

No. 11-345

IN THE
Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

**BRIEF FOR THE NEW YORK STATE BAR
ASSOCIATION AS *AMICUS CURIAE* IN
SUPPORT OF RESPONDENTS**

NEW YORK STATE
BAR ASSOCIATION
SEYMOUR W. JAMES, JR.,
PRESIDENT
1 Elk Street
Albany, NY 12207
(518) 463-3200

NIXON PEABODY LLP
DAVID M. SCHRAVER
Counsel of Record
DAVID H. TENNANT
1300 Clinton Square
Rochester, NY 14604
(585) 263-1000
dtennant@
nixonpeabody.com

Counsel for Amicus Curiae



TABLE OF CONTENTS

	<i>Page</i>
TABLE OF CONTENTS.....	i
TABLE OF CITED AUTHORITIES	ii
INTEREST OF <i>AMICUS CURIAE</i>	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
THE GOVERNMENT HAS A COMPELLING INTEREST IN PROMOTING DIVERSITY IN THE LEGAL PROFESSION	3
1. To Remain Effective The Legal Profession Must Reflect The Changing Demographics Of The United States’ Population	3
2. The National Focus On the Diversity “Pipeline”	13
3. The NYSBA’s Commitment To Increasing Diversity In The Profession.....	16
4. The NYSBA’s New State-wide Diversity “Pipeline” Initiative	21
CONCLUSION	23

TABLE OF CITED AUTHORITIES

	<i>Page</i>
CONSTITUTIONAL PROVISIONS	
U.S. Const., Preamble.	2
FEDERAL CASES	
<i>Grutter v. Bollinger</i> , 539 U.S. 306 (2003)	<i>passim</i>
OTHER AUTHORITIES	
<i>A Disturbing Trend in Law School Admissions</i> , at http://blogs.law.columbia.edu/salt/	12, 13
<i>A Major Concern: The Shortage of Minority Lawyers – NYSBA President Heads Committee to Seek Solutions</i> (The Metropolitan Corporate Counsel, Inc. Vol. 13 No. 3) (March 2005), at http:// www.ebglaw.com/files/7342_article_1329.pdf	17
ABA <i>Perceptions of Justice Project, A Dialogue on Race, Ethnicity and the Courts</i> , at http:// www.americanbar.org/content/dam/aba/ administrative/lawyers_conference/2011_poj_ writtenreport.authcheckdam.pdf	7, 8
ABA Report and Recommendations, <i>The Next Steps, Diversity in the Legal Profession</i> (April 2010), at http://www.americanbar.org/ content/dam/aba/administrative/diversity/ next_steps_2011.authcheckdam.pdf	<i>passim</i>

Cited Authorities

	<i>Page</i>
ABAPresidentialAdvisoryCouncilonDiversityinthe Profession, <i>The Critical Need to Further Diversify the Legal Academy & the Legal Profession</i> (October 2005), at http://apps.americanbar.org/op/pipelineconf/acdreport.pdf	7
ABA Press Release, New York State Bar Association and Baton Rouge Bar Foundation Honored with 2012 ABA Partnership Award (August 1, 2012), at http://www.abanow.org/2012/08/new-york-state-bar-association-and-baton-rouge-bar-foundation-honored-with-2012-aba-partnership-awards)	21
ABA House of Delegates Recommendation, adopted August 7-8, 2006, and Report, at http://blogs.law.columbia.edu/salt/files/2009/08/American-Bar-Association.pdf	14
Dennis W. Archer, <i>The Value of Diversity: What the Legal Profession Must Do to Stay Ahead of the Curve</i> , 12 Wash. U.J.L. & Pol’y 25 (2003) ...	7
Jeffrey S. Passel & D’Vera Cohn, U.S. Population Projections: 2005-2050, Pew Hispanic Center (Feb. 11, 2008), at http://www.pewhispanic.org/files/reports/85.pdf U.S.	5-6

Cited Authorities

	<i>Page</i>
<i>Making a Difference</i> , NYSBA Journal (June 2012)	19
Membership of the 112th Congress: A Profile, CRS 7-5700 (August 1, 2012)	11
Miles to Go 2000: Progress of Minorities in the Legal Profession (ABA Commission on Racial and Ethnic Diversity in the Profession July 2000) Executive Summary at http:// apps.americanbar.org/abastore/products/ books/abstracts/4520014_2005%20 execsumm.pdf	6
<i>Miles to Go in New York: Measuring Racial and Ethnic Diversity Among New York Lawyers</i> (NYSBA Committee on Minorities in the Profession) (September 2007), at http://www.nysba.org/AM/Template. cfm?Section=Committee_on_Minorities_in_ the_Profession_Home&Template=/CM ContentDisplay.cfm&ContentID=12709	4
NYSBA Special Committee on Civil Rights, Steps Towards a More Inclusive New York and America (October 2008), at http://www. nysba.org/Content/NavigationMenu42/ November12008HouseofDelegatesMeeting AgendaItems/FinalCivilRightsAgenda Report.pdf	19

