Nos. 02-241 & 02-516

In The

Supreme Court of the United States

BARBARA GRUTTER,

Petitioner,

v.

LEE BOLLINGER, JEFFREY LEHMAN, DENNIS SHIELDS, AND THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN, *et al.*,

Respondents.

JENNIFER GRATZ AND PATRICK HAMACHER,

Petitioners,

v.

LEE BOLLINGER, JAMES J. DUDERSTADT, AND THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN, *et al.*,

Respondents.

On Writs of Certiorari To The United States Court of Appeals For the Sixth Circuit

BRIEF OF REPRESENTATIVE RICHARD A. GEPHARDT, ET AL., AS *AMICI CURIAE* SUPPORTING RESPONDENTS

Andrew L. Sandler
Mary L. Smith
Counsel of Record
Susan K. DeClercq
Galen D. Bellamy
Kishka-Kamari Ford
Lesley B. Whitcomb
1440 New York Avenue, N.W.
Washington, D.C. 20005-2111
(202) 371-7000

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INTEREST OF THE AMICI CURIAE

This brief is submitted on behalf of certain individual members of the U.S. House (the "Congressional Amici") as amici curiae.[1] The Congressional Amici have the responsibility of enacting various statutes prohibiting discrimination on account of race and ethnicity.[2] The Congressional Amici also have a substantial interest in ensuring that the Equal Protection Clause of the Fourteenth Amendment continues to promote equal opportunity for all Americans in the context of public education including admission to public colleges and universities.[3]

SUMMARY OF ARGUMENT

This Court's jurisprudence has recognized that diversity is a compelling governmental interest in the context of a university's admissions program. Since that time, the practical effects of diversity both in the classroom and beyond have been extensively discussed and documented. It is time for this Court to reaffirm that diversity in higher education is a compelling governmental interest.

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[1] A list of the individual members of Congress is included in the appendix to this brief. Counsel for the Congressional Amici were the sole authors of this brief. No person or entity other than the Congressional 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.

[2] *See, e.g.*, §§ 42 U.S.C. 2000d-1, 2000e-5(f), 2000h-2.

[3] Congressman Gephardt graduated from the University of Michigan Law School in 1965, a year in which the only minority graduate was the Honorable Harry T. Edwards of the United States Court of Appeals for the District of Columbia Circuit. *See Defend Affirmative Action Party, Affirmative Action Facts, at* http://www.umich.edu/~daap/facts.htm.

Even those who contend diversity is not sufficiently compelling do not dispute its importance. Rather, they seek to uproot the purpose behind the Equal Protection Clause by arguing that the use of race by the University of Michigan's College of Literature, Science, and the Arts (the "undergraduate college") in *Gratz v. Bollinger*, No. 02-516 and Law School (hereinafter together the "University") in *Grutter v. Bollinger*, No. 02-241, is impermissible stereotyping. The Equal Protection Clause, however, does not prohibit the use of race, but rather guarantees that race is not used to arbitrarily burden a group of individuals. Here, the University's use of race is narrowly tailored to meet this interest because it is not a quota and is utilized in a manner consistent with the Fourteenth Amendment and this Court's decision in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

Finally, the alleged race-neutral alternatives put forth by the Bush Administration are not really "race-neutral" at all. These percentage plans, standing alone, are not effective in maintaining current levels of diversity nationwide. They also rely, to a great extent, on racially segregated high schools to produce racial diversity in colleges. Therefore, these alleged race-neutral alternatives are constitutionally suspect.

This Court should uphold the constitutionality of the University's admissions program, and may do so in a manner completely consistent with *Bakke* and this Court's prior cases.

ARGUMENT

I. PROMOTING DIVERSITY IN HIGHER EDUCATION THROUGH INCREASED MINORITY REPRESENTATION IS A COMPELLING GOVERNMENTAL INTEREST.

The Equal Protection Clause of the Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The Equal Protection Clause was born of our belief in human equality and guarantees equal treatment and equal opportunity for all Americans regardless of race. At its heart, the Equal Protection Clause recognizes that the diversity of our Nation is one of its greatest strengths.

The Constitution also breathes life into this principle of equality and the importance of diversity in its framework for a democratic system of government. Our country was founded on the principles of democracy and representational government. The founding fathers recognized that every person should be allowed to participate fully in national affairs by voting and having a representative in Congress to protect and advance their interests. This framework still exists today in both Houses of Congress. While certainly there are heated debates and members do not always agree, the legislative process resulting from real debate and dialogue can result in a better, more-reasoned legislative product. It is important for persons with varying viewpoints, experiences and perspectives to weigh in at the national legislative level so that the citizens of this land are fully represented.

Similar principles are found in our two sister branches of government. The Executive Branch, including

the current Administration, recognizes that it is extremely beneficial and important to appoint persons with diverse backgrounds and experiences. *See* Statement of Clay Johnson, President George W. Bush's Presidential Personnel Director, *quoted in* Al Kamen & Ellen Nakashima, *Bush Picks as Diverse as Clinton's*, WASH. POST, Mar. 30, 2001, at A27 ("[I]f everybody comes from the same background, same part of the country, looks the same, acts the same, it's not going to be as strong . . . as if you have diversity of background, however you define that, of geography, ethnicity, gender."). This Court also has benefited and become stronger because of its diversity of race, gender and ethnicity while continuing its tradition of carefully calibrating the various and diverse opinions of individual Justices into a majority opinion, which becomes the law of the land.

