Nos. 02-241 and 02-516

IN THE

Supreme Court of the United States

BARBARA GRUTTER,
Petitioner,

v.

LEE BOLLINGER, *et al.*,
Respondents,

v.

KIMBERLY JAMES, *et. al.*,
Respondents.

JENNIFER GRATZ AND PATRICK HAMACHER,
Petitioners,

v.

LEE BOLLINGER, *et al.*,
Respondents,

v.

EBONY PATTERSON, *et al.*,
Respondents.

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

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BRIEF OF HOWARD UNIVERSITY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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MISCELLANEOUS

INTEREST OF HOWARD UNIVERSITY AS *AMICUS CURIAE*[1]

Founded two years after the conclusion of the Civil War in March of 1867, Howard University is among the oldest and most comprehensive institutions of higher learning within the group of historically black colleges and universities. The University was founded by a group of men committed to the idea of preparing the freed people for responsible citizenship and inclusion in a free America. Two hundred and fifty years of involuntary servitude had rendered the former slaves bereft of many of the basic rights of humanity, including, due to compulsory illiteracy, even a rudimentary educational experience.[2]

General Oliver Otis Howard, Commissioner of the Freedmen's Bureau, and the men who secured the Howard charter realized that sustained progress and inclusion in the society on an equal footing for black people would necessitate access to institutions of higher education that would prepare "good teachers, professional men, and leaders to the rising generation of freedmen."[3] Their aims ran counter to the prevailing wisdom of the day that the freed people lacked the intellectual capacity for training at the "higher grade."

Thus, General Howard and his colleagues settled upon a plan for a university that would provide an education in the

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[1] The parties in this case have granted general consents for the filing of amicus briefs, which are filed with the Court. Pursuant to Supreme Court Rule 37.6, counsel represents that this brief was authored by the attorneys listed on the cover with the assistance of Howard University faculty members. Other than the support of the amicus party, there were no monetary contributions made by any person or entity for the filing of the brief.

[2] *See* Rayford Logan, *Howard University: The First Hundred Years – 1867-1967* vii, 21 (1969).

[3] Oliver Otis Howard, *Autobiography of Oliver Otis Howard: Major General United States Army* 395 (reprint 1971) (1907).

liberal arts and sciences and that, while pursuing its special mission to educate the freed men and women, would be inclusive in that it set no racial or gender limitations.[4] Indeed, the first students to enroll were young white women, presumably the daughters of members of the Board of Trustees. Significantly, then, at its beginning, Howard University embraced the idea of black and white students and men and women attending school together.[5]

The Reconstruction Period that brought about the establishment of the University, however, was short lived, and the freed men and women found themselves facing the harsh yoke of Jim Crow practices that brutalized them, relegated them to the status of second-class citizens, and purposefully denied them education in order to maintain their subjugation. This would endure for decades, but early in the new century, the University's leadership decided that it would embark on a long and arduous journey -- training lawyers and social scientists who would eventually challenge the prevailing racial social order in the courts. The University's efforts culminated in this Court's landmark decision in *Brown v. Board of Education*, 347 U.S. 483 (1954).[6]

Howard's seminal role in the civil rights movement – changing the course of this nation's history – unquestionably demonstrates the critical function of higher education in the advancement of our society and the primacy of the goal of creating a society marked not by its divisions but by its ability to bring people of all races, ethnic groups, and nationalities

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[4] Logan, *supra* note 2, at 20, 25; *see also* John Alcott Carpenter, *Sword and Olive Branch: Oliver Otis Howard* 170-71 (1964).

[5] Logan, *supra* note 2, at 34, 67.

[6] *See* Richard Klugar, *Simple Justice* 126-32 (1976); Genna Rae McNeil, *Groundwork: Charles Hamilton Houston and the Struggle for Civil Rights* 60-127 (1983).

together to learn, to work, and to live productively and peacefully.

Howard University's long-term commitment and significant contributions to the achievement of this goal by providing leadership for the nation and the global community makes it uniquely interested in the case now before the Court.[7]

SUMMARY OF THE ARGUMENT

These cases are of tremendous importance. Their outcome will shape our Nation for many years to come. Thus, like *Dred Scott, Plessy, Brown, and Bakke* – they present a door to the future. This Court will determine if that door is open or closed.

I. In *City of Richmond v. Croson*, 488 U.S. 469, 503 (1989), the Court held that states can take race-conscious action to avoid participating in or perpetuating discrimination. The record in this case demonstrates that the state and national pools from which the University of Michigan selects its students are affected by past and present discrimination. To

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[7] The life's work of the University's graduates, who are a diverse group of persons of different racial, ethnic, and national origins, stands as proof of its success in pursuing these goals. Howard's alumni include, for example, Justice Thurgood Marshall; former United States Senators Edward Brooke and Harris Wofford; former United States Ambassador to the United Nations, Andrew Young; Pulitzer Prize winner Toni Morrison; the first woman admitted to the bar of the District of Columbia, Charlotte Ray; founder and former Dean of the Washington College of Law (American University School of Law) and the first woman admitted to the American Bar Association, Emma Gillett; internationally acclaimed opera singer Jessye Norman; former Governor of Virginia, L. Douglas Wilder; President of the International Criminal Tribunal for the Former Yugoslavia, The Hague, Judge Gabrielle Kirk McDonald; and local leaders in its home city such as current and former At-Large Members of the District of Columbia City Council, Linda Cropp and the late David A. Clarke respectively. *See also* J. Clay Smith, *Emancipation: The Making of the Black Lawyer* (1993).

wit, federal, state and local officials acting in concert with private parties caused rigid residential segregation resulting in racially isolated schools serving dense concentrations of poor students whose educational opportunities are, at once, separate and profoundly unequal. Under the precedent in *Croson*, the University may properly take race-conscious actions to avoid participating in or perpetuating the effects of this discrimination.