Cited Authorities

	<i>Page</i>
The National Law Journal, <i>Statistics Show No Progress in Federal Court Law Clerk Diversity</i> , May 2, 2012	12
The Washington Post, <i>The Browning of America</i> , May 18, 2012, at http://www.pressdisplay.com/pressdisplay/viewer.aspx	5
William A. Henry III, <i>Beyond the Melting Pot</i> , 135(15), Time Magazine, Apr. 9, 1990	5
Youth Law Day, New York State Bar Association's Special Committee on Youth Outreach, at http://www.nysba.org/AM/PrinterTemplate.cfm?Section=Youth_Law_Day1	17

INTEREST OF *AMICUS CURIAE*

Amicus curiae the New York State Bar Association (“NYSBA”) is the largest voluntary state bar association in the United States with approximately 77,000 members.¹ Among its functions, the NYSBA develops forward-looking policies relevant to the profession and takes positions in litigation (either as party or amicus) concerning matters of interest to its members and the legal profession as a whole. The NYSBA previously has submitted amicus briefs in the Supreme Court of the United States. This amicus brief is limited to highlighting the importance of racial and ethnic diversity within the legal profession and the concomitant need to maintain an adequate flow of diverse students in the undergraduate “pipeline” to fill seats in law schools and ultimately enter the profession. The NYSBA is actively committed to increasing diversity in the legal profession including developing and running undergraduate and high school “pipeline” programs (*see, infra*, at 15-16, 19).²

1. This brief is submitted pursuant to the blanket consent letters from all parties on file with the Court. Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amicus* and its counsel made such a monetary contribution.

2. Counsel for *amicus* are actively involved in the NYSBA and its diversity programming. Seymour W. James, Jr. is President of the NYSBA. David M. Schrauer is President-Elect of the NYSBA and will begin service as the 116th president of the Association on June 1, 2013. David H. Tennant is the immediate past chair of the NYSBA’s Commercial and Federal Litigation Section, which is a leader in diversity programming for the Association (described herein).

The American Bar Association (“ABA”) has bestowed its Partnership Award on the NYSBA in recognition of its continuing diversity initiatives. *See, infra*, at 19.

In advocating for the compelling government interest in promoting diversity in the legal profession, the NYSBA takes no position on whether the specific steps taken by the University of Texas fall within the educational interests in student body diversity endorsed in *Grutter v. Bollinger*, 539 U.S. 306 (2003).

SUMMARY OF ARGUMENT

The government has a compelling interest in promoting diversity in the legal profession because of the central role that lawyers, judges and legal institutions play in resolving civil and criminal matters and maintaining social order. The Framers of the Constitution understood the essential role that lawyers and judges would play in carrying out the founders’ stated mission “to establish justice, insure domestic tranquility . . . and secure the blessings of liberty to ourselves and our posterity.” U.S. Const. (Preamble). A commitment to diversity in the legal profession recognizes the undeniable fact that the demographics of the United States’ population are changing—becoming more diverse racially and ethnically—and that institutions in the United States will lose credibility and effectiveness if they fail to adapt to these changes. For the legal profession, the consequences of failing to become more diverse in a “majority-minority” America are profound. The legitimacy and effectiveness of our civil and criminal justice systems will be undermined if the profession does not reflect the changing demographics. The lack of diversity among lawyers and judges today fuels distrust of the legal system in many minority communities. Allowing

such underrepresentation to persist while the society at large becomes increasingly diverse is untenable. It will lead to a stark racial divide that will only strengthen the distrust and disaffection among people of color and leave the majority of Americans to view the legal profession as an out-of-touch holdover from an earlier era. For the legal profession to continue serving its vital mission in a “majority-minority” America, colleges must graduate in substantial numbers qualified and talented diverse candidates for the nation’s law schools. That is the only way the legal profession can become meaningfully diverse and earn the confidence of an increasingly diverse nation.

ARGUMENT

THE GOVERNMENT HAS A COMPELLING INTEREST IN PROMOTING DIVERSITY IN THE LEGAL PROFESSION.

