BLACKROCK (Jan. 2019), <https://www.blackrock.com/corporate/literature/fact-sheet/blk-responsible-investment-engprinciples-global.pdf>.

these expectations, State Street may vote against board members or chairs of board committees.¹¹

Shareholder proposals reflect this trend as well. Through July 2022, shareholders submitted over 120 diversity, equity, and inclusion proposals, and between 2020 and 2021, for example, there was a 234% increase in shareholder proposals seeking company reporting on diversity data.¹² In short, companies are under unprecedented scrutiny from their shareholders and large investors – and the general public – to be transparent and ultimately show meaningful progress on increasing diversity in the workplace.

There is further pressure both to disclose statistics and demonstrate progress from government and market regulators as well. The Nasdaq stock exchange, for example, will begin requiring listed companies to disclose the composition of its board by gender, race/ethnicity, and sexual orientation, as well as have at least one board member who identifies as female or an underrepresented minority.

¹¹ Guidance on Diversity Disclosures and Practices, STATE STREET GLOBAL ADVISORS (Jan. 2022), <https://www.ssga.com/library-content/pdfs/asset-stewardship/racial-diversity-guidance-article.pdf>.

¹² FRESHFIELDS, TRENDS AND UPDATES FROM THE 2022 PROXY SEASON 39 (July 2022).

C. American Companies are Committed to Diversity and Inclusion

Given the mounting evidence that a diverse workforce leads to better business outcomes, it is unsurprising that American companies, including *amicus* members, have committed substantial resources towards furthering diversity, equity, and inclusion in their own workplaces. These efforts take a variety of forms and include initiatives in several different areas, including employee resource groups and mentorship programs, targeted recruiting initiatives, linking incentive pay to diversity progress, and, overall, providing transparency to reinforce management's accountability for increasing diversity.

Within the last few years, many companies have spearheaded these diversity efforts from the very top of the organization, with company boards and C-suite executives taking central roles and responsibility in changing the cultural and demographic makeup of their companies. As demonstrated in examples from *amicus* member companies outlined below, these types of top-down initiatives reflect a renewed and more sustainable commitment to diversity, equity, and inclusion in the workplace.

1. Increased Transparency

Prior to regulatory requirements or investor expectations as outlined above, many leading companies, including *amicus* members, voluntarily decided to disclose their diversity data. Such disclosures are often

made a part of company 10-k filings or proxy statements while an increasing number of companies are also publishing standalone diversity, equity, and inclusion reports providing detailed breakdowns of the company's demographics.¹³

Such disclosures are meant to demonstrate a company's commitment to increasing diversity within its employee ranks and creating an inclusive workplace culture. These disclosures often include publicly stated goals for increasing diversity. Accenture, for example, has publicly committed to achieving a "gender-balanced workforce by 2025,"¹⁴ while 3M has committed to doubling its "global diverse representation of talent in management by 2025."¹⁵ These visible aspirations are intended to create further accountability for these companies' diversity, equity, and inclusion efforts.

2. Linking Executive Pay to Diversity

Many leading companies are also beginning to link progress on diversity efforts to performance evaluations for management level employees. This can also take the form of specifically tying an executive's annual incentive pay to their efforts in increasing

¹³ See, e.g. INCLUSION & DIVERSITY, <https://www.apple.com/diversity/> (last visited July 22, 2022).

¹⁴ Gender Equality in the Workplace, <https://www.accenture.com/us-en/about/inclusion-diversity/gender-equality> (last visited July 22, 2022).

¹⁵ 3M, 2021 GLOBAL DIVERSITY, EQUITY & INCLUSION REPORT 4 (2021).

representation of minorities and underrepresented employees. Allstate, for example, considers executives' progress against factors including "diversity and equity strategies," among other strategic priorities when setting annual bonus levels, while CVS Health Corp. modifies annual bonuses for senior executives by as much as 10% based on their progress in "achieving greater diverse leadership representation."¹⁶ Prudential Financial, Inc. uses similar modifiers for their long-term incentive programs, which again can increase or decrease incentives for senior executives as much as 10% based on progress made towards furthering diversity, equity, and inclusion efforts.¹⁷

Tying diversity efforts to executive pay creates further accountability and responsibility for senior corporate leaders for diversity, equity, and inclusion efforts. Such pay modifiers ensure that the C-suite and other senior management employees "walk the walk" when it comes to increasing and sustaining diverse representation across companies.

