No. 02-516

IN THE

Supreme Court of the United States

JENNIFER GRATZ and PATRICK HAMACHER,
Petitioners,

v.

LEE BOLLINGER, JAMES J. DUDERSTADT, and
THE BOARD OF REGENTS OF THE
UNIVERSITY OF MICHIGAN,

and

EBONY PATTERSON, *et al.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit**

BRIEF OF MEMBERS OF THE UNITED STATES CONGRESS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Does the University of Michigan's use of racial preferences in undergraduate admissions violate the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d), or 42 U.S.C. § 1981?

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INTEREST OF *AMICI CURIAE*

Amici curiae are a group comprising 60 members of the United States Congress,[1] representing 24 States and two Territories, and an array of racial and ethnic diversity. *Amici*

[1] A list of the individual members of Congress is included in the Appendix. Counsel for the Congressional *Amici* were the sole authors of this brief. No person or entity other than the *Amici* made a financial contribution to this brief. Pursuant to Supreme Court Rule 37.2(3)(a), all parties have consented to the filing of this brief. These consents were filed with this Court in December 2002.

have devoted their professional lives to public service and to assuring that all citizens have an equal opportunity to realize their individual and collective potential.

Amici have a vital interest here because of their constitutional role in enacting legislation to enhance and support opportunity for all students in primary, secondary, and post-secondary education. "Because a well-educated populace is critical to the Nation's political and economic well-being and national security, the Federal Government has a substantial interest in ensuring that States provide a high-quality education by ensuring that all children have access to the fundamentals of educational opportunity . . . to enable the children to succeed academically and in life." Student Bill of Rights, H.R. 236, 108th Cong. § 3(a)(16) (2003); *see also* Student Bill of Rights, S. 2912, H.R. 5346, 107th Cong. (2002). The leadership role of the Federal Government in education "has been a particularly important one during times of national crisis. Whether as a response to the Civil War, the Great Depression, a world war, or economic conditions, or through efforts such as Lyndon Johnson's 'War on Poverty,' education has always been a key part of the solution."[2]

Accordingly, ensuring that all Americans are educated equally to high standards is a long-standing and necessary focus of Congress. Stark disparities in the opportunity to realize this goal, however, remain a reality for growing numbers of minority children. *Id.* Indeed, President Bush's signature K-12 education bill, "No Child Left Behind," has a stated purpose of "closing the achievement gap between high- and low-performing children, especially the achievement gaps between minority and nonminority students, and between disadvantaged children and their more advantaged peers." 20 U.S.C. § 6301(3).

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[2] Richard W. Riley, *The Role of the Federal Government in Education —Supporting a National Desire for Support for State and Local Education*, 17 St. Louis U. Pub. L. Rev. 29, 40 (1997).

Amici have a significant and historic duty to eliminate the racial discrimination that impedes educational equity and equality at all levels. In their focus on primary and secondary public education, *Amici* put before the Court the argument that there is a necessary link between K-12 education and the ability of higher education leaders to meet their core missions, including that of diversity.

For these historical and institutional reasons, *Amici* urge this Court not to overturn the seminal holding in *Regents Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) that diversity is a compelling interest, and that educators may establish narrowly tailored programs to achieve that goal. Therefore, the holdings of the Court of Appeals for the Sixth Circuit should be affirmed.

SUMMARY OF ARGUMENT

Fundamentally, education is the foundation of social and economic advancement in America. American parents rightly hope that no matter their own station in life, their children can realize their dreams, so long as they start out in life with a quality education. However, Congress and the courts have long known that minority children in school have faced inappropriate and unconstitutional barriers to achieving that goal.

Certainly, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), and the social movements that followed have produced great strides in eliminating State-sponsored or -supported segregation in schools. But we have much work yet to do. The same discrimination and disparate opportunity the Supreme Court found unconstitutional fifty years ago continues to deprive many minority children today of the valuable educational opportunities available to their white counterparts.

The question before this Court is whether the University of Michigan's use of racial preferences in undergraduate admissions violates the Equal Protection Clause of the

Fourteenth Amendment, Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d), or 42 U.S.C. § 1981. *Amici* urge this Court to answer that question in the negative.

Whether diversity in education remains a permissible and compelling government interest must be addressed in the context of the entire educational continuum. Because K-12 public education in many instances fails currently to provide quality educational opportunity to minority school children in increasing numbers, the achievement of diversity in higher education requires that admissions programs continue to take race and ethnicity into account. It is entirely right, constitutional, and lawful that they do so. The racial and ethnic disparities that presently exist in K-12 public education and the compelling interest that we all have in diversity as a means of promoting both quality education and democracy make such programs what this Court has held a "legitimate . . . use[ ] of race in governmental decision-making." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 228 (1995).