Equally as important is diversity of race, gender and ethnicity in this country's higher educational institutions. As set forth more fully in other amici briefs filed with this Court, diversity in the classroom produces tangible benefits both during the educational process and throughout a student's life. Colleges and universities are the gateways to future opportunities. An undergraduate degree removes the barriers to a wealth of career options for the rest of a student's life. We have seen the tremendous impact of providing *meaningful* equal opportunity for minority students at this country's higher education institutions by their increased numbers as lawyers, physicians, professors, and judges.

In addition to the practical benefit of providing increased educational and professional opportunities for minorities, diversity in the context of higher education also creates a more dynamic, improved learning environment.

See Bakke, 438 U.S. at 312 ("The 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.") (opinion of Powell, J.) (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957)). Indeed, in 1998, in bold recognition of the value of diversity in education, the 105th Congress overwhelmingly rejected a proposal which would have banned public colleges and universities that accept Federal funding under the Higher Education Act from using racial or gender preferences in admissions. *See* H.AMDT 612 to H.R. 6, 105th Cong. (1998) (failed by recorded vote of 171-249), *available at* http://thomas.loc.gov.[4]

In *Bakke*, this Court upheld the use of race in higher education admissions. *Bakke*, 438 U.S. at 320. Justice Powell's opinion recognized that "the interest of diversity is compelling in the context of a university's admissions program." *Id.* at 314-315. Justice Powell explained 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 Similarly, Justice O'Connor explained in *Wygant v. Jackson Board of Education*, "a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest." 476 U.S. 267, 286 (1986) (O'Connor, concurring in part and concurring in the

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[4] There also have been other votes against legislation that would have eliminated traditional affirmative action programs. *See, e.g.*, H.AMDT 548 to H.R. 6, commonly known as TEA-21, 105th Cong. (1998) (sought to eliminate the Disadvantaged Business Enterprise Program) (failed by recorded vote of 194-225), *available at* http://thomas.loc.gov.

judgment). It is now time for a majority of this Court to reaffirm that diversity is a compelling governmental interest in the context of higher education.

The Bush Administration recognizes the importance of ensuring diversity through increased minority representation in institutions of higher learning. Indeed, the Administration, in its *amicus curiae* brief, even characterizes the goal of educational diversity variously as "important," "laudable" and even "paramount." Brief for the United States as *Amicus Curiae* Supporting Petitioner in *Grutter v. Bollinger* (the "Administration's *Grutter* Br.") at 9, 10, 16. Not only does the Bush Administration recognize the importance of achieving educational diversity, but it also concedes that it is "government's responsibility" to ensure that such diversity is achieved, and that minorities are provided "meaningful access to institutions of higher learning." Administration's *Grutter* Br. at 10.

Despite its explicit recognition that the goal of ensuring diversity in the context of higher education is "laudable," "important" and "paramount" – and further that it is the government's responsibility to see that such diversity is realized – the Bush Administration attempts to skirt the ultimate issue of whether diversity is a compelling governmental interest. However, this attempt is undercut by the Administration's own language.

The position of the Bush Administration and Petitioners that Equal Protection Clause generally prohibits – and, by implication, is violated by – the use of race in admissions decisions is not well founded. *See* Administration's *Grutter* Br. at 13 ("central purpose [of the Equal Protection Clause] is to guarantee 'racial neutrality in governmental decisionmaking'") (citation omitted); Pet.'s Br.

in *Grutter* at 18; Pets.' Br. in *Gratz* at 15.[5] By making arguments such as these, Petitioners seek to turn the Clause against those whom it was intended to help. This type of tactic has been used previously – most notably, by those seeking to uphold a "separate but equal" status for blacks in *Plessy v. Ferguson*, 163 U.S. 537 (1896). It is clearly inconsistent with the history of the Equal Protection Clause and this Court's Equal Protection jurisprudence.

The Equal Protection Clause was never intended to be completely color-blind, but rather to "do away with all governmentally imposed discrimination based on race." *Wygant*, 476 U.S. at 277 (citation omitted). This is an important distinction. In the wake of the Civil War and in the era of Reconstruction, the 39th Congress was presented with an alternative, "color-blind" draft of the Fourteenth Amendment, which provided that "[a]ll national and State laws shall be equally applicable to every citizen, and no discrimination shall be made on account of race and color." CONG. GLOBE, 39th Cong., 1st Sess. 10 (1865), *available at* http://memory.loc.gov/ammen/amlaw/lwcg.html; ANDREW KULL, THE COLOR-BLIND CONSTITUTION, at 67 (1992).

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[5] The Petitioner in *Grutter* quotes the opening argument of Robert L. Carter, the attorney for petitioners in *Brown v. Board of Education*, 347 U.S. 483 (1954), in support of her argument, echoed by the Bush Administration, that the Fourteenth Amendment requires color-blind governance. Pet.'s Br. in *Grutter* at 18. In so doing, Petitioner demonstrates the danger of ignoring the historical context in which that argument was made. Put simply, "*Brown* and its progeny do not stand for the abstract principle that governmental distinctions based on race are unconstitutional. Rather, those great cases, forged by the gritty particularities of the struggle against white racism, stand for the proposition that the Constitution prohibits any arrangements imposing racial subjugation." Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1336 (1986).

Congress, thus, considered and explicitly rejected the idea that the Equal Protection Clause embodies a requirement that government act in a color-blind fashion. *See* John Hasnas, *Equal Opportunity, Affirmative Action, and the Anti-Discrimination Principle: The Philosophical Basis for the Legal Prohibition of Discrimination*, 71 FORDHAM L. REV. 423, 444-45 (2002).