1. To Remain Effective The Legal Profession Must Reflect The Changing Demographics Of The United States’ Population.

The legal profession is overwhelmingly white in a country that is increasingly diverse. As of the 2000 Census, more than 90% of attorneys in the United States were white (not Hispanic). *See* ABA Report and Recommendations, *The Next Steps, Diversity in the Legal Profession* (April 2010) (“ABA 2010 Report”) at 12, at http://www.americanbar.org/content/dam/aba/administrative/diversity/next_steps_2011.authcheckdam.pdf.³ Minority attorneys made up less than 10 percent

3. This brief relies on the ABA 2010 Report and other recent bar studies of diversity within the legal profession as the

of the profession. *Id.* This pattern held true in New York in 2000. Even though New York has a more diverse population than most states, and the NYSBA has taken aggressive steps to increase diversity in the profession (*infra*, at 15), the bar in New York remained 89% white. *Miles to Go in New York: Measuring Racial and Ethnic Diversity Among New York Lawyers* (NYSBA Committee on Minorities in the Profession)(September 2007) (“NYSBA Report”) at 6, at http://www.nysba.org/AM/Template.cfm?Section=Committee_on_Minorities_in_the_Profession_Home&Template=/CM/ContentDisplay.cfm&ContentID=12709.⁴

The lack of diversity in the legal profession nationally and in New York stands in sharp contrast to “the browning” of the general population of the United States from 1970 to 2009.⁵

best measure of the limited inroads into the profession made by minorities, with the reports culling data from the 2000 Census. Comparable bar studies of the 2010 Census data are not yet available. As documented outside the Census process, minority entry into the profession over the past decade has been very limited. *See, infra*, at 10-11. Membership in the NYSBA remained 88% white in 2012. *See, infra*, at 18.

4. The 11 percent of attorneys “of color” in New York in 2000 were broken down as follows: 4.2 percent African American, 3.3 percent Hispanic, 3.4 percent Asian American and .1 percent Native American. NYSBA Report, at 6.

5. The phrase “browning of America” (often attributed incorrectly to author Richard Rodriguez) “has been used regularly to describe an increase in the mixing of cultural, racial, and ethnic identities in the United States in the past century. . . The phrase is commonly applied to the current demographic shift towards a higher proportion of minorities in the total population in the

	1970	1980	2000	2009
Whites	87.4	83.2	70	66.1
Afr. Am	11.1	11.7	12.3	12.8
Am. Ind	.4	.6	1.5	1
Asian Am.	.8	1.5	4.3	4.4
Hisp.	4.5	6.5	12.5	15.1
Other	.3	3		1.6

[Table Reproduced from ABA 2010 Report at 10.]

Given these population trends, the United States is projected to be less than 50% white in 25 years or so. *See* <http://inamerica.blogs.cnn.com/2012/05/17/census-2011-data-confirm-trend-of-population-diversity> (“If the trend continues, . . . several decades from now, possibly in the late 2030s or early 2040s, the U.S. population will become less than 50% non-Hispanic white”). By 2050, the United States’ population is projected to be 47 percent non-Hispanic white; 29 percent Hispanic; 13 percent African American; 9 percent Asian American and 1 percent Native American. Jeffrey S. Passel & D’Vera Cohn, U.S. Population Projections: 2005-2050, Pew Hispanic Center

United States. It can be used neutrally as a name for the current demographic shift in the United States . . .” http://en.wikipedia.org/wiki/Richard_Rodriguez. *See, e.g.*, The Washington Post, *The Browning of America*, May 18, 2012, at <http://www.pressdisplay.com/pressdisplay/viewer.aspx>; William A. Henry III, *Beyond the Melting Pot*, 135(15), Time Magazine, Apr.9, 1990 (“In the 21st century—and that’s not far off— racial and ethnic groups in the U.S. will outnumber whites for the first time. The “browning of America” will alter everything in society. . .”).

(Feb. 11, 2008), at <http://www.pewhispanic.org/files/reports/85.pdf> U.S., at 9-10.⁶

African-Americans and Hispanics remain seriously underrepresented in the legal profession relative not only to their numbers in the general population but also to their participation rates in other professions. While minorities comprised just under 10 percent of all lawyers in the United States in 2000, minorities represented 20.8 percent of accountants, 23.1 percent of computer scientists and 24.6 percent of physicians. NYSBA Report at 6.⁷ The very slow rate of entry into the legal profession by traditionally underrepresented minority populations coupled with rapid increases in racial and ethnic diversity in the general population will lead to a serious demographic disjuncture with potentially serious consequences for the

6. The demographic changes are dramatic. The population of the United States is projected to increase from 296 million in 2005 to 438 million in 2050, an increase of 48 percent. *See* Pew Report at 1, 8. During that same period, it is estimated that the Hispanic population will triple in size from 42 to 128 million; the Asian-American population will nearly triple in size from 14 to 41 million; the African-American population will increase by a little more than half, from 38 to 59 million; and the white (not Hispanic) population will grow less than 5 percent, increasing from 199 to 207 million. *Id.* at 9-10.