ARGUMENT

Under the laws of the United States, educators may consider race and ethnicity along with other factors when making admissions decisions. Courts must evaluate such programs to ensure they are narrowly tailored to serve a compelling State interest. *Id.* at 227. This Court has held, however, that strict scrutiny may be "strict in theory, but [is not] fatal in fact." *Id.* at 237. "The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." *Id.* Nowhere is the government's response to persistent racial inequalities more important and more necessary than in the area of education.

I. THE COURT MUST CONSIDER THE NEXUS BETWEEN K-12 EDUCATIONAL OPPORTUNITY AND DIVERSITY IN HIGHER EDUCATION.

A. Minority Children Face Persistent, Pernicious Inequities in Primary and Secondary Public Education.

Amici begin from a fundamental proposition of both law and policy: a quality education available to all students on the same terms is essential to the survival and prosperity of our country. "It is the very foundation of good citizenship . . . . [I]t is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Brown, supra*, 347 U.S. at 493. In *Brown*, this Court concluded that, by its very nature, a "separate" education for minority students can never be "equal" to what the majority receives. *Id.* at 494.

The discrimination that precipitated this landmark holding in 1954 continues to plague students at the K-12 level and has resulted in an ever-widening gap in educational opportunity and achievement, especially for low-income, urban, minority students. According to the World Economic Forum's Global Competitiveness Report 2001-2002, the United States ranks last among the developed countries in the difference in the quality of schools available to rich and poor students,[3] and studies prove that the children suffering in poor schools are much more likely to be minorities.[4]

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[3] World Economic Forum, *The Global Competitiveness Report 2001-2002* at 394 (2002).

[4] National Research Council, *Making Money Matter: Financing America's Schools* 19 (1999); U.S. General Accounting Office, *Title I Program: Stronger Accountability Needed for Performance of Disadvantaged Students* 18 (2000) (reporting that schools with poverty rates *of*

The right to receive a public education is fundamental.[5] Millions of students in grades K-12 nationwide are currently being denied this right, however, in large measure because of inequitable systems of financing schools at the State and local levels.[6]

Public school systems nationwide are financed through a hodgepodge of property-related tax schemes whose lack of parity inexorably engenders inequality in educational opportunities.[7] The race of the schoolchildren in a district

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50 percent or greater are more likely to be elementary schools located in urban areas, and to have a higher percentage of minority students).

[5] *See Brown*, *supra*, 347 U.S. at 493 ("Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."). *See* Representative Chaka Fattah, *Revisiting the Federal Role*, Education Week, Apr. 22, 1998 ("Equal access to widespread systems of public education are the very cornerstone of our democracy.").

[6] *See also,* Rochelle L. Stanfield, *Making Money Matter*, National Journal, May 23, 1998, at 1176 ("The highly charged school desegregation lawsuits over the past 44 years have involved many racial and philosophical issues, but ultimately have come down to money: whether minority children in low-income neighborhoods would have access to the same educational opportunities as white youngsters in middle-class communities."); *The Way America Pays for Public Schools,* Daily Education News, June 19, 1998, at 9 ("The disparities in many states are so great that some communities have twice as much money or more to spend per pupil as nearby towns.").

[7] *See* Jill Zuckman, *The Next Education Crisis: Equalizing School Funds*, Congressional Quarterly, Mar. 27, 1993, at 753 ("The financing of public education varies from town to town, each with its own local

plays a significant role in the educational resources made available to it: children of color living in impoverished areas in America bear the principal brunt of the widespread inequities in school financing systems.

That inequalities exist among financing schemes is an axiom accepted across party lines by liberals and conservatives alike. *See, e.g.*, George F. Will, *Straight Talk From Arizona*, Newsweek, Apr. 17, 2000, at 76. Studies confirm that the critical variable is race, not economic advantage. School districts that are heavily populated with impoverished minority children receive fewer State resources for educational uses than those districts where white children live in poverty.[8] For example, a 2000 report by the Council of the Great City Schools found that the City of New York

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customs and methods for raising money. The one common denominator is the property tax: the nicer the neighborhood, the more money that is likely to be raised and spent on schools. The poorer neighborhoods may even tax themselves at a higher rate, but because their property values are so much lower, the money they raise never equals the amount raised in wealthier towns. Furthermore, some school districts include a lucrative source of funds: commercial property, such as shopping centers and factories. In Ohio, for example, some school districts spend nine times as much money per student as others. 'The Ohio legislature has no responsibility to any child in that state to explain why it gives $22,000 to one and $2,500 to another,' said Kern Alexander, an education professor who specializes in school finance at Virginia Polytechnic Institute in Blackburg.'").