3. Recruiting and Outreach

"Special college recruitment programs to identify women and minorities . . . increase managerial

¹⁶ Ross Kerber, *Allstate Among Large Firms Linking CEO Pay to Diversity Gains*, *Ins. J.* (July 27, 2021), <https://www.insurancejournal.com/news/national/2021/07/27/624459.htm>.

¹⁷ Prudential Financial, Inc., 2022 Proxy Statement (DEF 14A) 35-45 (Mar. 22, 2022).

diversity [in particular] markedly.”¹⁸ To that end, *amicus* members are also devoting significant resources towards expanding their recruiting and outreach efforts to ensure they are finding the diverse talent wherever it is. This includes partnering with colleges and universities to create pathways towards higher education and employment for underrepresented communities, as well as other third parties including business leadership and training groups and foundations designed to increase diverse representation in different industries.

Amicus member Johnson & Johnson, for example, partners with philanthropic organizations such as the Thurgood Marshall College Fund, United Negro College Fund, the National Society of Black Engineers, and the Hispanic Scholarship Fund to ensure that minorities have increased opportunities both for higher education and ultimately for the type of STEM careers that Johnson & Johnson offers.¹⁹ Advance Auto Parts, Inc., meanwhile, has tailored its internship program to target rising college juniors and seniors to work in their distribution centers as operations supervisors, and in field sales organization, leadership programs, and corporate support centers as analysts “as an

¹⁸ Frank Dobbin & Alexandra Kalev, *Why Doesn't Diversity Training Work? The Challenge for Industry and Academia*, 10 ANTHROPOLOGY NOW 48, 52 (Sept. 2018).

¹⁹ JOHNSON & JOHNSON, 2021 DIVERSITY, EQUITY & INCLUSION IMPACT REVIEW 19 (2021).

accelerator for . . . leadership development.”²⁰ A significant number of people of underrepresented backgrounds participated, consistent with the company’s focus on expanding diversity.²¹ Seventy percent of interns accepted a full-time job with the company in 2021, and the program expanded in 2022.²²

Mondelez International, Inc., another *amicus* member, has also recognized the importance of investing in early career development “as a key entry point to increased diversity within [their] company’s leadership.”²³ Mondelez partners with the Thurgood Marshall College Fund and offers scholarships and other financial resources to students within the Fund’s network of schools, including 47 Historical Black Colleges and Universities and Predominantly Black Institutions.²⁴ This investment includes professional development programs “to increase higher education access and completion among minority students and underserved communities, and to support educational programs that prepare the students for success in corporate careers.”²⁵ These types of recruiting and development initiatives, which also include a partnership with the Boys & Girls Clubs of America, create tangible “opportunities to secure internships and full-time

²⁰ ADVANCE AUTO PARTS, 2021 CORPORATE SUSTAINABILITY & SOCIAL REPORT 27 (2021).

²¹ *Id.*

²² *Id.*

²³ MONDELEZ INT’L, 2021 ESG REPORT 31 (2021).

²⁴ *Id.*

²⁵ *Id.*

employment after graduation,” and are central to Mondelez’s efforts to “foster a new generation of leaders prepared to live and lead in a diverse, integrated world economy.”²⁶

4. Fostering Inclusive Cultures

It is not enough to merely add diverse talent to specific roles within a company, whether in entry level positions or at the executive level. In order to retain and attract diverse talent, companies must foster workplace cultures that ensure that each of their employees feels involved as an integral part of the team. Inclusivity is particularly essential for retaining key talent that can be molded into the next generation of diverse company leadership – in short, fostering inclusive cultures makes efforts to increase diversity sustainable.