Based on the foundational underpinnings of the Equal Protection Clause, this Court's jurisprudence, and the significant short- and long-term benefits of a diverse student body, it is clear that diversity in the context of higher education is a compelling governmental interest.

II. THE UNIVERSITY OF MICHIGAN'S ADMISSIONS POLICIES ARE NARROWLY TAILORED TO MEET THIS INTEREST.

The Congressional Amici believe that Michigan's use of race is constitutional, entirely consistent with this Court's decision in *Bakke*, and narrowly tailored to meet a compelling government interest.

A. It is Undisputed That Race is a Constitutionally-Permitted Factor to Consider in Achieving a Diverse Student Body.

This Court has repeatedly emphasized that it "never has held that race-conscious state decisionmaking is impermissible in all circumstances." *Shaw v. Reno*, 509 U.S. 630, 642 (1993); *see also Bakke*, 438 U.S. at 355 ("[T]he position that such factors [as race] must be 'constitutionally an irrelevance,' summed up by the shorthand phrase '[o]ur Constitution is color-blind,' has never been adopted by this Court as the proper meaning of the Equal Protection

Clause.") (Brennan, J., concurring) (citations omitted). In fact, this Court has upheld the use of race in many different contexts. *See, e.g., Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) (government contracting); *Easley v. Cromartie*, 532 U.S. 234 (2001) (legislative redistricting); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) (school desegregation).

In the context of considering the merits of diversity in higher education through increased minority representation, Justice Blackmun explicitly recognized the propriety of considering race when he wrote in *Bakke:* "In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot – we dare not – let the Equal Protection Clause perpetuate racial supremacy." *Bakke*, 438 U.S. at 407 (Blackmun, J., concurring opinion). Indeed, it would be paradoxical to claim that "taking race into account by preferential treatment or any other means may result in unequal treatment, while failing to take race in account may result in maintaining a status quo that offers substantial evidence of unequal treatment and opportunity based on race." Lloyd Peake & John Sealander, *Societal Impact Reports: The Paradox of Legalized Inequality and a Revised Context for Race Based Affirmative Action*, 29 W. ST. U. L. REV. 57, 66 (2001).

In recent cases, this Court reaffirmed that the reason why considerations of race are held up to strict scrutiny is not because race cannot be used as a basis for decisionmaking *per se*, but rather it is to "distinguish legitimate from illegitimate[6] uses of race in governmental

[6] Illegitimate uses of race have been noted by this Court to include invidious purposes and conceptions such as "racial prejudice or stereotype," "illegitimate notions of racial inferiority," and "simple racial

decisionmaking." *Adarand*, 515 U.S. at 228. In unequivocally rejecting the notion that strict scrutiny is "strict in theory, but fatal in fact," *id.* at 237, this Court confirmed that under certain circumstances, race is a permissible factor to consider. Indeed, this Court recognized that not all race-based decisions are "equally objectionable." *Id.* at 228. As this Court acknowledged in *Adarand*, "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and the government is not disqualified from acting in response to it." *Id.* at 237.

Here, it is undisputed that the University's admissions policies are employed for the legitimate purpose of promoting a diverse student body – not as a means to discriminate against individuals on the basis of racial prejudice or due to notions of racial inferiority. As such, it is precisely the kind of circumstance under which the use of race has been approved by this Court. *See id.* at 228; *Bakke*, 423 U.S. at 314. Thus, the University's use of race in this instance is constitutionally permissible to meet the compelling governmental interest of attaining a diverse student body.

B. The University of Michigan's Use of Race is Constitutional.

The way in which the University uses race in its admissions considerations, both in the Law School and the undergraduate college, is narrowly tailored to further the compelling interest of a diverse student body. Far from using race bluntly, the University's policies are carefully

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politics." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

crafted to allow the active participation of underrepresented minority students, without precluding others solely on the basis of their race. Most significantly, neither of the admissions policies uses race standing alone, or as the single decisive component, in making admissions decisions. Rather, race is simply one factor which is considered along with test scores, grades, and numerous other attributes in an individual applicant's background (*e.g.*, geography, alumni connection, and socioeconomic status). This approach is entirely consistent with this Court's decision in *Bakke* where considering race as a "plus" factor was deemed permissible.[7] *See Bakke*, 438 U.S. at 317 ("race or ethnic background may be deemed a 'plus' in a particular applicant's file"). Thus, in keeping with the instruction of this Court in *Bakke*, the University's policies clearly consider a variety of "pertinent elements of diversity" – which *Bakke* said includes race – relating to each applicant. *Id.*

Moreover, contrary to the Bush Administration's assertions, the University's policies are not "automatic, inflexible, and overwhelming[ly] relian[t] on race." Brief for the United States as *Amicus Curiae* Supporting Petitioner in *Gratz v. Bollinger* (the "Administration's *Gratz* Br.") at 26.

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[7] It is also worth noting that the University's use of race is entirely consistent with the views of several prominent members of the Bush Administration. *See* Statement of Condoleezza Rice, National Security Advisor to President Bush and Former Provost at Stanford University, *quoted in* Mike Allen, *Rice: Race Can Be Factor in College Admissions*, WASH. POST, Jan. 18, 2003, at A1 ("[I]t is appropriate to use race as one factor among others in achieving a diverse student body."); *see also* Statement of Colin Powell, Secretary of State under President Bush, *on* CNN-Late Edition, Jan. 19, 2003, *at* http://www.cnn.com/2003/ALLPOLITICS/01/19/powell.race ("I believe race should be a factor among many other factors in determining the makeup of a student body of a university.").