[8] *See, e.g.*, Council of the Great City Schools, *Adequate State Financing of Urban Schools: An Analysis of State Funding of the New York City Public Schools* 43 (2000)("In other words, [New York's] formula for distributing school aid over-adjusts for poverty in school districts with few students of color and under-adjusts in school districts with many. This means that poverty among white children in the State is being more adequately compensated through the school aid formula than poverty among children of color. Conversely, the lack of resources among students of color in New York State is being under-compensated in the school aid formula.").

distributes more educational aid funds in poor school districts where white students predominate than in districts heavily populated by minority children.[9] Educational inequality is most significant in inner-city communities that have been the subject of unsuccessful court-ordered desegregation in the past. The resulting inadequate education provided to children in such areas is further exacerbated by white flight from those neighborhoods.[10]

The legal framework for analyzing claims of disparity in educational funding legislation, of course, was established by this Court's ruling in *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973). There, the Court

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[9] *Id.* at 49 ("New York State's distribution of education aid undercompensates for the poverty of minority children and undermines student achievement.") (emphasis in original). Widespread perception of inequality in this area has spurred civic action leading to scores of litigation.

> [A] growing number of civic and parent coalitions rightfully are asking the courts to intervene to force states to distribute the money they now get more fairly among students. They want the courts to determine the legality of a skewed formula that works like this in many school districts: the poorer and browner the children, the poorer the condition of their schools, availability of certified teachers and resources. They say these inequities lead to the deficient academic performances that are the hallmark of such schools.

Saundra Smokes, *Fix Disparities Among Our Schools*, USA Today, Apr. 28, 2000, at 17A.

[10] "Throughout the 1960s and '70s, some communities resisted court-ordered desegregation, while others attempted to comply with programs such as busing and magnet schools. But simultaneously, whites fled cities in droves, along with businesses, jobs and tax revenues that fund public schools. The cities they left behind became increasingly poor, increasingly minority—and so did the schools." *Unequal Education: Better Teacher Training and Equitable Funding Could Improve Public Schools for All Children*, The Philadelphia Inquirer, Jan. 18, 1999, at A12.

held that educational finance reform must come from the legislative branch, not the judiciary. *San Antonio*, 411 U.S. at 58-59.

Since *Rodriguez*, however, the highest courts of at least 29 States have nonetheless ruled on the inequities of school finance legislation.[11] The Supreme Court of New Jersey has struck down five separate legislative schemes.[12] School finance measures have been attacked as unconstitutional in the overwhelming majority of the States over the past 30 years,[13] with State financing systems being struck down by numerous State supreme courts,[14] and in at least one case, the highest State court declared the entire elementary and secondary school system of the State—not simply its financing scheme—unconstitutional.[15]

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[11] Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. Chi. L. Rev. 131, 194 (1995).

[12] *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990). *See also* Sherry, *supra*, at 194; Jerry Gray, *Ruling Puts New Jersey in Eye of School Financing Issue*, N.Y. Times, Sept. 2, 1993, at B6.

[13] "Since the 1970s, lawsuits attacking inequitable school finance systems have been filed in 43 states; so far, 16 state courts (but not Pennsylvania's) have ruled unconstitutional their state's system of funding public schools. But the glacial pace of change—such as in New Jersey, which took 28 years to implement comprehensive remedies—shows benign neglect has a longer life than proactive solutions." *Unequal Education, supra* at A12.

[14] Karen Swenson, *School Finance Reform Litigation: Why Are Some State Supreme Courts Activist And Others Restrained?* 63 Alb. L. Rev. 1147, 1181 (2000)(citing cases in which courts struck down school funding schemes in Arizona, Arkansas, California, Connecticut, Kentucky, Massachusetts, Montana, New Jersey, New Hampshire, Ohio, Tennessee, Texas, Vermont, Washington, West Virginia, and Wyoming).

[15] In perhaps the most dramatic school reform and finance case, *Rose v. Council for Better Educ.*, 790 S.W.2d 186 (Ky. 1989), the Kentucky Supreme Court found the Commonwealth's entire elementary and secondary school system unconstitutional. *Id.* at 215 ("Lest there be any

The findings by the courts in education finance litigation highlight the real costs of unequal funding.[16] For example, the New Jersey Supreme Court's decision in *Abbott v. Burke*[17] revealed that in elementary school in Paterson, New Jersey, lunch was served to children in the boiler room area of the school basement. A space formerly used as a bathroom was used for remedial classes. A coal bin was converted to a classroom in another school, as were closets and storage rooms. In East Orange, New Jersey, one elementary school lacked a cafeteria; the children used the first floor hallway to eat lunch in shifts. In another school, built in Jersey City in 1900, the library was a converted cloakroom. Accordingly, the *Abbott* court held the State was not providing a constitutionally adequate education to all of its children.[18]