II. Creating racially and ethnically diverse educational environments is a compelling governmental interest in a pluralistic and democratic nation. The critical role of higher education in training the next generation to function in multi-cultural national and global environments, and negotiate group differences in contexts of commerce, politics, war and peace, cannot be gainsaid. A unanimous Supreme Court in *Sweatt v. Painter*, 339 U.S. 629 (1950), emphasized, in a higher education context, the importance of learning through intergroup exposure to the quality of the educational experience. The record evidence in this case empirically demonstrates the correctness of the Court's judgment.

The programs at issue in these cases are radically different and distinguishable from the type stricken by the Court as odious to a civil society and violative of the Fourteenth Amendment. Moreover, the Court's recognition of a university's First Amendment interests in selecting a student body that creates an environment for a high quality educational experience and the appropriate deference due in that regard give further warrant for this Court's approval of the actions of the University of Michigan.

III. The Court has said that narrow-tailoring does not mean fatal; thus, its application to reasonable and necessary race-conscious admissions programs ought not be so rigid that colleges and universities effectively are prohibited from exercising affirmative action in admissions. Application of the

narrow-tailoring standard of strict scrutiny review in these cases reveals that race-consciousness is necessary for the University to accomplish its goals and that the burden of these programs on third parties is demonstrably diffuse and minimal. *See United States v. Paradise*, 480 U.S. 149 (1987).

FACTUAL CONTEXT

Missing from the analyses of most courts and many of the parties addressing the questions at issue here is the factual context which drove the adoption of the Reconstruction Era Amendments to the Constitution, namely America's racial caste system based upon a belief in the superiority of the white race. This racial hierarchy permeated every aspect of life for persons of African descent, whether free or slave, as documented in great detail in the Court's now infamous decision in *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857), which held that blacks were not intended by the framers of the Constitution to be "citizens" because they were universally considered to be "a subordinate and inferior class of beings." *Id.* at 402.

A. Racial Caste in the United States

1. School Segregation

From emancipation through the mid 1900's, the vast majority of African Americans lived in the southern part of the United States.[8] With the rise of Jim Crow, supported by law under the so-called separate but equal doctrine and upheld by

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[8] Nicolas Lemann, *The Promised Land: The Great Black Migration and How it Changed America* 6 (1991) ("In 1940, 77 percent of black Americans still lived in the South.").

the Court in *Plessy v. Ferguson*, 163 U.S. 537 (1896),[9] most blacks either had no schooling or segregated and inferior education compared to that available to whites.[10] The United States Court of Appeals for the Eleventh Circuit captured the purpose and structure of the dual system in the following quote, which relates specifically to Alabama but is descriptive generally of the 17 southern and border states that operated the de jure segregated systems under which most blacks lived.[11]

> In very broad terms, for more than a century following its admission to the Union in 1819, Alabama denied blacks access to college-level public higher education and did so for the purpose of maintaining the social, economic and political subordination of black people in the state. . . . Until Reconstruction, all education of enslaved blacks was criminalized in Alabama. Following Reconstruction, blacks were excluded from the universities attended by

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[9] The *Brown* plaintiffs viewed the separate but equal doctrine as an instrument of "defiant nullification" of the Fourteenth Amendment:

> [T]he history of segregation laws reveals that their main purpose was to organize the community upon the basis of a superior white and inferior Negro caste. These laws were conceived in a belief in the inherent inferiority of Negroes, a concept taken from slavery.

Brown v. Board of Education, Brief for Appellants in Nos. 1, 2 and 4 and for Respondents in No. 10 on Reargument at 50 (1953)

[10] *See generally*, W.E.B. Du Bois, *Black Reconstruction in America 1860-1880* (1935); Eric Foner, *Reconstruction, America's Unfinished Revolution: 1863-1877* (1988); John Hope Franklin, *From Slavery to Freedom* (8th ed. 2000); Gunnar Myrdal, *An American Dilemma* (1944); C. Vann Woodward, *The Strange Career of Jim Crow* (1974).

[11] *See Women's Equity Action League v. Cavazos*, 906 F.2d 742, 744 (D.C. Cir. 1990); *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973) (en banc).

> whites, relegated instead to only vastly inferior institutions . . . . Although they were upgraded somewhat beginning in the 1940's, the institutions to which blacks were restricted by state law continued to be allocated a radically disproportionately small share of the resources devoted by the state to public higher education.[12]

Education at the elementary and secondary level was also rigidly segregated and grossly unequal.[13] The Court's decisions in *Brown* in 1954 and 1955[14] striking the separate but equal doctrine in education and requiring the dismantling of racially dual school systems faced massive resistance by the states bringing the first return of federal troops to the South since Reconstruction. Resolutions of "Interposition" and "Nullification" were adopted by states to thwart the effect of the *Brown* decision, and state officials were openly defiant and

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[12] *Knight v. Alabama*, 14 F.3d 1534, 1538 (11th Cir. 1994); *see also generally*, Gil Kujovich, *Equal Opportunity in Higher Education and the Black Public College: The Era of Separate But Equal*, 72 Minn. L. Rev. 29 (1987); W.E. Trueheart, *The Consequences of Federal and State Resource Allocation and Development Policies for Traditionally Black Land-Grant Institutions: 1862-1954* (University Microfilms International, Ann Arbor, Michigan) (1979).

[13] *See generally* James Anderson, *The Education of Blacks in the South, 1865–1935* (1988); Horace Mann Bond, *Negro Education in Alabama: A Study in Cotton and Steel* (reprint 1994 University of Alabama Press) (1969); Kluger *supra* note 6. The separate but equal doctrine was a ruse from the beginning. Separate schools were not required to be equal. *See Cumming v. Board of Education of Richmond County*, 175 U.S. 528 (1899).