In fact -- and it cannot be emphasized enough – under both of the University's admissions policies, *every application* is reviewed individually and is weighed fairly and competitively against every other application submitted. There is no "dual" track or evaluation system based upon the applicant's race. *See Bakke*, 438 U.S. at 315 (holding invalid an admissions program using a two-track system based solely on race). Under the University's admissions policies, because race is used as only one factor among many, white applicants are in no way foreclosed from consideration or competition based on their race. Thus, comporting with Justice Powell's prescription in *Bakke*, the University's use of race does not "insulate the individual from comparison with all other candidates for the available seats." *Id.* at 317.

C. The University of Michigan's Admissions Policy is Not a Quota.

Despite the efforts of opponents of the University's admissions policies, *see, e.g,* Administration's *Grutter* Br. at 11-12, 28-30, merely repeating that the policies amount to a "quota" does not make it so. Rather, the record is clear that the University of Michigan Law School seeks to achieve a "critical mass" of students from underrepresented minority groups. As University officials testified before the district court, a "critical mass" is a sufficient number of underrepresented minority students to ensure that they can "contribute to classroom dialogue and do not feel isolated." *Grutter v. Bollinger*, 288 F.3d 732, 747 (6th Cir. 2002). Preventing racial tokenism is necessary to allow for the classroom interactions that make diversity an educational benefit to the entire student body. *See Bakke*, 438 U.S. at 316-17. The use of such an educational concept is completely consistent with *Bakke's* recognition that the

benefits of diversity "cannot be provided without some attention to the numbers." *Id.* at 323.

Also, unlike a quota, the concept of "critical mass" is flexible, having no set numbers, or even target percentages of how many underrepresented minority students to admit. Indeed, it is so flexible that it was deemed "amorphous" by the district court in *Grutter*. *Grutter v. Bollinger,* 137 F. Supp. 2d 821, 850-51 (E.D. Mich. 2001). Ironically, the University's witnesses' failure to "clearly define critical mass in terms of numbers or percentages" was criticized by the district court and cited as a reason that the University's policy was *not* narrowly tailored. *Id.* at 851.

But the principal reason that the University's admissions policy is not a quota is because, as discussed above, the University "treats each applicant as an individual in the admissions process." *Bakke,* at 318; *see also Croson,* 488 U.S. at 508 (considerations on "a case-by-case basis. . . are less problematic from an equal protection standpoint because they treat all candidates individually. . . ."). Upon even a cursory review of either of the admissions policies, it is clear that race is but one factor among many that are combined to reveal the entire applicant. Moreover, this individualized attention is far closer to the ideals stated in *Bakke* than a rigid bright-line rule that relies upon nothing but one aspect of an individual, such as their class rank. *See Bakke* at 318.

D. Programs Based on Socioeconomic Status Or Other Factors Cannot Replace Race-Conscious Admissions Policies to Achieve a Diverse Student Body.

Both Petitioners and the Bush Administration criticize the University's admissions policies as not narrowly tailored because, according to them, race-neutral policies can effectively achieve a diverse student body. The Bush Administration suggests several "race-neutral factors" to consider as replacements for race in college admissions. *See* Administration's *Grutter* Br. at 24-25. However, programs based solely on these other factors, such as a purely socioeconomic affirmative action policy, would be insufficient to achieve a diverse student body.

For instance, relying solely on socioeconomic status or similar factors will not result in underrepresented minorities being represented in significant numbers at colleges and universities. Although minorities are disproportionately poor, the greatest *number* of people in poverty are white. For example, in 2001, 22.7% of African Americans were below the poverty level, while only 9.9% of whites were below the poverty level. However, the number of African Americans living below the poverty level was only 8.1 million as compared to 22.7 million whites.[8] Accordingly, based on numbers alone, a purely socioeconomic system would predominantly assist white students and would likely yield an insufficiently small number of minorities to achieve a racially-diverse student body.

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[8] *See* A Joint Report Between the Bureau of Labor Statistics and the Bureau of the Census, The Annual Demographic Survey, March Supplement, *at* http://ferret.bls.census.gov/macro/032002/pov/new01_001.htm.

Moreover, use of factors other than race – which the University already considers as well – cannot completely replace race as a factor. These other considerations standing alone do not take into account the realities of race in America. As one scholar explained, "[i]n a country saturated with race-conscious beliefs, feelings, and practices, people will have different experiences on account of the ways they are differently racially classified, and these experiences will influence their other beliefs and attitudes." Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 N.Y.U. L. Rev. 1195, 1233 (2002). Contrary to the Petitioners' argument that any assertion that an individual's race influences his or her experiences is a stereotype or within-race homogeneity (*i.e.*, that all people of one race have the same views), this view fully recognizes "both between-race and within-race heterogeneity" (*i.e.*, that both people of different races, and people of the same race, can have different worldviews due to the impact of their own racial classification on their life). *Id.*

In fact, racial diversity is an important component of a diverse student body. *See Bakke*, 438 U.S. at 315 ("The 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 important element.") (opinion of Powell, J.) Race not only influences an individual's view of the world and factors into his own unique experiences and viewpoints, *see, e.g.*, Deborah C. Malamud, *Affirmative Action, Diversity, and the Black Middle Class*, 68 U. COLO. L. REV. 939, 950 (1997) (noting that "one can be economically indistinguishable from a white person and still be culturally and experientially distinct as an African American"), but also influences the entire student body by fostering an ability to understand the

perspectives of others. *See* Patricia Gurin, *Expert Report of Patricia Gurin, Gratz v. Bollinger, Grutter v. Bollinger*, 5 MICH. J. RACE & L. 363, 399-401 (1999). Accordingly, race and considerations of these other "race-neutral" factors cannot be viewed as interchangeable.

