

August 31, 2018

The Honorable Charles E. Grassley
Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Dianne Feinstein
Ranking Member
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Grassley and Ranking Member Feinstein:

As the Judiciary Committee begins its formal consideration of the nomination of Judge Brett M. Kavanaugh to serve as an Associate Justice of the U.S. Supreme Court, the Committee undoubtedly will begin to probe Judge Kavanaugh's judicial philosophies and views that, if confirmed, would inform his approach to an array of significant issues before the Court. On behalf of the American Council on Education, the major coordinating body for the nation's two-year and four-year public and private colleges and universities, I am writing today to underscore the four decades of judicial deference to higher education institutions' ability to define for themselves, within broad limits, the diversity that will produce the educational benefits they seek for all their students, and to use their admission processes to further that goal. We respectfully ask that the Committee's queries of Judge Kavanaugh include those which will provide clarity regarding the nominee's views on this subject.

Forty years ago, in *Regents of University of California v. Bakke*, the Supreme Court embraced campus diversity as one of the very few "compelling interests" that can justify the government's consideration and use of race. See *Bakke*, 438 U.S. 268, 320 (1978). The Court also noted that "[t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Id.* at 315.

Since then, the Court's precedent has further encouraged and enabled higher education institutions to "assemble a student body that is not just racially diverse, but diverse along all of the qualities valued by the university." *Grutter v. Bollinger*, 539 U.S. 306, 340 (2003); see also *Bakke*, 438 U.S. at 321 (universities must evaluate the "broad range of qualities and experiences that may be considered valuable contributions to student body diversity"). The different forms of student diversity are nearly limitless, incorporating, for example, those who have "lived or traveled widely abroad, are fluent in several languages, have overcome personal adversity and family hardship, have exceptional records of extensive community service, and have had successful careers in other fields." *Grutter*, 539 U.S. at 338. Moreover, campus diversity not only varies between institutions; it is also "multi-dimensional" and layered—flexible enough to allow the same college or graduate school to pursue several of its many different forms. See *Fisher v. University of Texas*, 136 S. Ct. 2198, 2214 (2016) [hereinafter *Fisher II*].

This institutional freedom, enabled by judicial deference and recognition of a compelling interest, has made college campuses the “laboratories for experimentation” that they are. See Fisher II, 136 S. Ct. at 2214 (quoting United States v. Lopez, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring)). It has helped establish and maintain American higher education as the greatest in the world.

The Court has again and again confirmed Bakke’s central ruling. As recently as 2016, the Court reaffirmed the benefits of campus diversity, such as “the destruction of stereotypes, the promotion of cross-racial understanding, the preparation of a student body for an increasingly diverse workforce and society, and the cultivation of a set of leaders with legitimacy in the eyes of the citizenry.” Fisher II, 136 S. Ct. at 2211. And, because the compelling interest at stake is fundamentally educational in nature and requires educational judgment, the Court has continued to permit colleges and universities to pursue the version of diversity that best suits their own mission and goals, including through the limited consideration of race. See Fisher II, 136 S. Ct. at 2214 (a university is free to seek its “own definition of . . . diversity”); Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 792 (2007) (Kennedy, J., concurring in part and concurring in the judgment) (noting that the First Amendment affords universities “particular latitude in defining diversity”).

There are many important benefits that flow to students placed in diverse settings, from better learning outcomes to greater cross-racial understanding that helps to break down stereotypes. All of this ultimately helps produce students well-equipped to navigate a nation more diverse, and a world more interconnected, than ever before. In turn, it helps our nation compete and succeed on the global stage.

As the confirmation process of Judge Kavanaugh proceeds, we respectfully urge you to keep in mind the essential educational benefits of a diverse student body in our institutions of higher education and the Supreme Court’s long established recognition of that principle.

Sincerely,

A handwritten signature in black ink, appearing to read "Ted Mitchell". The signature is written in a cursive, somewhat stylized font.

Ted Mitchell
President

cc: Members of Senate Committee on the Judiciary