[14] *Brown v. Board of Education*, 349 U.S. 294 (1955).

encouraged violations of the law.[15] Northern schools also were rigidly segregated and opposition to desegregation was often strong and violent.[16]

The Court's desegregation cases implementing *Brown* through the late 1970's recognized the physical separation of the races as a central component of America's racial caste system and required affirmative steps to end it.[17] Significant desegregation at the elementary and secondary level began to occur in the late 1960's and continued into the late 1980's until federal courts began routinely to dismantle desegregation plans. Many school systems were never significantly desegregated and others for only a very short time.[18]

In 2000, more black students attended 90-100% minority schools than in 1980. The South, which went from the most segregated to the most desegregated region in the country, is now at its lowest level of desegregation since 1968. Increasing school segregation is occurring in every region of

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[15] Taylor Branch, *Parting the Waters, America in the King Years 1954-63* (1988); Robert A. Pratt, *We Shall Not Be Moved: The Desegregation of the University of Georgia* (2002); Woodward, *supra* note 10; *see e.g., Cooper v. Aaron*, 358 U.S. 1 (1958); *United States v. Barnett*, 376 F.2d 681, 686 (5th Cir. 1964); *United States v. Barnett*, 330 F.2d 369 (5th Cir. 1963) (en banc).

[16] *See e.g.*, Lisa Belkin, *Show Me a Hero: A Tale of Murder, Suicide, Race and Redemption* (1999) (Yonkers, New York); J. Anthony Lukas, *Common Ground: A Turbulent Decade in the Lives of Three American Families* (1985) (Boston, Massachusetts).

[17] *See Green v. County School Board of New Kent County*, 391 U.S. 430 (1968); *Alexander v. Holmes County Board of Education*, 396 U.S. 19 (1969); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Columbus Board of Education v. Penick*, 443 U.S. 449 (1979).

[18] Gary Orfield, Susan Eaton and the Harvard Project on School Desegregation, *Dismantling Desegregation: The Quiet Reversal of Brown v. Board of Education* (1996).

the country in part due to demographic change, but a significant factor is the loss of desegregation measures. In the Northeast, more than half of black students attend 90-100% minority schools, and one quarter of black students in the Northeast and Midwest attend hyper-segregated 99-100% minority schools. In the three regions of the country with the smallest proportion of black students, the Northeast, Midwest, and West, at least two thirds of the black students attend predominately minority schools.[19] These heavily minority elementary and secondary schools also have another salient feature – they are often islands of deeply concentrated poverty.[20] Students in these schools face circumstances that academically speaking are starkly different from those in majority white schools in terms of funding, teacher quality, school facilities, and resources.[21]

A comprehensive 50-state review of education by Education Week and the Pew Charitable Trusts concluded that "[t]he biggest challenge facing U.S. cities and their school systems is concentrated poverty . . . [which] is an overwhelmingly urban phenomenon, and one that afflicts far more black children than any other racial or ethnic group."[22] The review found that poor students who attended middle-class schools performed significantly better. In urban schools where most of the students are poor, two thirds or more of the children

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[19] Erica Frankenberg et al., Harvard Civil Rights Project, A *Multiracial Society with Segregated Schools: Are We Losing the Dream?* 38-40 (2003).

[20] *Id.* at 35.

[21] *See, e.g., Id.*, Jonathan Kozol, *Savage Inequalities, Children in America's Schools* (1991); john powell, *Segregation and Educational Inadequacy in Twin Cities Public Schools*, 17 Hamline J.Pub.L. & Pol'y 337, 341 (1996) ("The concentration of racialized poverty extant in American schools has devastating consequences for education."); *Quality Counts '98*, Education Week (1998).

[22] *Quality Counts '98, supra* note 21.

fail to reach even "basic" levels on national tests. These findings are corroborated by the four-year, congressionally mandated study of educational achievement for disadvantaged students. It found that school poverty depresses the test scores of all students where at least half of the students are eligible for subsidized lunch, and that it seriously depresses the scores when more than 75 percent of the students live in low-income households.[23]

Educational opportunities for blacks at the higher education level continue to be restricted, particularly with respect to access to historically white institutions. Despite a start on desegregating former segregated state systems of higher education in the late 1970's, the government abandoned most of its efforts in the late 1980's and early 1990's and began releasing states from their desegregation obligations.[24] A 1998 review of 12 southern states that had been undergoing desegregation found that, while showing improvement from the period of absolute exclusion, not one of the 12 could demonstrate real success in desegregating its higher education system.[25] Historically black colleges continued to be major points of entry for black students. "[W]ithout them, the limited access to higher education for black students would be drastically reduced."[26]

The intergenerational and cumulative effects of the educational discrimination suffered by African Americans are

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[23] *Id.* (quoting Michael Puma et al., Department of Education, *Prospects: Student Outcomes Final Report* (1997)).

[24] The states were released under a standard inconsistent with Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. *See* Notice of the Application of *Fordice*, 59 Fed. Reg. 4272 (1994).

[25] Southern Education Foundation, *Miles to Go* (1998).

[26] Southern Education Foundation, *Redeeming the American Promise* xxi (1995).

evident in today's population. While the gap in achievement between blacks and whites narrowed significantly during the period between 1970 and 1990 when desegregation and other educational opportunity programs reached their peaks, those gains have stagnated and the achievement gap remaining is significant.[27] The black/white gap in college going and completion rates remains wide as well. Data from the 2000 Census show a high school graduation rate for whites ages 25-29 of 94% compared to 86% for blacks. Thirty-four percent of whites in the 25-29 age group held a college degree compared to 18% of blacks.[28] These gaps in educational achievement and attainment translate into significant income and wealth effects.