Precluding the use of race completely in admissions would prevent the University from addressing the unique reality that racial diversity is an essential component of a diverse student body. Therefore, the Congressional Amici believe that the University's use of race is constitutional and entirely consistent with this Court's decision in *Bakke*.

III. THE ALLEGEDLY RACE-NEUTRAL ALTERNATIVES PROPOSED BY THE BUSH ADMINISTRATION ARE CONSTITUTIONALLY SUSPECT.

Both the Bush Administration and the State of Florida tout percentage-based programs like those recently implemented in California, Florida, and Texas as a viable, race-neutral alternative to achieve racial diversity. These percentage programs, adopted first by Texas (under then-Governor George W. Bush), and later by Florida (under Governor Jeb Bush) and California, guarantee the top 4% (California), 10% (Texas) and 20% (Florida) of each graduating class throughout the state's high school system admission into the state's colleges and universities. *See, e.g.*, TEXAS EDUC. CODE ANN. § 51.803 (West 2001); FLA. ADMIN. CODE ANN. R. 6C-6.002(5) (2002).[9]

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[9] For a detailed discussion of each state's percentage plans and highlights of the differences between them, *see generally*, Catherine L. Horn & Stella M. Flores, *Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences*, The Civil Rights

The Bush Administration and the State of Florida contend that these percentage programs have been successful in maintaining, even surpassing, the levels of minority enrollment at California, Florida, and Texas state schools achieved by traditional affirmative action programs like the University's without the explicit use of racial classifications. However, as set forth below, these plans – which operate much like quotas – are not racial neutral at all, and, in fact, achieve racial diversity at the college level by impermissibly relying upon racial segregation at the high school level. This racially discriminatory scheme renders these programs constitutionally questionable under the Equal Protection Clause of the Fourteenth Amendment.

Furthermore, even if these percentage programs were constitutional, the uncontroverted evidence shows that they have not delivered results as promised in the states where they have been implemented, and, standing alone, will never work to achieve racial diversity in the majority of states. Therefore, contrary to the assertions of the Bush Administration and the State of Florida, these percentage programs are not viable alternatives to the University's admissions policies.

A. Percentage Programs Impermissibly Rely on Segregated High Schools to Produce Racial Diversity In Colleges.

The percentage programs at work in California, Florida, and Texas all share the common purpose of achieving racial diversity at the university level without

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Project, Harvard University, February 2003 [hereinafter *Percent Plans in College Admissions*].

explicitly considering race in the admissions process. For example, Governor Jeb Bush expressly announced: "Through the Talented 20 program, we will enhance the diversity of our state university system by pulling in high-performing minority students who might not otherwise be eligible for admissions." *See* Governor Jeb Bush's "Equity In Education Plan", *at* http://www.myflorida.com/myflorida/government/governorinitiatives/one_florida/documents/educationplan.doc. Similarly, the legislative history behind Texas' program shows that "[t]he sponsoring legislators hoped that because it targeted high schools highly segregated by race and class, the Ten Percent Plan would broaden the student applicant pool." *See* Danielle Holley & Delia Spencer, *The Texas Ten Percent Plan*, 34 HARV. C.R.-C.L. L. REV. 245, 253 (1999).

To the extent that these stated goals of racial diversity have purportedly been achieved at California, Florida, and Texas universities, such achievement is due to the *de facto* segregation of California, Florida, and Texas high schools.[10] It is a sad fact in this country's history that this Court's mandate to state actors in *Green v. County School Board* to "take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch" was to be so short-lived. 391 U.S. 430, 437-38 (1968). Not even two generations after this mandate, the majority of this Nation's high schools remain heavily racially segregated.[11] It is this *de facto* segregation

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[10] *See Percent Plans in College Admissions* at viii ("These policies are not race-conscious at the level of the individual student, but are built on the high levels of racial segregation in the k-12 system. . . .").

[11] *See* Erika Frankenberg, Chungmei Lee, and Gary Orfield, *A Multiracial Society with Segregated Schools: Are We Losing the Dream?*, The Civil Rights Project, Harvard University, January 2003, at

that allows percentage programs to promise racial diversity at the college level simply by skimming a certain percentage of students from the top of every high school in the state. In fact, in at least one of those states, officials literally consulted mathematicians to develop the numbers to achieve that goal. *See* Jeffrey Selingo, *What States Aren't Saying About the 'X-Percent Solution,'* CHRON. OF HIGHER EDUC., June 2, 2000, at A31 [hereinafter "Jeffrey Selingo"] ("Aides to Gov. Jeb Bush of Florida admit they settled on a 20-percent standard after computer models of 10-percent and 15-percent policies failed to produce enough black and Hispanic students.").

This interdependency between continued racial segregation and educational opportunities turns this Court's ruling less than fifty years ago in *Brown v. Board of Education*, 347 U.S. 483 (1954), on its head by encouraging the practice that *Brown* declared unconstitutional. As this Court has observed, "[t]he constant theme and thrust of every holding from *Brown I* to date is that state-enforced separation of the races in public schools is discrimination that violates the Equal Protection Clause." *Swann*, 402 U.S. at 22. Even when state actors found creative ways to achieve school segregation by facially-neutral means, this Court recognized that discrimination – although indirect – for what it was. *See Keyes v. School District No. 1*, 413 U.S. 189, 201 (1973).