7. An ABA study confirms that “minority representation in the legal profession is significantly lower than in most other professions, with only dentistry and natural science demonstrating worse records.” *See Miles to Go 2000: Progress of Minorities in the Legal Profession* (ABA Commission on Racial and Ethnic Diversity in the Profession July 2000) Executive Summary at http://apps.americanbar.org/abastore/products/books/abstracts/4520014_2005%20execsumm.pdf.

administration of justice. Former ABA President (and former Mayor of Detroit and Michigan Supreme Court Justice) Dennis Archer observed:

Too often, where white people see justice in our legal system, people of color see justice short-changed. When you recognize that in the United States, it is the ability to petition our courts for fairness that keeps people from seeking justice in the streets then you understand that diversity in the legal profession is critical for democracy to survive.

ABA Presidential Advisory Council on Diversity in the Profession, *The Critical Need to Further Diversify the Legal Academy & the Legal Profession* (October 2005), at <http://apps.americanbar.org/op/pipelineconf/acdreport.pdf>.⁸

8. Dennis Archer was the first lawyer of color to lead the American Bar Association in its 125-year history and remains an outspoken advocate of diversity in the legal profession. See Dennis W. Archer, *The Value of Diversity: What the Legal Profession Must Do to Stay Ahead of the Curve*, 12 Wash. U.J.L. & Pol'y 25 (2003); *id.* at 27 (“What we need are more lawyers of color. We need them as judges in all jurisdictions. We need them as law clerks, law professors, general counsel, and partners in large law firms.”) ABA President Carolyn B. Lamm (ABA Report at 3): “we are committed to see a bench that reflects our population.” Increasing racial and ethnic diversity among lawyers and judges will help to address differing perceptions of justice in minority communities. ABA *Perceptions of Justice Project, A Dialogue on Race, Ethnicity and the Courts*, at http://www.americanbar.org/content/dam/aba/administrative/lawyers_conference/2011_poj_writtenreport.authcheckdam.pdf The ABA convened a series of town hall meetings between 2009 and 2011 to identify

Justice Sandra Day O'Connor, writing for the Court in *Grutter v Bollinger*, 539 U.S. 306 (2003), recognized the compelling government interest in educating a racially and ethnically diverse student body to enter the legal profession:

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 heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training.

* * *

Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training necessary to succeed in America.

539 U.S. at 332-333.

and document the perceptions of justice across racial and ethnic groups. At the April 7, 2009 symposium, held at SMU Dedman School of Law, speakers “shared statistics demonstrating that people of color have a disturbingly low level of confidence in our justice system and are convinced that color blind and fair justice does not exist.” *Id.* at 3. The ABA is now developing strategies to address the identified concerns. *Id.* at 1. Increasing the number of persons of color working in the justice system is widely viewed as an essential step. *Id.* at 5, 7, 9.

It is critical to the legal profession—and to society—to attract more minorities to law school, to “feed the pipeline.” This is not a cosmetic concern. It goes to ensuring the legitimacy and trustworthiness of the legal institutions we prize as lawyers and judges. We need to be more diverse in a more diverse society to have those institutions accepted, respected, valued and trusted – indeed to remain relevant and useful to a majority of the people who live and work here, own homes, run businesses, elect judges and political leaders, serve on juries and otherwise exercise rights as citizens. If the legal profession is not broadly reflective of that multi-cultural society, it cannot help but be viewed as “out of touch” by members of that society. In that case, the value of legal pronouncements, whether from courts or other legal institutions, necessarily will carry less weight.

The need for a racially and ethnically diverse bar—to be responsive to and accepted by the diverse members of society who are the consumers of the legal system—finds support in the previously recognized need for a diverse officer corps to lead the American military. As detailed in the consolidated amicus brief filed on behalf of certain former senior military officers in *Grutter*⁹ (cited at length in the *Grutter* opinion)¹⁰, in 2003 more than 31% of service men and women were African American or Hispanic (and another 5% Asian American or Native American) (Becton Amicus Br. at 4)—reflecting current general population demographics. The amicus brief explained that an effective military requires a diverse officer corps

9. Consolidated Brief of Lt. General Julius W Becton, Jr. et al., No. 02-241, 02-516, February 19, 2003 (Virginia A Seitz, Sidley & Austin, Counsel of Record) (“Becton Amicus Brief”).