> During the past fifteen years the labor market has distributed ever larger rewards to workers who have college educations. In 1980 the average 25- to 34-year-old male college graduate earned 19 percent more than a male high school graduate of the same age. By 1995 the difference had widened to 52 percent.[29]

2. Residential Segregation

As a result of an unbroken chain of massive past discrimination followed by ongoing and substantial current discrimination in housing, African Americans currently experience the highest degree of residential segregation of any

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[27] David Grissmer et al., Rand, *Student Achievement and the Changing American Family* (1994); National Center for Educational Statistics, *Educational Achievement and Black/White Inequality* vi (2001).

[28] U.S. Census Bureau, *Percent of High School and College Graduates of the Population 15 Years and Over, by Age, Sex, Race and Hispanic Origin: March 2000.*

[29] Thomas J. Kane, *The Price of Admission: Rethinking How Americans Pay for College* 1 (1999).

racial or ethnic group in the country.[30] Expert evidence in this case, supported by a strong body of research, demonstrates that this phenomenon is not the product of free choice or happenstance. As blacks moved from the rural south to cities in the north and west they found neighborhoods rigidly restricted by race. Black "ghettos" – neighborhoods inhabited exclusively by blacks regardless of the income or class composition of the neighborhood or the individuals – were the only places they could live. This physical restriction on black housing opportunities resulted from the actions of federal, state and local governmental officials working in concert with the members of the private real estate industry to keep neighborhoods racially homogeneous.[31]

> The urban ghetto, constructed during the first half of the twentieth century and successively reinforced thereafter, represents the key institutional arrangement ensuring the continued subordination of blacks in the United States.[32]

Residential Segregation is a key component of school segregation and the concentration of poverty.[33]

While the South was home to the great majority of blacks prior to the 1940's, discrimination and its adverse effects

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[30] U.S. Census Bureau, *Racial and Ethnic Residential Segregation in the United States: 1980 - 2000* 4 (2002); see *infra* notes 41-43.

[31] Expert Report of Thomas J. Sugrue, Expert Report of Eric Foner, and trial testimony in *Grutter v. Bollinger* of Gary Orfield. Hereinafter the reports of expert witnesses in these cases are cited as "Expert Report of _____," and abbreviated as "_____ Repor[illegible]" Many of the expert reports are available at <www.umich.edu>. Pa[illegible] citations included herein are from "The Compelling Need for Diversity in Higher Education" available on that site.

[32] Douglas S. Massey and Nancy A. Denton, *American Apartheid: Segregation and the Making of the Underclass* 18 (1993).

[33] *Id.* at 118-125.

were never limited to points south of the Mason-Dixon line.[34] Between 1910 and the 1960's approximately 4.7 million African Americans left the South heading for points north and west -- typically cities.[35] The arrival of a large, readily identifiable, non-white population bearing the burdens of oppression and seeking work drew hostility from northern whites like no other immigrants had.[36]

Violent opposition to the black influx was followed by organized efforts to bar blacks physically from residing in white neighborhoods.[37] Cities enacted residential segregation ordinances,[38] and neighborhood organizations developed racially restrictive covenants, approved in *Corrigan v. Buckley*, 271 U.S. 323 (1926). Restrictive covenants were found to be a powerful and effective tool for the institution and maintenance of residential segregation, and were used extensively throughout the United States between 1910 and 1948, when the Court ruled that they were unenforceable in

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[34] Racial prejudice in the North and its effects are seen early on in the struggle over separate schools in Boston, Massachusetts; *see* Derrick Bell, *Race, Racism and American Law* 530-537 (3rd ed. 1992).

[35] Charles Abrams, *Forbidden Neighbors*, 24 (1955) (1910-1940 figures); Massey and Denton, *supra* note 32, at 45 (1950's and 1960's figures).

[36] Massey and Denton, *supra* note 32, at 32-33.

[37] Abrams, *supra* note 35, at 81-90 (1955); *see also id.* at 91-102 (Detroit and Dearborn, Michigan).

[38] Massey and Denton, *supra* note 32, at 41; *see e.g.* Garrett Power, *Apartheid Baltimore Style: The Residential Segregation Ordinance of 1910-1913*, 42 Md. L. Rev. 289 (1983). The Court prohibited these ordinances in *Buchanan v. Warley*, 245 U.S. 60 (1917), but some jurisdictions adopted them anyway. *See, e.g., Allen v. Oklahoma City*, 175 Okla. 421, 52 P.2d 1054 (Okla. 1935) (ordinance in effect from 1922 to 1936).

Shelley v. Kraemer, 334 U.S. 1 (1948). But the racial geography of urban America already had gained a solid footing.

Operating through federal agencies starting in the 1930's and 1940's, the federal government became a central and controlling figure in mortgage lending. As a proponent of redlining, racial steering, and restrictive covenants, it drove the creation of racially restricted neighborhoods. Federal agencies developed a real estate appraisal system that "redlined" neighborhoods where black people lived and those in proximity to black people and rated them as least desirable for investment, while white homogeneous neighborhoods were rated as most desirable. Every city in the nation would eventually be rated, and federal agencies and private lending institutions utilized those ratings to impose a rigid racial structure on communities nationwide.[39]

In 1970, then Secretary of the United States Department of Housing and Urban Development, George Romney, admitted that the federal government had not stopped practicing redlining in housing until 1965 and that it would take some time before changes in "embedded" practices like redlining would take effect.[40] National organizations of real estate appraisers as well as real estate agents and others followed these practices well into the 1970's and beyond.[41]

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[39] *See* Sugrue Report at 31-32; Kenneth T. Jackson, *Crabgrass Frontier: The Suburbanization of the United States* 190-218 (1985); Abrams, *supra* note 35, at 227-243.

[40] *Equal Educational Opportunity: Hearings before the Select Committee on Equal Educational Opportunity*, 91st Cong. 2755, 2771 (1971).