To these ends, *amicus* members have created employee resource groups that bring groups of employees together across all parts of the company. United Parcel Service, for example, has ten different “Business Resource Groups” (BRGs) such as the African American BRG, the Veterans BRG, the Millennial BRG, the Women’s Leadership Development BRG, and the Abilities BRG.²⁷ These groups “offer networking and learning opportunities” for employees “from a variety

²⁶ *Id.*

²⁷ *Business Resource Groups*, UPS, <https://www.jobs-ups.com/diversity> (last accessed July 26, 2022).

of backgrounds.”²⁸ Each group has advisors and sponsors who are members of the company’s executive leadership team to “help connect BRGs with people at the highest levels of UPS, so the BRG can best align their objectives with those of the Company.”²⁹ According to UPS, the BRGs, comprised of hundreds of chapters globally, “make significant contributions to growing the business, developing our people and supporting the communities we serve.”³⁰ Internal mentorship programs in particular have been shown to increase executive-level diversity.³¹

Amicus members also have specific roles, teams, and committees dedicated to the employee diversity and inclusion experience, which studies have shown to be essential towards furthering diversity, equity, and inclusion efforts.³² Levi Strauss & Co., for example, is one of many *amicus* member companies that have Chief Diversity, Equity, & Inclusion officers embedded in their top leadership ranks. Similarly, like many large and mid-size companies, Charles River Laboratories has created a “global-executive level DE&I Council to provide the oversight needed to drive change and

²⁸ UPS, 2020 GRI CONTENT INDEX 54 (2020).

²⁹ *Id.*

³⁰ *Id.*

³¹ Dobbin & Kalev, *supra* note 18, at 52.

³² Frank Dobbin & Alexandra Kalev, *Frank Dobbin & Alexandra Kalev Explain Why Diversity Training Does Not Work*, *The Economist* (May 21, 2021), <https://www.economist.com/by-invitation/2021/05/21/frank-dobbin-and-alexandra-kalev-explain-why-diversity-training-does-not-work>.

embody diversity, equity and inclusion principles in [their] words and actions.”³³ This CEO-led council “has established a multi-year strategy with five strategic pillars to provide a consistent approach” on diversity, equity, and inclusion.³⁴ A number of member companies also feature board committees dedicated to diversity, equity, and inclusion, again demonstrating company commitments to lead from the top on these initiatives.

* * *

The above examples and anecdotes demonstrate *amicus* member companies’ and the wider business community’s comprehensive commitment to furthering diversity, equity, and inclusion in the American workplace. Further, the above discussion highlights in particular the top-down approach companies are taking for these commitments – corporate leadership is both taking responsibility and being held accountable for meaningful progress in this area. Finally, these examples and anecdotes demonstrate that *amicus* member companies are particularly concerned with developing and maintaining a pipeline of diverse talent to establish the next generation of diverse corporate leadership.

³³ *Our Commitment to Diversity, Equity, & Inclusion*, Charles River, <https://www.criver.com/about-us/about-us-overview/our-commitment-equality?region=3701> (last accessed July 25, 2022).

³⁴ *Id.*

II. American Businesses Need Diversity-Conscious Admissions Programs to Recruit and Retain Diverse Talent

Justice Sandra Day O'Connor optimistically opined in the final sentence of her opinion in *Grutter v. Bollinger* that “[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today [the university’s need to factor race into its admissions process].”³⁵

As the end of Justice O'Connor’s suggested period approaches, as discussed below, there still is considerably more progress to be made in increasing diversity in the American workplace, and in particular at the leadership level. Accordingly, it remains more important than ever that colleges and universities graduate highly qualified diverse classes from which employers can recruit the next generation of American business leaders. *Amicus* submit that diversity-conscious admissions programs remain the most effective method of producing such diverse and qualified classes.