10. *Grutter*, 539 U.S. at 331 (citing to pages 5 and 29 of Becton Brief).

to lead diverse soldiers. *Id.* at 7.¹¹ By increasing racial and ethnic diversity among the officer corps, the military was able to reduce racial polarization, perceptions of discrimination and disciplinary problems. *Id.* at 5-7. The Becton Amicus Brief directly identified the need for race-conscious admissions policies at the service academies and other colleges to turn out in numbers talented and qualified officers “of color.” *Id.* at 6 (“The military must be permitted to train and educate a diverse officer corps to further our compelling interest in an effective military. . . to expand the pool of highly qualified minority candidates in a variety of race-conscious ways.”).

In a similar vein, increasing the diversity of lawyers and judges will help legal institutions to be more responsive to minority concerns and to be viewed more favorably by diverse communities, and thereby reduce the significant alienation from the legal system felt by many people of color. Judicial pronouncements will be met with greater acceptance and less suspicion, and the resolution of legal disputes, both civil and criminal, will be aided. *See Grutter*, 506 U.S. at 332-333; Becton Amicus Br. at 9 (noting that “broad access to the education that leads to leadership roles is essential to public confidence in the fairness and integrity of public institutions, and their ability to perform their vital functions and missions.”).¹²

11. As of February 2003 the officers corps was 81% white (with 8.8% African-American, 4% Hispanic, 3.2% Asian-American and .6% Native American). Becton Amicus Br. at 7.

12. The ABA Report (April 2010) identified four rationales for creating greater diversity in the legal profession:

The legal profession must be permitted to train and educate diverse law students to further the mission of the legal system as well as to produce diversity among the many political and business leaders who hold JD degrees.¹³

-
- Democratic Rationale: Lawyers and judges have a unique responsibility for sustaining a political system with broad participation by all of its citizens. A diverse bar and bench create greater trust in mechanisms of government and the rule of law.
 - The Leadership Rationale: Individuals with law degrees often possess the communication and interpersonal skills and the social networks to rise into civil leadership positions both in and out of politics. Justice Sandra Day O'Connor recognized this when she noted in *Grutter v Bollinger* that law schools serve as the training ground for such leadership and therefore access to the profession must be inclusive.
 - The Demographic Rationale: ... With respect to the nation's racial/ethnic populations, the Census Bureau projects that by 2042 the United States will be a 'majority minority' country.
 - The Business Rationale: Business entities are rapidly responding to the needs of global customers, suppliers and competitors by creating workforces from many backgrounds, perspectives, skill sets and tastes. Ever more frequently, clients expect and sometimes demand lawyers who are culturally and linguistically proficient.

ABA Report at 5, 9-10.

13. In the 112th Congress, "law is the dominantly declared profession of Senators" and is listed by 148 Members of the House. See Membership of the 112th Congress: A Profile, CRS 7-5700 (August 1, 2012).

Broad access to undergraduate education is essential to ensure that an adequate pipeline of qualified and talented diverse applicants exists for law school.

Regrettably, diverse enrollment and graduation rates in U.S. law schools are slipping. While over-all law school enrollment increased dramatically between 1993 and 2008, African-American enrollment and Mexican-American enrollment remained relatively steady (despite improvements in grade point averages and LSAT scores). *A Disturbing Trend in Law School Admissions*, at <http://blogs.law.columbia.edu/salt/>. This has resulted in a 7.5 percent decline in the representation of African-American students entering the class of 2008 and an 11.7 percent drop in Mexican-American students in the same entering class. *Id.*¹⁴

14. In keeping with this documented drop in African Americans entering law school, the legal profession has seen a decline in the number of African Americans serving as federal law clerks. *Statistics Show No Progress in Federal Court Law Clerk Diversity*, The National Law Journal, May 2, 2012 (“The decrease for African American clerks between the fiscal years 2006 and 2010 was most pronounced, with a decline from 3.5 percent of appellate level law clerks in 2006 to 2.4 percent in 2010 . . .”). Clerking provides recent law school graduates with excellent training while expanding employment opportunities. The experience also provides a chance for diverse law clerks to influence their surroundings, whether by having the “judge’s ear” when discussing the court’s work, or by interacting with court staff and counsel. Because of these benefits, the NYSBA sponsors a minority law clerk program that places minority law students in a paid summer position in the chambers of a Justice of the New York State Supreme Court Commercial Division. NYSBA believes the experience will attract minority law students to a career in commercial litigation and spark interest in clerking after graduation.

The relative decline in African-American and Mexican-American enrollment in law school is particularly troubling because the demand for admission has remained steady for 15 years, the quality of the applicant pool has improved, and 3,000 seats have been added for first year students in that period as 24 new ABA-accredited law schools opened. *Id.* Yet these two diverse groups have seen their relative enrollment substantially decline. *Id.* (“Even in real numbers, there are fewer African-American and Mexican-American matriculants in the 2008 class (4,060 combined) than existed in the Fall 1993 class (4,142 combined).”).