[41] *See, e.g., Paschal v. Flagstar Bank*, 295 F.3d 565 (6th Cir. 2002) (mortgage lending); *Zuch v. Hussey*, 394 F. Supp. 1028 (E.D. Mich. 1975), *aff'd*, 547 F.2d 1168 (6th Cir. 1977) (racial steering); *see also Hall v. Lowder Realty Co.*, 160 F. Supp. 2d 1299 (M.D.Ala. 2001); *United States*

(continued...)

In addition to the segregation in the private housing market, public housing jointly funded by federal and local governments was also openly and starkly segregated by race. Today, African American public housing residents are concentrated in projects in severely poor neighborhoods.[42]

A recent study of housing markets in the United States using paired testers confirms that although housing discrimination has declined since 1989, African Americans and Hispanics still face significant discrimination in both the housing rental and sales markets.[43] Redlining in the mortgage lending and home insurance markets are also continuing problems.[44] The continuing effects of these discriminatory practices adopted, perfected, and promoted by the government and the private real estate industry are experienced in today's housing market in the form of extensive residential

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[41](...continued)
v. American Institute of Real Estate Appraisers, 442 F. Supp. 1072 (N.D. Ill. 1977), *appeal dismissed*, 590 F.2d 242 (7th Cir. 1978).

[42] John Goering et al., Department of Housing and Urban Development, *The Location and Racial Composition of Public Housing in the United States* 7 (1994); *see also Abrams, supra* note 35, at 306-319; Arnold R. Hirsch, *Searching for a "Sound Negro Policy": A Racial Agenda for the Housing Acts of 1949 and 1954*, Vol. 11, Issue 2, Housing Policy Debate 393 (2000).

[43] Margery Austin Turner et al., Department of Housing and Urban Development, *Discrimination in Metropolitan Housing Markets: National Results from Phase I HDS 2000* iii-iv (2002).

[44] *See, e.g., U.S. v. Chevy Chase Federal Savings Bank*, CV 94-1834-JG (consent decree of August 22, 1994); *U.S. v. American Family Mutual Insurance* (E.D. Wisc.) (Consent decree included $14.5 million in damages to victims of illegal discrimination in home owners insurance) available at <www.usdoj.gov/crt/housing/caselist.htm> along with descriptions of a significant number of other housing discrimination cases.

segregation.[45] Residential segregation concentrates poverty[46] and adversely affects access to jobs, financial capital, health care and education.[47]

B. Michigan: The Effects of Race, Poverty and Segregation

The University of Michigan draws nearly two-thirds of its students from the State of Michigan and over half from the Detroit Metropolitan Area. Sugrue Report at 18. "Three of the ten most segregated metropolitan areas in the United States are in Michigan. . . . Detroit is the second most segregated metropolitan area in the country. . . ." *Id.* The record shows that this residential segregation in Michigan is the product of discrimination by both governmental and private actors. It is not a naturally occurring phenomenon, *id.* at 31-34, and it is ongoing, *id.* This stark residential segregation causes a concentration of poverty, educational segregation and disadvantage, racial isolation, and racial stereotyping. *Id.* at 38-

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[45] Massey and Denton, *supra* note 32, at 74-78 (describing "hypersegregation" of African Americans). Residential segregation is so extensive that the states of Texas, Florida and California rely on it as the basis for undergraduate admissions programs designed to produce racially and ethnically diverse student bodies. *See* Brief of the United States as Amicus Curiae Supporting Petitioner in *Grutter v. Bollinger*, No 02-241 at 17-22 (describing programs).

[46] Massey and Denton, *supra* note 32, at 118-125, 180. "Concentrated poverty is created by a pernicious interaction between a group's overall rate of poverty and its degree of segregation in society." *Id.* at 118.

[47] Sugrue Report at 34; *see generally* Melvin L. Oliver and Thomas M. Shapiro, *Black Wealth White Wealth: A New Perspective on Racial Inequality* (1995); William Julius Wilson, *When Work Disappears* (1996); William Julius Wilson, *The Truly Disadvantaged: The Innercity, The Underclass, and Public Policy* (1987).

45. Strikingly, far more students in Michigan are likely to attend racially segregated schools than in Louisiana, Mississippi, Georgia and other southern states. *Id.* at 36.

Michigan's residential segregation is educationally significant because Latino and African American students are in segregated schools that are characterized by a concentration of poverty. These schools fail to offer equal educational opportunities in that they have few or no Advanced Placement (AP) or International Baccalaureate (IB) courses – critical to the academic preparation needed for a competitive university. Thirty-eight percent of all African American students are in schools with no IB/AP courses, while only 4% of white students are in such schools. Expert Report of William Trent in *Gratz* at 6. These same segregated schools have low college going rates and low average SAT scores. *Id.* As a result, minority students in Michigan make up a disproportionately small percentage of the pool of qualified applicants for the University of Michigan, Expert Report of Wayne Camara in *Gratz* at 10-12, 15, and are underrepresented in the number of students admitted and enrolled at the University.

ARGUMENT

I. The Fourteenth Amendment and Title VI Allow Race-Conscious Measures To Avoid Participation in and Perpetuation of Discrimination

In *City of Richmond v. Croson*, 488 U.S. 469 (1989), the Court held that state actors may take race-conscious actions when their own practices are exacerbating a pattern of prior discrimination. This theory applies with particular force in these cases. It is initially described in *Croson* as the "passive participant" theory in Section II of the opinion, joined by three Justices:

> [I]f the city could show that it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system. It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.

Id. at 492 (O'Connor, J., joined by Rehnquist, C.J., and White, J.). Subsequently, in Section III-B of the opinion, five Justices agreed that

> [In a proper case], a city would have a compelling interest in preventing its tax dollars from assisting these organizations in maintaining a racially segregated construction market. See *Norwood* [*v. Harrison*, 413 U.S. 455 (1971)] at 465; *Ohio Contractors* [*Assn. v. Kiep*, 713 F.2d 167 (6th Cir. 1983)], *supra*, at 171 (upholding minority set aside based in part on earlier District Court finding that "the state had become a 'joint participant' with private industry and certain craft unions in a pattern of racially discriminatory conduct which excluded black laborers from work on public construction contracts").