A. Minorities Remain Underrepresented in the American Workforce and in Corporate Leadership Positions

The latest U.S. Census shows substantial demographic changes within the overall American population over the last decade. Minority populations have

³⁵ *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

contributed the majority of the overall population growth since 2010, and by 2060, the non-Hispanic White population is projected to be less than half of the overall American population.³⁶ The current younger generations – those born in 1981 or later – are the most racially and ethnically diverse in the history of the United States.³⁷ In sum, the American population – and consequently the American labor force – is growing more and more diverse every year.

This increasing diversity among the general population, however, is not reflected in the American workplace. With non-White individuals making up only 23% of America’s labor force, minorities continue to be underrepresented in the American workplace.³⁸ This underrepresentation is particularly evident at the leadership level as management roles, the C-suite, and the board room remain disproportionately homogenous. As of June 2022, only six Fortune 500 companies

³⁶ U.S. Census Bureau, *Demographic Turning Points for the United States: Population Projections for 2020 to 2060* (Feb. 2020) at 6-7.

³⁷ Brookings, *What the 2020 Census Will Reveal about America* (Jan. 11, 2021), <https://tinyurl.com/y64xfx9p>.

³⁸ U.S. BUREAU OF LABOR STATISTICS, *LABOR FORCE CHARACTERISTICS BY RACE AND ETHNICITY, 2020* (Nov. 2021).

have Black CEOs³⁹ and only 44 have women CEOs,⁴⁰ and fewer than 10% of the most senior profit and loss leaders in the Fortune 500 are Black.⁴¹ According to one study, on the current trajectory, it will take nearly a century for Black employees to reach talent parity across all levels in the private sector.⁴² While 82% of management-level employees are White, Asian, Black, and Hispanic combined representation in such positions is only 26%, well below this group's total share of the general population.⁴³ Such disparities are also harmful for economic growth – up to 40% of growth in U.S. GDP per capita between 1960 and 2010 can be attributed to increases in the share of women and Black men working in highly skilled occupations.⁴⁴ Continued underrepresentation, therefore, is

³⁹ Abbianca Makoni, *The Fortune 500 List Has A 'Record Number' Of Black CEOs – But There Are Still Only 6 Of Them*, PEOPLE OF COLOR IN TECH (May 31, 2022), <https://peopleofcolorintech.com/front/the-fortune-500-list-has-a-record-number-of-black-ceos-but-theres-still-only-6-of-them/#:~:text=6%20Of%20Them,The%20Fortune%20500%20List%20Has%20A%20Record%20Number%20Of%20Black,businesses%20on%20the%202022%20ranking>.

⁴⁰ Emma Hinchcliffe, *The Number of Women Running Fortune 500 Companies Reaches a Record High*, Fortune (May 23, 2022), <https://fortune.com/2022/05/23/female-ceos-fortune-500-2022-women-record-high-karen-lynch-sarah-nash/>.

⁴¹ Korn Ferry, *The Black P&L Leader 6* (2019).

⁴² MCKINSEY & CO., *RACE IN THE WORKPLACE: THE BLACK EXPERIENCE IN THE US PRIVATE SECTOR* (2021).

⁴³ Bureau of Labor Statistics, U.S. Dep't of Labor, *Labor Force Statistics from the Current Population Survey*, tbl.11 (2021) <https://www.bls.gov/cps/cpsaat11.htm>.

⁴⁴ Chang-Tai Hsieh et al., *The Allocation of Talent and U.S. Economic Growth*, 87 *ECONOMETRICA* 1439, 1441 (Sept. 2019).

preventing the American economy from achieving its true potential.

Accordingly, despite Justice O'Connor's best hopes, to put it simply, the job is not done. A pipeline of highly educated diverse individuals from American college campuses is needed more than ever as companies commit to changing the homogeneity that is still endemic – particularly at the leadership level – in the American workplace.