The percentage plans in California, Florida, and Texas perpetuate segregation in much the same way as the school transfer policies encountered by this Court post-*Brown*. Rather than "eliminat[ing] . . . all vestiges of state-

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4 ("The desegregation of black students. . . has now receded to levels not seen in three decades.").

imposed segregation," *Swann*, 402 U.S. at 15, the percentage plans encourage minority students to remain in inadequate majority-black and/or Hispanic schools, and punish those who transfer to integrated and majority-white schools in search of a better education. As observed by DeWayne Wickham in *Bush's Timing Symbolizes Misunderstanding of King's Message*, the vast majority of all-black or Hispanic schools are severely "under funded, understaffed and underperforming" yet, "[t]o increase their chances of getting into college, black students in Texas, Florida and California must attend a mostly-black school, where they have a better chance at guaranteed college admission – but where they are less likely to get the education they need to succeed in college." GANNETT NEWS SERV., Jan. 16, 2003. One talented minority high school student at a magnet school eloquently expressed his frustrations with the irony of the percentage plans, saying: "I'm punished no matter what I do. I come here, I may not make the 20 percent, but I get the medical classes and internships that I need for college. Or I go back to my home school, make the 20 percent, but I don't get the science classes. It doesn't make sense." Jeffrey Selingo, *supra*, at A31. Under the University's policy, school administrators would have been able to exercise their discretion to admit this student based on his specific circumstances. Under the percentage programs in California, Florida, or Texas, the talented minority student from a segregated school district often is forced to choose between segregation and better educational opportunities.

Because the percentage plans touted by the Bush Administration and the State of Florida are dependent upon, and, indeed, perpetuate the *de facto* segregation of this Nation's public schools, these plans are constitutionally suspect under the Equal Protection Clause of the Fourteenth Amendment. As such, these plans do not – as the Bush

Administration and the State of Florida contend – offer a viable alternative to the affirmative action policies used by the University.

B. Cookie-Cutter Percentage Plans Improperly Regard Students as Numbers, Rather Than Unique Individuals.

An unwavering theme among this Court's most recent decisions pertaining to issues of race-based policies is that under the Equal Protection Clause, "personal rights" are paramount. *See, e.g., Croson*, 488 U.S. at 493; *Adarand*, 515 U.S. at 230. In *Croson*, this Court, recognized that "rigid rules" erecting a "sole criterion" for evaluation is a disrespect to an individual's personal rights. *Id.*

In light of this recognition, it is counterintuitive that the Bush Administration rejects the University's admissions policy – which examines potential students on an individual basis – in favor of replacing traditional affirmative actions policies with percentage plans that, in fact, reduce a school admissions decision to one "sole criterion," *i.e.*, class rank, thereby stripping a student of their "personal right" to be treated as an individual. *See, e.g., Bakke*, 438 U.S. at 314 ("Although a university must have wide discretion in making sensitive judgments as to who should be admitted, constitutional limitations protecting individual rights may not be disregarded.") (Powell, J.).

In direct contradiction to the teachings of this Court, the percentage plans deprive school administrators of "the opportunity to look at [the] whole person and the person's talents, abilities, experience, interests," and reduces the admissions process to "simply a mechanical exercise where a

spot is guaranteed based on the high school rank."[12] Sadly, what percentage plans do is make the admissions process inflexible and automatic. *Id.*

In stark contrast to the cookie-cutter approach of the percentage plans, the University's policies, as discussed previously, allow its administration to assess the students as unique people and not simply as numbers.

C. Percentage Plans Are Not Effective on a Nationwide Scale.

1. Percentage Plans Are An Unworkable Approach to Increasing Minority Representation in Most States.

Aside from relying upon a segregated secondary school system in order for minorities to be "represented in significant numbers," Administration's *Grutter* Br. at 25, the percentage plans also necessarily assume the presence of a large number of minorities within the state. However, such percentage plans will not function on a nationwide scale because of the lack of a significant minority population in the majority of the states.

This failure to take account of the varying minority populations among the different states, and even within different communities in the same state, fails to accomplish

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[12] Statement of Marvin Krislov, Vice President and General Counsel of the University of Michigan, on ABC News, *Schools Differ On Affirmative Action*, Jan. 16, 2003, http://abcnews.go.com/sections/wnt/DailyNews/affirmativeaction_options030116.html.

the goal of ensuring equal opportunities for minority applicants at higher education institutions. As such, these plans are not racially neutral and will unfairly discriminate against minority applicants in many states. This Court has consistently evaluated affirmative action programs with an eye toward their flexibility and taking into account variances in the applicant pool. *See, e.g., United States v. Paradise*, 480 U.S. 149, 171 (1987); *Fullilove v. Klutznick*, 448 U.S. 448, 487 (1980) (recognizing that the scope of the problem of discrimination in the construction industry could vary from market area to market area).