Minority students will remain at a disadvantage so long as State legislatures support financing measures for education that fail to provide equal opportunities for all. "[I]t is grossly unfair to expect all students to reach the same finish line

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doubt, the result of our decision is that Kentucky's entire system of common schools is unconstitutional."). *Id.*

[16] In *Horton v. Meskill*, 376 A.2d 359 (Conn. 1977), the Connecticut Supreme Court found a "direct relationship between per pupil school expenditures and the breadth and quality of educational programs." The Wyoming Supreme Court, in *Washakie County Sch. Dist. Number One v. Herschler*, 606 P.2d 310, 334 (Wyo. 1980), expressly rejected all decisions disputing the relationship between per pupil school expenditures and quality of education. Numerous State courts have analyzed the correlation between educational opportunity and funding, with at least thirteen State supreme courts recognizing the correlation, while four did not. All but two of the thirteen States ruled in favor of plaintiffs attacking school funding schemes. John Dayton, *Correlating Expenditures and Educational Opportunity in School Funding Litigation: The Judicial Perspectives*, 19 J. Educ. Fin. 167, 182 (1993).

[17] *Abbott, supra*, 575 A.2d 359.

[18] *Id.*

when some are given far more help than others to get there."[19] Worse, even in the cases where State school finance systems have been held unconstitutional, remedial efforts can take years to implement—in some cases nearly 30 years[20]—and generations of students of color fail to advance in life because their beginnings were stunted by a lack of opportunity in education.

Certainly, *Amici* do not ask this Court to cause a more equitable means of funding education at the local school level. But it is clear, as demonstrated below, that a child who is schooled in the type of settings outlined above, with their attendant dearth of resources, as recognized and struck down by a growing number of State courts, stands little chance of competing for a space in an academic institution such as the University of Michigan. Overwhelmingly, the students who are most significantly disadvantaged are of racial and ethnic minority backgrounds. It is certainly, therefore, within the proper role of higher education administrators to do what they can to right these imbalances by taking students' race into account in the admissions process. This Court should not impede those efforts.

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[19] Zuckman, *supra*, at 749-50; *see also Rose, supra*, 790 S.W.2d at 197 ("The achievement test scores in the poorer districts are lower than those in the richer districts and expert opinion clearly established that there is a correlation between those scores and the wealth of the district. Student-teacher ratios are higher in the poorer districts. Moreover, although Kentucky's per capita income is low, it makes an even lower per capita effort to support the common schools. Students in property poor districts receive inadequate and inferior educational opportunities as compared to those offered to those students in the more affluent districts.").

[20] *Id.*

B. Congress Has Long Recognized Educational Disparities, Especially in K-12 Education, That Are Correlated to Race.

Since 1965, Congress has recognized the disparities that fall disproportionately upon minority and disadvantaged students and has sought to assist public schools with additional funding. Title I of the nation's education law specifically targets funding to States for low-income and at-risk children. 20 U.S.C. § 6301 *et seq.* This non-discretionary program seeks to "clos[e] the achievement gap between high- and low-performing children, especially the achievement gaps between minority and nonminority students, and between disadvantaged children and their more advantaged peers." *Id.* at § 6301(3). In FY2002, Title I grants to states totaled $10.35 billion, [21] and this year, Congress authorized $11.75 billion.[22]

As implemented, Title I itself demonstrates that inequalities in K-12 education disproportionately impact minority children. Even though this program targets disadvantaged students across all races and ethnicities, statistics show that Title I funds disproportionately serve minority students.[23] For example, in school year 1999-2000, 27 percent of Title I students were black, non-Hispanic; 31 percent were Hispanic, and 7 percent were from other racial

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[21] Memorandum from the Congressional Research Service to the Honorable Chaka Fattah, *Consideration of Minority Status in the Distribution of Federal Funding for Elementary and Secondary Education* 2 (2003) (hereinafter "CRS Memorandum") (on file with author).

[22] H.J.Res. 2, 108th Cong. (2003) (presented to the President).

[23] CRS Memorandum, *supra*, at 2.

and ethnic minorities.[24] Only 35 percent of Title I students nationwide were white, non-minority.[25]

Congress continues its efforts to address the disparities and to help ensure that all of America's children receive a quality education. However, *Amici* and their colleagues recognize the enormity of this challenge and well know that the playing field in K-12 education is far from level:

> Historically, many low- or moderate-income students or students who are otherwise disadvantaged or are disabled have needed extra assistance and support to acquire the basics to pay for college. Often the communities that serve these children have the least resources. As a General Accounting Office (GAO) study demonstrates, the U.S. Department of Education's funds are targeted to students of greatest need. While states try to provide the foundation funding for public schools in equitable fashion, generally at any given time about one-third to one-half of schools are in state courts because their state funding system is inequitable.[26]

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[24] U.S. Department of Education, Office of Elementary and Secondary Education, Planning and Evaluation Services, *State ESEA Title I Participation Information for 1999-2000: Final Summary Report* 9 (2002).