B. Diversity-Conscious Admissions Programs are Critical to Creating a Pool of Diverse Qualified Individuals from Which Employers Can Recruit and Hire and Promote to be Future Leaders

In 2009, Justice Antonin Scalia gave a lecture at the American University Washington College of Law. When asked by a student about what they had to do to become successful without “connections and elite degrees,” Justice Scalia noted the following in reference to how he selected candidates for his clerkships:

By and large, I'm going to be picking from the law schools that basically are the hardest to get into. They admit the best and the brightest. . . . If they come in the best and the brightest, they're probably going to leave the best and the brightest, OK?⁴⁵

⁴⁵ Adam Liptak, On the Bench and Off, the Eminently Quotable Justice Scalia, N.Y. TIMES (May 11, 2009), <https://www.nytimes.com/2009/05/12/us/12bar.html>.

Justice Scalia’s response encapsulates the critical need for colleges and universities – and particularly for the most elite schools – to ensure that their doors remain open to qualified students of all backgrounds. Like Justice Scalia, employers seek the best and the brightest, which involves recruiting at the highest level – elite colleges and universities.⁴⁶ Accordingly, if American colleges and universities fail to produce diverse classes inclusive of candidates of all backgrounds, then the American workplace, particularly with respect to future business leaders, will continue to lag behind in meaningful progress on diversity.⁴⁷

⁴⁶ *Amicus* is well aware of, and does not discount, the available pool of otherwise qualified individuals who did not go to college. Many of the companies represented in this brief have dedicated recruiting efforts for reaching such individuals. *Amicus* particularly endorses the Equal Employment Opportunity Commission’s recent initiatives to reduce barriers to the workforce for underrepresented individuals. See, e.g., *U.S. Department of Labor, Equal Employment Opportunity Commission Host HIRE Roundtable on Making Workplaces More Inclusive*, EEOC (June 29, 2022), <https://www.eeoc.gov/newsroom/us-department-labor-equal-employment-opportunity-commission-host-hire-roundtable-making>. Nevertheless, *amicus* maintains that college campuses remain an integral piece – if not the most important piece – of any successful company’s recruiting and hiring efforts, particularly for higher-level jobs. Accordingly, it is necessary for college campuses to be able to foster as diverse and inclusive of a student population as possible.

⁴⁷ As Scalia’s quote demonstrates, the Court overwhelmingly hires from Ivy League or similarly elite institutions for its law clerks. See, e.g., Tony Mauro, *Shut Out: SCOTUS Law Clerks Still Mostly White and Male*, N.Y. L.J. (Dec. 11, 2017), <https://www.bloomberglaw.com/document/X5LPFU1K000000?jcsearch=gml45>

Indeed, this Court itself has recognized the importance of ensuring access to higher education to students of all backgrounds:

The diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity.⁴⁸

This Court has further acknowledged that “the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.”⁴⁹

The need for diverse college campuses is paramount for increasing diversity in management roles, in the C-suite, and in the board room. Elite colleges and universities “form the pipeline to leadership positions in the United States,” and “universities provide value to their student body by educating diverse students to meet unmet demand for diverse leadership.”⁵⁰ This Court again has itself expressed the necessity of race or diversity-conscious college admission programs to creating and maintaining a pipeline of diverse talent for leadership roles in corporate America:

imjh#jcite (noting that half of the clerks hired were law graduates from Harvard or Yale).

⁴⁸ *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003).

⁴⁹ *Id.* at 334.

⁵⁰ Joni Hersch, *Affirmative Action and the Leadership Pipeline*, TUL. L. REV. (Dec. 2021) at 1, 9.

[U]niversities . . . represent the training ground for a large number of our Nation’s leaders. . . . In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training.⁵¹

The link between diversity-conscious admissions programs and increased diversity in the American workplace, and in particular at the leadership level, is therefore abundantly clear. American companies, including *amicus* members, rely significantly on colleges and universities to produce a pool of qualified diverse candidates from which they can recruit and develop the next generation of business leaders.

C. The Court Should Not Prohibit Diversity-Conscious Admissions Programs

In a recently conducted survey of *amicus* member companies regarding company diversity and inclusion programs, 61% of companies identified “building a pipeline of diverse talent that can be considered for senior roles” as a top goal of their diversity and inclusion program. *Amicus* member companies are actively seeking the next generation of diverse

⁵¹ *Grutter v. Bollinger*, 593 U.S. 306, 332-333 (2003).

company leaders, and building this pipeline starts with college admissions.