Census data confirm the unfortunate conclusion that percentage plans will not increase minority participation in the majority of states. Over 80% of African Americans live in only approximately one-third of the states.[13] And over *half* of the 50 states have populations that are at least 80% white and non-Hispanic.[14] As a result of this demographic reality, a broad stroke application of percentage plans would likely result in a scant number of minorities being admitted in the majority of the Nation's state university systems. Therefore, to the extent that its proponents claim that percentage plans can achieve racial diversity in schools at the same level enjoyed under the University's plan, the pro-

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[13] Seventeen states (Alabama, California, Florida, Georgia, Illinois, Louisiana, Maryland, Michigan, Mississippi, New Jersey, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Texas and Virginia) account for more than 80% of the nation's African Americans. *See* Press Release, U.S. CENSUS BUREAU, *Majority of African Americans Live in 10 States*, Aug. 13, 2001, *at* http://www.census.gov/Press-Release/www/2001/cb01cn176.html.

[14] *See* U.S. CENSUS BUREAU, Census 2000, *Population 18 Years and Over by Race and Ethnicity, at* http://www.eeoc.gov/stats/census/majorgroups/us/ us_state_rank.pdf.

ponents fail to account for the true national population picture.

Strikingly, even in states where there is a high proportion of minorities, such as in Florida, Texas, and California where these plans have been implemented, the percentage plans have not delivered results as promised. In fact, in a recent study regarding the impact of a percentage plan on minority university student populations, researchers found that at least in Texas' flagship universities,[15] "[t]he ban on affirmative action did have a chilling effect on enrollment of minority students admitted to the public flagships." *See* Marta Tienda, et al., *Closing The Gap?: Admissions & Enrollment at the Texas Public Flagships Before and After Affirmative Action,* Abstract (January 21, 2003), *available at* http://www.texastop10.princeton.edu/publications/tienda.012103.pdf. The study forcefully concluded that "*by itself, the top ten percent policy is NOT an alternative to race sensitive admissions.* " *Id.* (emphasis in original).

Likewise, in California, in 1995, prior to the ban on the use of race in admissions in the University of California ("UC") system, the student population was 16% Hispanic, 4% African American, and 1% Native American, with the remainder of the population equally divided between whites and Asian Americans. However, by 2001-02, only five years later, the UC system's population was 12-14% Hispanic, 3% African American and less than 1% Native American.[16] At

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[15] Texas' plan differs in one important respect from the Florida or California plans in that it guarantees admission to the university of the student's choice, including its flagship schools, The University of Texas-Austin and Texas A&M.

[16] *See,* U.S. Commission for Civil Rights, *Beyond Percentage Plans: The Challenge of Equal Opportunity in Higher Education,* Chapter 2, November 2002, *at* http://www.usccr.gov/pubs/percent2/summ.htm

California's most selective universities, UC-Berkeley and UCLA, minority students, once representing as much as 30% of the population, have dwindled to only 16-17%. *Id.*

In Florida, after its first year, the percentage plan had maintained minority enrollment across the state university system as a whole. However, at the state's flagship school, the University of Florida, there was a 40% drop in African American enrollment and a 7.5% drop in Hispanic enrollment.[17] Indeed, almost 73% of the Talented 20 program students applying to the University of Florida were white. Edgar K. Lee & Patricia Marin, *Appearance and Reality in the Sunshine State: The Talented 20 Program in Florida*, The Civil Rights Project, Harvard University, February 2003, at 29.

As the studies clearly indicate, in just the few years that percentage plans have been in effect in California, Texas, and Florida, enrollment numbers have sent a clear sign: these plans simply are not getting the job done in

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[hereinafter USCCR, *Beyond Percentage Plans*]; *see also Percent Plans in College Admissions* at 48 (reporting that between 1995 and 2001, the percentages of Hispanic and African-American students actually enrolling at UC-Berkeley dropped from 16.9% and 6.7%, to 10.8% and 3.9%, respectively.)

[17] *See* Report of New FTIC Student Enrollment, Division of Colleges and Universities, prepared by Office of Planning, Budgeting and Policy Analysis, *at* www.oneflorida.org/myflorida/government/governorinitiatives/one_florida/documents/minority_enrollment.xls. The "[e]nrollment of black freshmen dropped from a high of 829 students in 2000 to 461 students in 2001." *See* Vickie Chachere, *Bush's One Florida Praised*, THE TALLAHASEE DEMOCRAT, June 18, 2002, *available at* http://www.tallahassee.com/mld/democrat/news/local/3490611.htm.

assuring minority representation on the states' college campuses.

2. Percentage Plans Ignore Realities and Rely on the Very Same Problematic Criteria that Traditionally Have Stifled Minority Students.

There are also several particular facets of the percentage plans – standing alone – which render them inaccessible for many minority students who would benefit under the University's admissions policies. First, the percentage plans are based solely on high school class rank. This systematically excludes older minority students who tend to apply later, such as following several years of employment or service in the armed forces.[18]

Second, there is no national, state-wide, or even school district-wide method for calculating class rank. Each school varies in the courses used and the credits given for those courses. *See* National Association for College Admission Counseling, Issue Paper: *Affirmative Action in College Admission*, Summer 2001. Therefore, relying on class rank alone may present problems, particularly for minority students in underfunded and substandard schools that do not offer the more-challenging college-prepatory classes.