[25] *Id.*

[26] Riley, *The Role of the Federal Government in Education*, *supra*, at 37 (omitting footnote).

II. RACIAL INEQUITIES IN K-12 REQUIRE COLLEGES AND UNIVERSITIES TO TAKE RACE AND ETHNICITY INTO ACCOUNT IN THE ADMISSIONS PROCESS.

A. Disparate Educational Opportunities in K-12 Directly Impact Higher Education Admissions.

Many colleges and universities take race and ethnicity into account to ensure that their student bodies reflect the diversity needed to provide their students with a quality education that prepares them for complete participation in our democracy. Currently, and particularly in consideration of the challenges that continue to plague our college preparatory institutions, it is not possible to achieve this goal without taking race and ethnicity into account.

In its September 2001 study, *Paving the Way to Post-secondary Education: K-12 Intervention Programs for Underrepresented Youth,* the U.S. Department of Education's National Center for Education Statistics, the government's primary federal entity for collecting and analyzing data related to education in the United States and other nations, in collaboration with the National Postsecondary Education Cooperative, reported that "[b]eyond socioeconomic status and risk characteristics, the kind of education to which students are exposed in the K-12 years may be more effective at predicting their postsecondary choices than any other variable, including socioeconomic status."[27] "No single factor, including test scores and GPA, better predicts college completion for underrepresented students than the rigor of courses students have taken in high school."[28] And this variable still correlates to race.

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[27] U.S. Department of Education, National Center for Education Statistics, *Paving the Way to Postsecondary Education: K-12 Intervention Programs for Underrepresented Youth* 7 (2001).

[28] *Id.*

In his July 19, 2002 speech to the College Board's First Annual AP National Conference, former U.S. Education Secretary Richard W. Riley noted this stark reality:

> Several years ago a study was published by the Educational Testing Service, entitled *Crossing the Great Divide*. This report notes that our college campuses will be missing 250,000 African-Americans and 550,000 Hispanic undergraduates by the year 2015 because we did not prepare them to do college-level work. This is why I urge all of you to make every possible effort to encourage more minority students to take AP courses.
>
> Let's remember that these young people often have to overcome many disincentives to get on the path to college—everything from low expectations as to their achievement ability, lack of institutional support and negative peer pressure, just to name a few.[29]

The Educational Testing Service report Mr. Riley cited in his speech continues, "[i]f the economy continues to demand ever-higher skills for good jobs, minorities will have to run faster just to stay in place."[30]

B. The Percentage Programs Adopted in Texas, California, and Florida Do Nothing to Help Close the Gaps.

Petitioners may argue that this is all well and good but that the percentage-based admissions plans in Texas, California, and Florida (where race-conscious admissions arrangements have been outlawed) achieve the goals of leveling the playing field and fostering diversity without taking race into account. They are wrong. Indeed, perhaps the most shocking reality of

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[29] Richard W. Riley, Address at the College Board's First Annual AP National Conference 11 (July 19, 2002) (unpublished, on file with author).

[30] Educational Testing Service, *Crossing the Great Divide: Can We Achieve Equity When Generation Y Goes to College?* 32 (2000).

the percentage plans Petitioners defend so emphatically is that the students in Texas, California, and Florida are being educated in racially segregated schools reminiscent of a painful history this country and the courts have long fought to overcome. Also, plans select high school students solely on the basis of their comparative ranking among their classmates, requiring an educator to discount other desirable factors such as leadership qualities, extracurricular activities, teacher recommendations, and the many other individual characteristics that universities can and should measure—the very type of factors courts have found should be considered, along with race.[31]

On February 10, 2003, The Harvard Civil Rights Project released two of the most comprehensive reports to date on both the claims regarding, and the effectiveness of, these percent programs. Notably, the study *Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences*, establishes that

> [a]lthough these plans have been presented as effective alternatives to race-conscious affirmative action, our research shows that it is incorrect to attribute any significant increase in campus diversity to a percent plan alone. A variety of race-conscious outreach, recruitment, financial aid, and support programs appears to be central to the ability of some campuses to even partially recover from the loss of minority students that follows the abolition of affirmative action. In almost every case, however, even with these additional efforts in place, institutions have not been successful in maintaining

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[31] This result, of course, creates the exact scenario *Amicus* Ward Connerly argues to support his opposition to affirmative action—that "no one student can be fairly said to be representative of their race, or even more demeaning their race's viewpoint in class." Brief of *Amicus Curiae* Ward Connerly at 23, *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002) (No. 02-241).