2. The National Focus On The Diversity “Pipeline.”

The American Bar Association is supporting pipeline initiatives directed at all levels of education (undergraduate, high school, elementary, and kindergarten) in a broad and deep effort to attract traditionally underrepresented students to the legal profession. The ABA’s Presidential Advisory Council on Diversity in the Profession in 2006 prepared a report and recommendation that endorsed the following pipeline resolutions:

FURTHER RESOLVED, the American Bar Association urges all state, territorial and local bar associations to collaborate with colleges and universities to develop pre-law programs that will increase minority applications to law schools and will increase the readiness of minority applicants for law school.

FURTHER RESOLVED, the American Bar Association urges all states, territorial and local bar associations to collaborate with elementary and secondary schools to develop and support programs that will increase minority applications and will increase the readiness of minority applicants for college.

ABA House of Delegates Recommendation, adopted August 7-8, 2006, and Report (“ABA 2006 Report”), at <http://blogs.law.columbia.edu/salt/files/2009/08/American-Bar-Association.pdf>.

These and related diversity pipeline resolutions were adopted by the ABA House of Delegates based on the Pipeline Diversity Conference sponsored by the ABA and the Law School Admissions Council. ABA 2006 Report at 2. More than seventy bar groups and associations – including the NYSBA – signed on as official cosponsors of the ABA Pipeline Diversity Resolution.¹⁵

15. The co-sponsors (listed at http://www.americanbar.org/groups/diversity/pages/Co_Sponsors.htm) are: Advisory Council on Diversity in the Profession; Kansas Bar Association; American Immigration Lawyers Association; National Association of Women Judges; National Bar Association; Bar Association of Erie County; Association of the Bar of the City of New York; **New York State Bar Association**; The Florida Bar; New Jersey State Bar Association; Section of International Law; San Diego County Bar Association; National Lesbian and Gay Law Association; State Bar of New Mexico; King County Bar Association; Maryland State Bar Association Bar Association of Baltimore City; Section of Taxation Bar Association of San Francisco; Section of Administrative Law and Regulatory Practice; New York County Lawyers Association; Section of Business Law; Senior Lawyers Division; Section of Dispute Resolution; Oregon State Bar; Judicial Division; Tennessee Bar Association; Illinois

The ABA 2010 Report noted an apparent “consensus on the need for the legal profession to help dramatically improve the P-20 (pre-school through advanced degree) pipeline . . . students, lawyers, judges and clients are increasingly involved in pipeline activities, which emphasize law and civic engagement, aim to keep diverse students in school, facilitate the involvement of students’ families, and help all students improve their academic performance to pursue higher education.” *Id.* at 12. The ABA 2010 Report further observed that:

State Bar Association; State Bar of Wisconsin; Los Angeles County Bar Association; Hennepin County Bar Association; Ohio State Bar Association; South Carolina Bar; Dade County Bar Association; Health Law Section; DuPage County Bar Association; Section of Litigation; Section of Intellectual Property Law; Santa Clara County Bar Association; Section of State and Local Government Law; Bar Association of the District of Columbia; Law Student Division; Tort Trial and Insurance Practice Section; Washington State Bar Association; Utah State Bar; Austin Bar Association; Arkansas Bar Association; Kentucky Bar Association; Maricopa County Bar Association; Nashville Bar Association; Louisville Bar Association; Monroe County Bar Association; Pennsylvania State Bar Association; Minnesota State Bar Association; National Association of Women Lawyers; Section of Antitrust Law; Energy Bar Association; Hispanic National Bar Association; State Bar of South Dakota; Commission on Immigration; Massachusetts Bar Association; Section of Real Property Probate and Trust Law; Columbus Bar Association; Council on Legal Education Opportunity Commission on Women in the Profession; Council on Racial and Ethnic Justice; Association of American Law Schools; Commission on Racial and Ethnic Diversity in the Profession; Chicago Council of Lawyers; Section of Labor and Employment Law; Section of Individual Rights and Responsibilities; Young Lawyers Division; San Fernando Valley Bar Association; and National Asian Pacific American Bar Association.

State bars and bar associations are beginning to realize the need for a paradigm shift along the educational pipeline. Diversity programs that ‘take the long view,’ such as law-oriented pipeline programs focused on high school, college and even middle school are following other professions with robust pipeline programs such as math and science curricula developed by engineering schools.”

Id. at 14. *See id.* at 23 (identifying “pipeline” best practices).