Id. at 503, 504.

Regulations promulgated under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, for the United States Department of Education also expressly approve of race-conscious action for this purpose in 34 C.F.R. § 100.3(b)(6)(ii):

> Even in the absence of such prior discrimination [by the recipient of federal funds], a recipient in

> administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin.

President Nixon approved the adoption of this regulation by 21 Federal agencies in 1973, 38 Fed. Reg. 17920 (July 5, 1973).

The exercise of race-conscious measures to avoid participation in and perpetuation of discrimination is wholly consistent with the original intent of the framers of the Fourteenth Amendment. *See* Jed Rubenfeld, *Affirmative Action*, 107 Yale L.J. 427, 429-30 (1997). The Thirty-Ninth Congress which adopted the Fourteenth Amendment in June of 1866 also adopted race-conscious remedial legislation for the specific purpose of addressing the conditions of blacks, free and slave, following the Civil War. *Id.* The legislative record of debates from that Congress regarding the 1866 Freedmen's Bureau Act also shows that the unsuccessful opponents of the bill, including President Andrew Johnson who vetoed it, voiced essentially the same color-blindness arguments that are advanced in the cases now before the Court.[48] Opponents argued that the Freedmen's Bureau Act made "a distinction on account of color between the two races," and that it was impermissible "class legislation – legislation for a particular class of the blacks to the exclusion of all whites . . . ."[49] "Others argued that the bill would actually harm blacks either by increasing their dependence or by provoking white

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[48] *See* Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 Va. L. Rev. 753 (1985), *criticized* in Jeffrey Rosen, *The Color-Blind Court*, 45 Am. U.L. Rev. 791, 795 (1996); *but see* Rubenfeld, *supra*, at 431, n.23.

[49] Schnapper, *supra note* 48, at 763.

resentment."[50] Nonetheless, the Thirty-Ninth Congress passed the Act. Thus, these arguments rejected by the same Congress that passed the Fourteenth Amendment cannot fairly be asserted as the constitutional principles undergirding it. Instead, the guiding principle is that the purpose of the Amendment was to remove the badges of slavery burdening blacks and to put them on an equal footing with all citizens regardless of race. The holding in *Croson* that race-conscious action can be taken to avoid state participation in or perpetuation of discrimination rests solidly on the original intent of Congress in adopting the Fourteenth Amendment.[51]

The University of Michigan may properly seek to avoid participation in or perpetuation of the effects of the extreme racial segregation in its state caused by federal, state, and local actors working in concert with private parties, the record of which is documented in these cases. Sugrue Report. The limited pipeline of minority applicants from Michigan's segregated and unequal elementary and secondary schools justifies the University's race-conscious admissions programs which admit a small number of well-qualified minorities to the State's flagship institution supported by the tax dollars of all of its citizens, and without which the minority presence at the institution will rapidly and substantially decline. Expert Reports of Stephen W. Raudenbush. The University, which is also supported by federal tax dollars and governed by Title VI, draws a significant number of students from a national pool that is also depressed by the effects of past and present school and housing segregation caused by federal, state and private actors, as documented in the record of these cases. Expert Reports and

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[50] *Id.* at 764.

[51] Indeed, state actors have an affirmative duty to avoid actions that would make them complicit in racial discrimination or that would perpetuate such discrimination. *See, e.g., Green v. County School Board of New Kent County*, 391 U.S. 430 (1968).

testimony of Eric Foner, Gary Orfield, John Hope Franklin, and Joseph Feagin. Thus, the judgment of the Court of Appeals in *Grutter* and of the District Court in *Gratz* should be affirmed as supported by a finding that the University's actions were legally justifiable means of avoiding participation in and perpetuation of discrimination. *Croson*, 488 U.S. at 503-04.

II. Racial and Ethnic Diversity in Higher Education Is a Compelling and Necessary Governmental Interest

A. Racially and Ethnically Diverse Educational Environments for Learning are Critical in Preparing Citizens for Service to a Country that is Pluralistic, Democratic, and a Leader Among Nations

The Court's statement in *Brown* regarding the importance of elementary and secondary education is as compelling today with respect to higher education as it was in 1954 with respect to a high school diploma:

> Today, education is perhaps the most important function of state and local governments. . . . 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.

Brown, 347 U.S. at 492-93. Moreover, as Justice Powell recognized in *Regents of the University of California v. Bakke*, 438 U.S. 265, 313-14 (1978) (Powell, J.), this Court has previously emphasized, unanimously, that learning from others who are different in terms of social power and social relationships, of which race is a powerful determinant, is important and necessary to a high quality educational experience. *Sweatt v. Painter, 339 U.S. 629* (1950).

> Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned. The law school to which Texas is willing to admit petitioner excludes from his student body members of the racial groups which number 85% of the population of the State and include most of the lawyers, witnesses, jurors, judges and other officials with whom petitioner will inevitably be dealing when he becomes a member of the Texas Bar. With such a substantial and significant segment of society excluded, we cannot conclude that the education offered petitioner is substantially equal to that he would receive if admitted to the University of Texas Law School.