> racially/ethnically diverse campuses through percent plans. And, relative to the current college-age population in each of these states, none of the campuses reflects the students they are intended to serve.[32]

Specifically, some of the study's major findings conclude that: 1) there is simply not enough evidence to support an argument that percent plans, even with other race-conscious methods, are effective alternatives to using race/ethnicity as a factor in admissions processes; 2) because such plans set only basic requirements as to who should automatically be admitted to a campus or to a system, their effect varies dramatically at different institutions; 3) these plans do not address admissions challenges to private colleges or to graduate or professional programs, nor do they apply to out-of-state students. Particularly key to *Amici's* argument before this Court, *each of the states adopting such programs has deeply unequal educational K-12 outcomes by race and ethnicity and serious increases in racial segregation.*[33]

There are other dramatic and significant problems with Petitioners' argument that such plans affect an appropriate and race-neutral means to achieve diversity. For example, the University of Texas at Austin ("UT") actually supplements the 10 percent plan with outreach and scholarship programs targeted at a specific set of traditionally underrepresented high schools in communities where large numbers of blacks and Hispanics live. This makes UT's purported "race-

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[32] Press Release, The Harvard Civil Rights Project, Harvard University, *Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences* (February 7, 2003) *available at* http://www.Civil rightsproject.harvard.edu/research/affirmativeaction/tristate.php#full report.

[33] *Id.; see also* Catherine L. Horn & Stella M. Flores, *Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences* (2003).

neutral" program in fact "race-attentive." [34] Worse, at Texas A&M, the 10 percent plan has not worked at all. Indeed, that plan has failed to lead to diversity at the levels achieved through the use of affirmative action.[35]

This most recent comprehensive report concludes that

> [p]ercent plans alone will not serve as effective alternatives to affirmative action. In the best of circumstances, they have only been able to promote racial and ethnic diversity on campuses when they are coupled with recruitment, outreach, financial aid, and support programs targeted at underrepresented communities with large minority student populations—all elements of solid race-conscious affirmative action plans. Race-conscious affirmative action remains a stronger and more effective strategy for achieving racially and ethnically diverse campuses, particularly if it was bolstered by some of the resources and policies developed in the wake of its elimination.[36]

III. DIVERSITY IS AN EDUCATIONAL AND DEMOCRATIC IMPERATIVE WHICH REQUIRES THAT RACE BE TAKEN INTO ACCOUNT, AS ONE FACTOR AMONG OTHERS, IN THE ADMISSIONS PROCESS.

A. Diversity Is A Continuing and Compelling Educational Need, A Prerequisite to Advancement, and *Bakke* Is Still Good Law.

This Court has long recognized that diversity is a compelling interest in education.[37] As Justice Powell noted in

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[34] Horn & Flores, *supra, at 58-59.*

[35] *Id. at 52-54.*

[36] Press Release, The Harvard Civil Rights Project, *supra.*

[37] *Amici* agree with the numerous briefs that set forth the explanation as to why Justice Powell's conclusion that diversity is a compelling

Bakke, supra, 438 U.S. at 312-15, a diverse student body is "a constitutionally permissible goal for an institution of higher education" because "[t]he atmosphere of 'speculation, experiment, and creation'—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body." *Id.* at 311-12 (footnote omitted). Diversity is essential to the quality of higher education because it provides students with the opportunity to interact with peers from different racial and ethnic backgrounds—both formally and informally. This exposure to multiple perspectives enhances the ability of students to think more critically and to understand more complex issues.[38] Diversity enriches the educational experience, promotes personal growth, strengthens the community and workplace, and enhances economic competitiveness. Justice Stevens underscored the Court's recognition of diversity as a compelling interest and described the appropriateness of that holding:

> In the context of public education, it is quite obvious that a school board may reasonably conclude that an integrated faculty will be able to provide benefits to the student body that could not be provided by an all-white, or nearly all-white, faculty. For one of the most important lessons that the American public schools teach is that the diverse ethnic, cultural, and national backgrounds that have been brought together in our famous "melting pot" do not identify essential differences among the human beings that inhabit our land. It is one thing for a white child to be taught by a white teacher

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interest remains the law of the land and do not expand on those arguments in this brief.

[38]*See generally,* Press Release, The Harvard Civil Rights Project, *supra.*

> that color, like beauty, is only "skin deep"; it is far more convincing to experience that truth on a day-to-day basis during the routine, ongoing learning process.

Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 315 (1986) (Stevens, J., dissenting) (footnote omitted).