3. The NYSBA’s Commitment To Increasing Diversity In The Profession.

The NYSBA has long recognized the need to increase diversity in the legal profession and has taken practical and creative steps to address this critical shortcoming but like many other bar groups is not able to report significant increases in the number of diverse lawyers entering the profession. That remains a core concern and focus of NYSBA’s diversity programming.

The NYSBA formed its first committee on minorities in the profession in 1984, examining concerns about the lack of diversity in the legal profession, especially the absence of traditionally underrepresented groups. That committee—and its successor, the Committee on Diversity and Inclusion—has for more than two decades designed and implemented diversity programs for the NYSBA to benefit its members and the profession. These programs include career development programs in the private sector (e.g., a Minority Hiring and Counsel project to facilitate

referral of legal work from corporations to minority attorneys and firms) and efforts to make the judiciary more diverse. As the result of efforts by the NYSBA and other groups, the state court bench, especially downstate, has become substantially more diverse.¹⁶

In 1993, the State Bar selected its first black president, Archibald Murray, who was born in Barbados. Kenneth G. Standard became the second State Bar President “of color” serving from 2004-2005. President Standard was concerned about the low numbers of African-American law students (especially male) and commissioned a Special Committee on Youth Outreach to identify the causes of and possible responses to the “leakage” in the educational pipeline. *A Major Concern: The Shortage of Minority Lawyers – NYSBA President Heads Committee to Seek Solutions* (The Metropolitan Corporate Counsel, Inc. Vol. 13 No. 3) (March 2005), at http://www.ebglaw.com/files/7342_article_1329.pdf. As a result, the NYSBA developed a new program designed to introduce high school students to law school, including by attending a mock law school class.¹⁷

16. NYSBA Report at 9, Table 6 New York Judges by Race/Ethnicity and Gender (2000) and at 10 (noting 22.8 % minority representation among judges).

17. A description of the NYSBA high school pipeline program (Youth Law Day Program), together with sample agendas, planning timeline and course materials is available on the NYSBA website. See Youth Law Day, New York State Bar Association’s Special Committee on Youth Outreach, at http://www.nysba.org/AM/PrinterTemplate.cfm?Section=Youth_Law_Day1

Also during President Standard's tenure reforms were made to the NYSBA's governance structure to open up leadership opportunities for attorneys of color. The Association's by-laws were amended to increase by two seats the size of its executive committee, going from 24 to 26 members, with those two additional seats dedicated for diverse attorneys. At the same time, the NYSBA also added 12 minority seats to the association's House of Delegates, expanding the number of seats from 283 to 295. In recognition of these efforts, the NYSBA was awarded the ABA's Partnership Award in 2005. *See* <http://www.americanbar.org/content/dam/aba/migrated/barserv/partnership/2005/partner10.authcheckdam.pdf>.

For his work in promoting diversity in the profession, former President Standard in 2011 received the ABA's Life Achievement Award for Excellence in Pipeline Diversity.

The NYSBA's current president Seymour W. James, Jr., is African-American. President James, like his predecessors, has a deep commitment to diversity:

At the State Bar, we know how much we benefit from having diverse perspectives inform our work, and we continue to make our association more inclusive. A long-standing priority of the State Bar has been to ensure that our association reflects the diversity of our profession and our society. We have been making steady progress in that area and through the President's Section Diversity Challenge, our immediate past president Vince Doyle has done an outstanding job continuing

this tradition. I look forward to building upon his work and that of past presidents.

Making a Difference, NYSBA Journal (June 2012) at 5.

In keeping with the State Bar's long-standing commitment to diversity, and the ABA's efforts on the national stage, the NYSBA commissioned a report that comprehensively examined the state of diversity in the legal profession in New York in 2007 (*see* NYSBA Report, *supra*, at 4) and charted in a 2008 report the next steps for the State Bar to pursue.¹⁸ The Executive Committee of the NYSBA adopted a resolution endorsing the 2008 report and its recommendations to bring greater diversity to the profession.

The NYSBA's Commercial and Federal Litigation ("ComFed") Section established in 2006 a significant new diversity initiative designed to attract attorneys of color to NYSBA and the ComFed Section: the Smooth Moves CLE Program and Awards Ceremony. The event offers complimentary CLE programming relevant to career development such as practice development techniques and public sector career opportunities. It also recognizes an esteemed attorney or jurist of color through the presentation of the Section's Honorable George Bundy Smith "Pioneer Award." The Pioneer Award is given each

18. NYSBA Special Committee on Civil Rights, *Steps Towards a More Inclusive New York and America* (October 2008), at <http://www.nysba.org/Content/NavigationMenu42/November12008HouseofDelegatesMeetingAgendaItems/FinalCivilRightsAgendaReport.pdf>.

year to an attorney of color whose career accomplishments exemplify those of the retired New York Court of Appeals judge for whom the award is named: legal excellence, community involvement, and mentoring.¹⁹ Judge Smith was a pioneer in the civil rights movement and devoted 30 years of public service in the New York judiciary, including 14 years as an associate judge of the Court of Appeals. In its six years, the Smooth Moves program has drawn together more than one thousand lawyers and judges of color for networking and career development, and attracted hundreds of new diverse members to the NYSBA.