Those colleges and universities that actively seek to increase diversity and inclusion on campus – within the legal bounds as established by the Court in *Grutter* – are therefore essential to building this pipeline, and a decision in this case that prohibits or significantly limits diversity-conscious admissions programs will ultimately be detrimental in increasing diverse representation in American workplaces and in the next generation of American corporate leadership.

Indeed, there is substantial research and statistical evidence that demonstrates that the elimination of diversity-conscious admissions programs decreases diversity on college campuses, which in turn ultimately leads to decreased diversity in the American workplace and in particular, a decrease in the number of minority individuals in corporate leadership roles.⁵² For example, after bans on affirmative action were implemented in California, Florida, Texas, and Washington,

⁵² See, e.g., Joni Hersch, *Affirmative Action and the Leadership Pipeline*, TUL. L. REV. (Dec. 2021) at 1; Uma Mazyck Jayakumar & Scott E. Page, *Cultural Capital and Opportunities for Exceptionalism: Bias in University Admissions*, 92 J. HIGHER EDUC. 1109 (2021); Prabhdeep Singh et al., *When Affirmative Action Disappears: Unexpected Patterns in Student Enrollments at Selective U.S. Institutions, 1990-2016*, 7 J. SOCIOLOGY RACE & ETHNICITY 543 (2021); Liliana M. Garces, *Understanding the Impact of Affirmative Action Bans in Different Graduate Fields of Study*, Am. Educ. Rsch. J. (Jan. 2013) at 1; Jamie Gullen, *Colorblind Education Reform: How Race-Neutral Policies Perpetuate Segregation and Why Voluntary Integration Should be Put Back on the Reform Agenda*, 15 J. L. & SOCIAL CHANGE 251 (2012).

“selective undergraduate universities experienced a decline in the enrollment of underrepresented students of color.”⁵³ Similarly, “studies also documented declines in racial and ethnic student body diversity in the professional fields of law and medicine.”⁵⁴ In other words, race or diversity-neutral admissions policies often fail to ensure that colleges and universities remain accessible to underrepresented communities.

Accordingly, *amicus* urges this Court to retain the central holding of *Grutter*, to the extent that it allows colleges and universities to have narrowly-tailored diversity-conscious admissions programs. Specifically, *amicus* urges the Court to consider the effects of prohibiting altogether colleges and universities from having the ability to factor in a variety of diversity factors in admissions processes in an objective manner that weights each factor equally. *Amicus* does not endorse, nor does it ask the Court to endorse, admissions programs that unduly weight certain diversity factors over others, or certain races over others. *Amicus* similarly does not endorse, nor does it ask the Court to endorse, admissions programs that engineer student classes based on specific desired levels of students from one background or another.

To the extent that the Court modifies the central holding of *Grutter* to any degree, *amicus* urges the court to do so in a manner that does not limit or restrict colleges’ and universities’ ability to factor diversity

⁵³ Garces, *supra* note 52, at 2.

⁵⁴ *Id.*

into admissions processes in an objective and equally weighted manner. To do so would hinder or undermine commitments and progress made to date by *amicus* member companies. This Court should instead make every effort to narrowly address this issue in a manner so as not to disturb such progress and to permit further progress to be made in the future.

1. Narrowly Tailored Diversity-Conscious Admissions Programs Can Survive Strict Scrutiny

If the Court concludes that Respondents' specific admissions procedures do not satisfy strict scrutiny requirements, *amicus* respectfully requests that any such decision be thoughtfully limited so as to permit narrowly tailored diversity-conscious admissions programs to continue. *Amicus* and other stakeholders that are vitally interested in the Court's decision in the instant cases would be naïve to think that the key holdings of *Grutter* regarding the permissibility of the use of race and ethnic characteristics in college admissions processes are not under reexamination. A thoughtful reading of the dissents in *Grutter*, *Fisher*, and *Bakke* illustrate the complexities of the questions before the Court, especially with respect to the application of the Court's strict scrutiny standard.⁵⁵ Accordingly, *amicus* respectfully requests that if the Court finds