B. Diversity Is Essential to the Maintenance of American Democracy.

A diverse public education also assists in preparing "individuals for participation as citizens, and in the preservation of the values on which our society rests." *Ambach v. Norwick*, 441 U.S. 68, 76 (1979). Ensuring the continuation of our democracy is a compelling interest and diversity is essential to achieving that goal. To prosper and survive, America must draw on the variety of strengths of all of its citizens. Diversity in education helps to ensure America's survival, allowing students to take advantage of this diversity by learning to work together.

As America fights the war on terrorism, the importance of diversity is even more compelling and more closely linked to the continued operation of our democracy. The investigations into the September 11th attacks highlighted whether our military and intelligence men and women represented a community diverse enough to carry out key operational and other missions. That challenge persists. Indeed, the Federal Bureau of Investigation's (FBI) post September 11 reorganization calls for the recruitment of "those with certain critical skills deemed essential" for the new FBI, "including Foreign language—particularly Arabic, Farsi, Pashtu, Urdu, Chinese, Japanese, Korean, Russian, Spanish, and Vietnamese"[39].

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[39] Halls of Justice: *A Weekly Look Inside the Justice Department*, ABC News.com *available at* http://abcnews.go.com/section/vs/HallsofJustice/hallofjustice109.html.

More recently, Secretary of State Colin L. Powell has recognized the need for diversity in education to ensure a strong military and Foreign Service Corps. When speaking before the U.S. Senate Committee on Foreign Relations, he and Committee Chairman Richard G. Lugar, also a former Indianapolis Public Schools Board member, stressed the importance of diversity for our country's national security in the following exchange.

> Secretary Powell: I'd like to just brag about one point, if I may. On the last Foreign Service exam we gave, among those who passed the exam, was 38 percent minority. So we are working out, working very hard to make our Foreign Service look like our country. The beautiful diversity, which is the strength of this country should be reflected in the Foreign Service . . . .
>
> Senator Lugar: Well, thank you Mr. Secretary, I just have to pause to underline this remarkable statistic you shared with us. In this rigorous, merit-based test for the Foreign Service, 38 percent of those who passed were minorities. It's an important point, and I appreciate your making it.

State Department Reauthorization: Hearing Before the Senate Committee on Foreign Relations, 108th Cong. (2003) (transcript publication forthcoming).

This very Court benefits from the uniquely relevant judicial and social perspectives of its members. Indeed, Justice O'Connor has eloquently written about the important influence of Justice Thurgood Marshall's experiences of sustained prejudice on the Court, noting that Mr. Marshall's conversations about these experiences "perhaps change[d] the way I see the world."[40]

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[40] Justice Sandra Day O'Connor, *A Tribute to Justice Thurgood Marshall: Thurgood Marshall: The Influence of a Raconteur*, 44 Stan. L. Rev. 1217, 1218 (1992).

This view is not new. Our nation's leaders have long sought and continue to govern a nation that "promotes [the] fundamental unity [of] Americans and acknowledges our diversity as our greatest strength." A Joint Resolution Supporting the Day of Honor 2000 to Honor and Recognize the Service of Minority Veterans in the United States Armed Forces during World War II, Pub. L. No. 106-205. And as recently as just a week ago, the United States Department of Justice announced plans to create a new position dedicated solely to recruiting minority lawyers.[41] Additional plans for increasing the racial, ethnic, economic, and geographic mix among Justice Department lawyers reportedly include diversity training for managers and a formal mentoring program for new hires.

Clearly, diversity remains a compelling governmental interest—indeed an imperative—in education, in the military, and on the bench. And, race still matters.[42]

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[41] Press Release, The U.S. Department of Justice, *Justice Department Initiates New Diversity Program* (February 5, 2003) *available at* http://www.us.doj.gov/opa/pr/2003/February/03_ag_070.htm ("Our pursuit of justice is stronger and the fulfillment of our national mission more efficient, when we bring to bear the experience, judgment and energy of colleages from a wide spectrum of racial, ethnic and geographical backgrounds.").

[42] As Secretary of State Colin L. Powell told the delegates at the National Republican Convention:

> The issue of race still casts a shadow over our society, despite the impressive progress we have made over the last 40 years to overcome the legacy of our troubled past. So, with all the success we have enjoyed and with all the wealth we have created, we have much more work to do and a long way to go to bring about the promise of America to every American.

Colin L. Powell, Address to the Republican National Convention (July 31, 2001).

C. Accordingly, The Promotion of Diversity In Education Remains A Compelling Government Interest.

That diversity remains a compelling governmental interest is consistent with the Court's precedent since *Bakke*, 438 U.S. at 312-15. Not only is diversity important as a matter of policy, but achieving and maintaining it, honoring and respecting it, are among the proper roles of our government.