Through these various diversity initiatives, the membership of the State Bar has become more diverse, with attorneys of color increasing from around 8 percent in 2003 to nearly 12 percent in 2012.

The NYSBA's Immediate Past President Vincent E. Doyle III launched the Section Diversity Challenge in which he personally challenged each of the Association's 25 sections to take concrete steps in 2011-2012 to increase

19. Recipients of the Pioneer Award include Hon. George Bundy Smith himself (who received the inaugural award in 2007); Cesar Perales, the Co-Founder and past President and General Counsel of Latino Justice, who is currently serving in the Cuomo Administration as the Secretary of State for the State of New York; Elaine R. Jones, Director-Counsel Emeritus of the NAACP Legal Defense and Educational Fund; the father-son named partners of the esteemed Manhattan law firm of Kee & Lau-Kee; the Honorable Carmen Beauchamp Ciparick, Associate Judge of the New York Court of Appeals; and the Honorable Samuel L. Green, retired Senior Associate Justice of the New York State Supreme Court Appellate Division, Fourth Department.

diversity in the association and the profession as a whole. The outpouring of ideas from the sections, supported by concrete action plans with both short and long-term goals, earned accolades from the NYSBA leadership—and, in turn, national recognition by the ABA. On August 3, 2012, the ABA presented the ABA’s Partnership Award to the NYSBA for its “substantial and innovative efforts to advance diversity” within the association and broader legal community. *See* ABA Press Release, New York State Bar Association and Baton Rouge Bar Foundation Honored with 2012 ABA Partnership Award (August 1, 2012), at <http://www.abanow.org/2012/08/new-york-state-bar-association-and-baton-rouge-bar-foundation-honored-with-2012-aba-partnership-awards>.

4. The NYSBA’s New State-wide Diversity Pipeline Initiative.

One of the new diversity initiatives that came out of the NYSBA’s Section Diversity Challenge is a state-wide pipeline program aimed at undergraduate students of color. The concept, developed and spearheaded by the NYSBA’s ComFed Section, is to have each law school in New York State reach out to nearby colleges and recruit minority undergraduates to participate in an abbreviated moot court competition at the law school. The competition consists of reading a handful of cases, meeting with an attorney advisor, and participating in a half-day competition consisting of two or three rounds of oral argument. The model is designed to spark interest in law school by exposing undergraduate students to law students, lawyers, judges, and law school admissions staff in a fun and supportive atmosphere with the chance to win cash prizes—and without requiring participants to

make a burdensome time commitment (there is no writing component). The inaugural competition was held at the State University of New York at Buffalo Law School in April 2012, and drew contestants from the undergraduate program at the State University of New York at Buffalo and one other area school. The program was well received by the participating college students, attorney advisors, judges and administrators. The program is now poised to reach additional colleges and junior colleges in the Buffalo area and target an expanded group of students outside pre-law and criminal justice majors—and the Buffalo program will serve as a template for other schools to follow. At least two other law schools in New York are expected to establish similar moot court programs in 2012-2013.

Responsibility for these undergraduate moot court programs is shared among the minority law student organizations at each law school. The NYSBA program is designed to be multi-cultural and attract students of color across the spectrum. Through this and other pipeline efforts the NYSBA strives to attract more diverse students to law school, a goal that remains critical to the future of the profession.

CONCLUSION

The government has a compelling interest in promoting diversity in the legal profession. That can be achieved only if colleges and universities graduate students of color in substantial numbers to fill law school seats. Accordingly, the holding in *Grutter* that racial diversity in law school is a compelling state interest should be re-affirmed in the context of the undergraduate program at issue here, and that aspect of the court of appeals' decision affirmed.

Respectfully submitted,

NEW YORK STATE
BAR ASSOCIATION
SEYMOUR W. JAMES, JR.,
PRESIDENT
1 Elk Street
Albany, NY 12207
(518) 463-3200

NIXON PEABODY LLP
DAVID M. SCHRAVER
Counsel of Record
DAVID H. TENNANT
1300 Clinton Square
Rochester, NY 14604
(585) 263-1000
dtennant@
nixonpeabody.com

Counsel for Amicus Curiae