⁵⁵ See, e.g., *Fisher v. Univ. of Tex.*, 579 U.S. 365 (2016) (Alito, J., dissenting); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (Rehnquist, C.J., dissenting); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (Stevens, J., dissenting in part).

that Respondents' admissions processes with respect to the utilization of race and ethnic background do not pass strict scrutiny, that any such decision be as limited as possible to permit properly established admissions processes that are narrowly tailored to continue.

For the compelling reasons discussed in the instant brief, there is simply too much at risk, not only to the future success of the nation's employers, but also to the country's overall social fabric.⁵⁶ Simply stated, the "baby progress" of increased diversity that is being accomplished in the workplace and elsewhere should not be thrown out entirely with certain arguably tainted college admissions processes' "bathwater."

Amicus is confident that college and university admissions processes can include narrowly tailored uses of race and ethnicity considerations, among other important diversity criteria such as gender and socio-economic status, and survive strict scrutiny analysis. Justice Kennedy perhaps best stated this goal in his dissent to *Grutter*:

There is no constitutional objection to the goal of considering race as one modest factor among many others to achieve diversity, but an educational institution must ensure, through sufficient procedures, that each applicant

⁵⁶ As the Court noted in *Grutter*, "[the Court has] repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to 'sustaining our political and cultural heritage' with a fundamental role in maintaining the fabric of society." *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003).

receives individual consideration and that race does not become a predominant factor in the admissions decision-making.⁵⁷

Amicus submit that Justice Kennedy's conclusion is especially telling and insightful given the fact that he dissented in *Grutter* and concluded that the University of Michigan Law School's race-conscious admissions process in that specific case did not meet strict scrutiny.

Finally, although *amicus* is well acquainted with the Court's reluctance to provide broader guidance in its decisions, given the importance of the pending questions, and how the resolution of such questions could impact the future success of the business community and the country as a whole, *amicus* respectfully requests that one or more justices provide insight on how diversity criteria can be lawfully utilized in the college admissions process going forward.⁵⁸



⁵⁷ *Grutter v. Bollinger*, 539 U.S. 306, 393 (2003).

⁵⁸ See e.g. *Dobbs v. Jackson Women's Health Org.*, 2022 U.S. LEXIS 3057, at *156-170 (June 24, 2022) (J. Kavanaugh, concurring) (in which J. Kavanaugh provides guidance on issues potentially affected by the majority decision).

CONCLUSION

Breaking down racial and ethnic barriers to permit constructive interaction between people of different backgrounds should be an objective with which there is no dispute. One important way to accomplish this objective is to increase the diversity in leadership in the business community. Encouraging and supporting our colleges and universities to produce more highly educated diverse graduates is consistent with this objective. Indeed, it is a compelling need for the future of this country. *Amicus* cannot stress strongly enough to the Court the importance of achieving this objective. Accordingly, *amicus* urges the Court to affirm the decisions below in the pending cases, or at a minimum, preserve the potential for American colleges and universities to utilize narrowly tailored diversity-conscious college admissions processes.

Respectfully submitted,

JACQUELYN L. THOMPSON
 FORD HARRISON LLP
 2000 M St. NW, Suite 505
 Washington, DC 20036
 (202) 719-2064
 jthompson@fordharrison.com

TIMOTHY J. BARTL
 HR POLICY ASSOCIATION
 1001 19th St. N., Suite 1002
 Arlington, VA 22209

G. ROGER KING
Counsel of Record
 HR POLICY ASSOCIATION
 1001 19th St. N., Suite 1002
 Arlington, VA 22209
 (614) 582-3939
 rking@hrpolicy.org

GREGORY HOFF
 HR POLICY ASSOCIATION
 1001 19th St. N., Suite 1002
 Arlington, VA 22209

Counsel for Amicus Curiae