Id. at 634; *accord McLaurin v. Oklahoma State Regents,* 339 U.S. 637 (1950).[52]

Group difference and conflict are the history of America – indeed the world – and our colleges and universities have a special mission to help train the coming generations to negotiate and successfully manage these differences. A pluralistic democracy demands this and, as the record demonstrates, through diversity on college campuses, we are much better able to achieve it. Expert Reports of William Bowen and Patricia Gurin. Technology brings us much closer to our global

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[52] "The admission of colored and white men and women to Howard University was an act of defiance to this determination [i.e. "to keep the Negro in his place"] and a commitment to the belief that a desegregated coeducational institution of higher learning was consistent with the Nation's ideal of potential human equality." Logan, *supra* note 2, at 67. Howard's leadership in the journey to *Brown* proves the founders to have been correct.

neighbors and as a nation we are becoming more racially and ethnically diverse.[53] We are also increasingly dependent on other nations for natural resources and an international interdependency exists with respect to peace and security. In this context, it is unimaginable that our institutions of higher learning, the gate keepers of access to knowledge and power, would lose the ability to create racially and ethnically diverse educational environments. Diversity in higher education is indeed a compelling governmental interest.[54]

The Court has valued and respected a university's "academic freedom" to determine how best to educate its students by giving special deference to its judgments as to its academic mission and the composition of its student body. *See Bakke,* 438 U.S. at 312 (Powell, J.); *Board of Regents of University of Wisconsin v. Southworth,* 120 S.Ct. 1346 (2000); *Keyishian v. Board of Regents,* 385 U.S. 589, 603 (1967). Indeed, given the special First Amendment interests involved in a university's decision to seek student diversity and the values served by the exercise of those interests, the Court's own teachings support the exercise of deference to university officials pursuing these goals. Accordingly, in *North Carolina State Board of Education v. Swann,* 402 U.S. 43 (1971), the Court held that "[s]chool authorities have wide discretion in formulating school policy, and [ ] as a matter of educational policy may well conclude that some kind of racial balance in schools is desirable quite apart from constitutional

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[53] By the year 2005, minorities will make up almost 28 percent of the U.S. workforce. Anthony P. Carnevale and Richard Fry, Educational Testing Service, *Crossing the Great Divide: Can We Achieve Equity When Generation Y Goes to College?* 39 (2000).

[54] *See also* Brief of Amici Hillary Browne et al., and Students of Howard University Law School Supporting Respondents in *Grutter v. Bollinger, No. 02-241,* for a detailed student perspective on the important value of diversity in higher education.

requirements." *Id.* at 45. In the higher education context, five Justices agreed in *Bakke* that "the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin." 438 U.S. at 320.

B. Race-conscious Measures Designed to Promote Diversity and to Avoid the Perpetuation of Discrimination are Constitutionally Distinct from Invidious Discrimination

Under this Court's precedents, strict scrutiny is applied to race-conscious actions for the purpose of distinguishing racial classifications that are benign from those that are the product of illegitimate discrimination or stereotypes.

> [S]trict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.

See, e.g., *Croson*, 488 U.S. at 493 (O'Connor, J.). The Court has recognized that state actors can take race into account where their motives are the avoidance of racial or ethnic inequity, *see United Jewish Organizations v. Carey*, 430 U.S. 144 (1977) (New York could permissibly take race into account in redistricting in order to minimize the consequences of racial discrimination in the electoral process), or to provide integrated student bodies, without regard to a history of de jure

discrimination, *North Carolina State Board of Education,* 402 U.S. at 45.

Neither the Petitioners nor the United States, which has filed briefs on their behalf, has argued that the University of Michigan adopted the challenged programs with a purpose to discriminate against, oppress or subjugate whites or others. Petitioners contend instead that the diversity rationale relied upon by the University is a crude stereotype which presumes that "[i]ndividuals of unfavored racial and ethnic backgrounds are unlikely to possess the unique experiences and backgrounds that contribute to viewpoint diversity." Brief for Petitioner Grutter at 38, citing *Metro Broadcasting, Inc. v. FCC,* 497 U.S. 547, 618 (1990) (O'Connor, J. dissenting).

But the diversity concept is really quite different. Its premise is that where there are, for example, only white people in a discussion, then the viewpoints, as seen through the eyes of persons of a different racial or ethnic background -- meaning those aspects of difference or sameness from a person who has experienced life as a black person or as a Latino or as a disabled person, no matter how varied from black person to black person or Latino to Latino, will in fact be missing. This is true without regard to the diversity on other, non-racial or ethnic grounds, of the group. University officials seeking to create a rigorous intellectual environment as well as prepare students for leadership in a multi-racial world, determined that the one-race dimension that so many students get in their segregated elementary and secondary classrooms did not serve this purpose. Admissions programs to promote diversity recognize the salience of race and ethnicity without making any assumptions about the cohesiveness or sameness of viewpoint among members of any group. In fact, the more varied the viewpoint of those persons typically absent from the conversation, the better, which is why a critical mass of minority students is needed – to prevent the stereotyping that

would be likely to occur if there were only a token number of minorities at the school.

Importantly, however, Petitioners' argument that the University's quest for diversity is based on flawed and impermissible stereotypes cannot be squared with the position of the Gratz Petitioners at trial, conceding that "valuable" benefits flow from educational diversity and agreeing not to dispute this proposition,[55] or that of the United States which asserts its belief in the importance of the goals being pursued. "Ensuring that public institutions, especially educational institutions, are open and accessible to a broad and diverse array of individuals, including individuals of all races and ethnicities, is an important and entirely legitimate government objective." Brief for the United States as Amicus Curiae Supporting Petitioner, *Grutter v. Bollinger*, No. 02-241 at 9. Surely, these acknowledged benefits of diversity in education preclude the argument that the programs were borne out of flawed stereotypes.

Thus, if invidious intent is the touchstone of a violation of the Fourteenth Amendment, as the Court has held, *Washington v. Davis*, 426 U.S. 229 (1976), then the record in these cases demonstrates that the programs are amply justified by intentions wholly consistent with the Equal Protection Clause.