Moreover, by relying solely on class rank, the percentage plans fail to take into account the disparity among

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[18] *See, e.g.*, USCCR, *Beyond Percentage Plans*, "Executive Summary," *at* http://www.usccr.gov/pubs/percent2/summ.htm ("Minority students are less likely to enroll in college right after high school. . . .").

high schools. "Top" students from less qualified schools, which are more often in minority areas, may not be as well-prepared for a college curriculum as some of their peers at higher quality high schools. A plan that relies on class rank alone, effectively sets up these students for failure at the university level. Conversely, minority students who attend above average high schools may not rank in the designated percentage of their class. A percentage plan that offers admission and scholarships based on rank alone may thereby preclude these students from thriving on a university campus. In sum, the percentage plans neither make adjustments nor account for any variation among high schools, an oversight which overwhelmingly burdens minority students.[19]

Third, the percentage plans do not offer a solution to graduate and professional school admissions. *See Percent Plans in College Admissions*, at 10. As currently implemented in Texas, California, and Florida, graduate and professional schools are excluded from the percentage plans. However, at the same time, as a result of case law or legislation, these same jurisdictions have prohibited or limited traditional affirmative action plans. As a consequence, the number of minority students has substantially declined at most of the professional schools in those states. For example, in Texas, the percentage of African American students at the University of Texas Law School dropped from 7.4% in 1995 to approximately 2% in 1998 and 1999, rising only recently to 4% in 2002. *See*

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[19] The Congressional Amici firmly believe that equal access to higher education must first begin with correcting the inequities that exist in K-12 education. Until there is true parity on the primary and secondary level, access to post-secondary education cannot be premised on the illusion of such.

Minority Enrollment for Entering First Year Classes at the Univ. of Texas School of Law, 1983-2002, *available at* http://www.law.utexas.edu/hopwood/minority.html. Accordingly, states with percentage plans alone offer only a first step to minority students toward the goal of equal access to education.

Despite their appeal to critics of race-based affirmative action policies, the percentage plans touted by the Bush Administration fail to fully address the complex issues facing educational professionals in assembling student bodies, and do not provide a viable alternative to policies, such as those employed by the University. [20]

* * *

It has been a little over forty years since President Kennedy issued Executive Order No. 10,925 and the term "affirmative action" entered our national consciousness. *See*

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[20] Indeed, the ramifications of a ruling declaring the admissions policies used by the University unconstitutional would be far-reaching in its potential affect on the admissions policies at private universities, which are also exempt from the percentage plans. It would also effect financial aid decisions because many universities utilize the principles enunciated in *Bakke* as a basis for extending financial aid. There have already been ramifications in Texas because of the prohibition on using race in financial aid decisions as well as in admissions. At Texas A&M, "[t]he lure of better financial packages from other schools is one of the primary reasons why only 53 percent of Hispanic applicants and 47 percent of black applicants who were admitted to A&M chose to enroll. By comparison, 64 percent of white applicants who were admitted decided to come to the University." Rolando Garcia, *Officials Say A&M Needs Racial Preferencing*, THE BATTALION ONLINE – TEXAS A&M'S NEWS SOURCE, Jan. 28, 2003 *at* http://www.thebatt.com/vnews/display.

Exec. Order No. 10,925, 3 C.F.R. 448 (1961). We have learned much over the last four decades, but we still have farther to go. At this juncture in our learning process toward the goal of achieving diversity in higher education, race is still the best method of ensuring that there is a racially-diverse student body. *See, e.g.,* Statement of Richard Kahlenberg, Senior Fellow at the Century Foundation, *quoted in* Michael A. Fletcher, *Race-Neutral Plans Have Limits In Aiding Diversity, Experts Say*, WASH. POST, Jan. 17, 2003, at A12 ("There is no better way to guarantee a certain percentage of the student body is minority than by taking race into account.").

We should not shy away from using race as one of the factors to be considered in an admissions decision. As Justice O'Connor acknowledged: "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." *Adarand*, 515 U.S. at 237. *See also Bakke*, 438 U.S. at 327 ("claims that law must be 'color-blind' or that the datum of race is no longer relevant to public policy must be seen as aspiration rather than as a description of reality") (Brennan, J., concurring in judgment in part and dissenting in part).

We must, however, guarantee that this use of race does not violate the Constitution. Unfortunately, we do not live in a color-blind society. While efforts to set forth alleged "race-neutral" policies are laudatory in the abstract, as demonstrated above, they are hardly "race-neutral" when applied. Utilizing race as the University does is entirely consistent with the Fourteenth Amendment, particularly given the rigors of this Court's strict scrutiny analysis. *See Adarand*, 515 U.S. at 237 ("When race-based action is

necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the 'narrow tailoring' test this Court has set out in previous cases.").

One of the hallmarks of upholding affirmative action plans is continuing to permit higher-education administrators to have the flexibility they need in order to further this Nation's compelling interest in ensuring diversity. It cannot be disputed that educators must be allowed discretion in making admissions decisions. The task for this Court is to ensure that this discretion is exercised in a constitutional manner as the University has done here.

CONCLUSION

For all of the reasons set forth herein, the University's admissions programs should be found to further a compelling government interest, to be narrowly tailored to meet that interest, and to be constitutional under the Equal Protection Clause of the Fourteenth Amendment.

Respectfully submitted,

Andrew L. Sandler
Mary L. Smith
Counsel of Record
Susan K. DeClercq
Galen D. Bellamy
Kishka-Kamari Ford
Lesley B. Whitcomb

1440 New York Avenue, N.W.
Washington, D.C. 20005-2111
(202) 371-7000

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APPENDIX

LISTING OF CONGRESSIONAL AMICI

Representative Richard A. Gephardt (Missouri)
Representative Xavier Becerra (California)
Representative James E. Clyburn (South Carolina)
Representative Elijah E. Cummings (Maryland)
Representative Chaka Fattah (Pennsylvania)
Representative Carolyn C. Kilpatrick (Michigan)
Representative Melvin L. Watt (North Carolina)