In *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547 (1990), the majority of this Court relied upon the reasoning of Mr. Powell in *Bakke*, to the effect that a "'diverse student body' contributing to a 'robust exchange of ideas' is a 'constitutionally permissible goal' on which race-conscious university admissions programs may be predicated." *Metro Broadcasting*, 497 U.S. at 568 (quoting *Bakke*, 438 U.S. at 311-13 (Powell, J.)).[43] In that case, the Court upheld a Federal Communications Commission program that expressly took race and ethnicity into account in awarding ownership of broadcast radio and television stations in order to assure a fair cross-section (*i.e.*, diversity) of content. "A broadcasting industry with representative minority participation will produce more variation and diversity than will one whose ownership is drawn from a single racially and ethnically homogeneous group." *Id.* at 579.

A similar sentiment influenced the Court's decision in *Holland v. Illinois*, 493 U.S. 474, 480-81 (1990), which prohibited the exclusion of individuals of a certain race or

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[43] *Amici* acknowledge that this Court in *Adarand*, 515 U.S. at 256 (Stevens, J., dissenting), overruled the use of "intermediate scrutiny" as articulated in *Metro Broadcasting*. However, the majority's reasoning as to the importance of diversity remains good law, untouched by *Adarand*. *See Adarand*, 515 U.S. at 258 (Stevens, J., dissenting) ("The proposition that fostering diversity may provide a sufficient interest to justify [a racial or ethnic classification] is not inconsistent with the Court's holding today—indeed, the question is not remotely presented in this case.").

gender from a jury venire because "[w]ithout that requirement, the State could draw up jury lists in such manner as to produce a pool of prospective jurors disproportionately ill disposed towards one or all classes of defendants, and thus more likely to yield petit juries with similar disposition."

These cases show the Court's understanding of and consistent, unwavering belief in the important principle that obtaining a "fair cross-section" of society is critical in education, the media, and the administration of justice. To ensure such a cross-section requires a means of providing that individuals of different races and ethnicities are fully represented in every aspect of our democratic lives.

D. Reaffirming Diversity As A Compelling State Interest Is Consistent with Limiting Principles.

It is important to note that *Amici* do not seek to correct a societal wrong through the courts. As legislators, they well know that the responsibility for such action lies within their own purview. This matter is *not* about remedying societal racism. Rather, it is about recognizing that in education both Congress and the courts have long realized that disparities in primary and secondary education impair the ability of colleges and universities to enroll a diverse student body. Education is a continuing process that begins for most children at age five and continues for some—those who are provided the tools to get there—through college and graduate school.

Nor does reaffirming diversity as a compelling interest in educating and preparing our citizens to participate fully and productively in our democracy mean that the Court is embarking on an unending path. Instead, it recognizes the essence of America today—the need for our diverse population to work together to preserve the values of our society.

Finally, and perhaps most importantly, this is not a question of requiring an individual white student to carry

society's burden by being eliminated from a specific college or university class. When universities and colleges take race into account, they act on behalf of the present and future benefit of *all* students—white as well as black, Hispanic, Asian, Native American, and others. Only with a fair cross section of students can colleges and universities provide an educational setting that promotes diversity, which leads to the "speculation, experimentation, and creation" for all, that all educators strive to engender.

CONCLUSION

A number of *Amici* have noted in their submissions that the Court's grant of *certiorari* in this case puts the nation at a crossroads with regard to the government's continued consideration of race in public life. Clearly, both the tenor and the number of *Amicus* briefs in this matter demonstrate the importance of this case to the future viability of our nation's democracy.

Those offering this brief for the Court's consideration believe, however, that much of the traveling has already been done. In reauthorizing the nation's K-12 education law at the end of 2001, Congress has already recognized that, even now, "achievement gaps between minority and nonminority students" persist, *see* 20 U.S.C. § 6301(3). It has noted that it is "in the best interest of the United States" to provide federal support for "local educational agencies that are voluntarily seeking to foster meaningful interaction among students of different racial and ethnic backgrounds, beginning at the earliest stage of such students' education." 20 U.S.C. § 7231.

However much we may wish it were otherwise, it is simply not a reflection of reality to say that race no longer matters in America, or that education of comparable quality is freely available to all students, both majority and minority, in K-12 or in college. Thus, it is *Amici*'s hope that this Court will affirm these facts as truths, acknowledge the nexus between

quality K-12 education educational opportunity and achievement and higher education success, and recognize the correlation and importance of race in determining these outcomes.

Finally, it is especially critical in this case to understand "the impact of legal rules on human lives[,]" "that the law is not an abstract concept removed from the society it serves, and that judges, as safeguarders of the Constitution, must constantly strive to narrow the gap between the ideal of equal justice and the reality of social inequality."[44]

The decision below should therefore be affirmed.

Respectfully submitted,

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[44] O'Connor, *supra*, at 1218.

APPENDIX

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* Congressman Fattah served as the lead Member on this brief.

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