III. Meaningful Application of the Narrow Tailoring Standard Must Not Be So Rigid as to Preclude All Reasonable Race-conscious Admissions Measures

The narrow tailoring requirement of the Court's strict scrutiny analysis seeks to determine whether race-conscious

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[55]Joint Appendix filed in *Gratz v. Bollinger* the United States Court of Appeals for the Sixth Circuit, JA-4157.

action is unacceptably burdensome to third parties. *United States v. Paradise*, 480 U.S. 149 (1987) (plurality opinion). In *Paradise*, the Court approved, under strict scrutiny standards, an appropriately tailored affirmative action program in hiring despite the presence of a burden on third parties. In doing so, the Court considered the need for race-conscious action and the nature and extent of the burden on third parties in order to determine if the program met constitutional standards. *See id.* at 166, 171, 186. The record here demonstrates that race-conscious action in admissions is necessary and that the burden on third parties is diffuse and minimal.

Petitioners argue that the notion of the competitive consideration of race in admissions is just not workable. Their view that diversity is not a compelling interest ultimately drives their conclusion that no program serving that purpose could ever be narrowly tailed. *See, e.g.*, Brief for Petitioner in *Grutter*, at 36 ("the interest in diversity is inherently unsuited to "narrowly-tailored means"). They also attack the particular means selected by the University as too burdensome for a variety of reasons including their contention that the University places too much emphasis on race and that the consideration of race is more automatic than flexible.[56] Petitioners' exceedingly strict application of the narrow tailoring requirement would likely bar all affirmative action measures in college admissions. The Constitution, however, permits reasonable race-conscious means of achieving compelling goals such the promotion of diversity and the avoidance of perpetuating discrimination where, as here, race-conscious action is necessary to accomplish the goal, and the burden on third parties is diffuse and minimal.

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[56] The so-called race-neutral options proposed by the United States are simply not race neutral because they rely on residential segregation to produce meaningful numbers of minority admittees. Moreover, they are inapplicable to admissions at the graduate and professional levels.

The University of Michigan considers race because race is a salient feature of our history and social structure as a nation. "It is morally wrong and historically indefensible to think of race as just another dimension of diversity."[57] Because of the nation's history, race is treated like virtually no other issue as it is a unique and significant factor of difference, affecting life's experiences for blacks in ways that are independent of one's income, wealth or social status.[58] This is not an argument that all blacks are alike or think alike or that the University's programs makes these assumptions, because they do not. Rather, the point is that race impacts most people profoundly regardless of political or social viewpoint,[59] and that it is the very overarching nature of its impact that makes race matter so significantly.[60] The fact that the University gives considerable weight to race and ethnicity in the admissions process in order to achieve diversity and ameliorate the effects of discrimination is both necessary, if it is to be a real factor, and unsurprising given the profound and intergenerational effects of two hundred and fifty years of slavery, followed by a century of Jim Crow, followed by slow progress in the face of continuing discrimination.[61]

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[57] William G. Bowen and Neil L. Rudenstine, *Race-Sensitive Admissions: Back to Basics*, The Chronicle of Higher Education (February 7, 2003) at B7.

[58] Ellis Cose, *The Rage of a Privileged Class* (1993).

[59] Andrew Hacker, *Two Nations: Black and White, Separate, Hostile and Unequal* 31-50 (1992).

[60] Cornell West, *Race Matters* (2001).

[61] In his comments about these cases, President Bush acknowledged that racial discrimination is a current and ongoing problem. Remarks by the President on the Michigan Affirmative Action Case, January 15, 2003, <http://whitehouse.gov/news/releases/2003/01/20030115-7.html>. The President's assertion that racial segregation is behind us, *id.*, however, is an unfortunate reflection of a common, but palpably false, sense

(continued...)

In addition to the demonstrated need to consider race in the admissions process, the record shows that the burden on the interests of third parties is a diffuse and, by the very nature of the admissions process, uncertain one. This is not an instance of disturbing settled expectations. It is undisputed that even absent the affirmative action programs the Petitioners were still unlikely to be granted admission. For example, in *Gratz*, over 1,500 students with grade point averages and SAT scores *lower* than Jennifer Gratz -- who were *not* beneficiaries of affirmative action -- were granted admission to the University. Expert Report of Jacob Silver and James Rudolph in *Gratz* at 9. This is not an uncommon phenomenon in college admissions cases. *See Texas v. Lesage*, 528 U.S. 18 (1999) (per curiam); *Hopwood v. Texas*, 999 F. Supp. 872 (W.D. Tex. 1998); *Tracy v. Board of Regents of the University System of Georgia*, No. CV 497-45, 2000 WL 1123268 (S.D.Ga. June 16, 2000); *Tracy v. Board of Regents of the University System of Georgia*, 59 F. Supp. 2d 1314 (S.D. Ga. 1999). These cases collectively establish that the burden imposed by affirmative action admissions programs is a diffuse one, related to a benefit the receipt of which is far from certain. *See Wygant v. Jackson Board of Education*, 476 U.S. 267, 283 (1986) (plurality opinion) (distinguishing layoffs in the employment context which "disrupt settled expectations" from general hiring goals which impose a "diffuse burden").

The effect of affirmative action on Petitioners and similarly situated persons is also, statistically speaking, minimal. In *Grutter v. Bollinger*, 288 F.3d 732, 758 (6th Cir. 2002) (Clay, J. concurring), Judge Eric Clay describes the minimal impact of affirmative action programs on persons like

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[61](...continued)
of the national reality regarding the spatial organization of our communities based on race. *See infra* at 11-16.

the Petitioners in these cases. Judge Clay relies on a statistical analysis of the issue that found the improved odds of admission for white applicants in the absence of affirmative action to be in the range of 1-3%. *Id.* at 766-768, *citing* Goodwin Liu, *The Myth & Math of Affirmative Action*, The Washington Post, (April 14, 2002) at B1; *see also* Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 Mich. L. Rev. 1045 (2002).

CONCLUSION

The judgment of the Court of Appeals in *Grutter v. Bollinger* and the district court in *Gratz v. Bollinger* should be affirmed.

Respectfully submitted,

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