No. 05-908

In the

Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS,

Petitioner,

v.

SEATTLE SCHOOL DISTRICT NO. 1, et al.,

Respondents.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, AMERICAN CIVIL RIGHTS INSTITUTE, AMERICAN CIVIL RIGHTS UNION, AND CENTER FOR EQUAL OPPORTUNITY IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the rationale for promoting student body viewpoint diversity in institutions of higher education, as discussed in *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003), should be limited and not extended into the context of elementary and secondary public schools.

2. Is racial diversity a compelling interest that can justify the use of race in selecting students for admission to public high schools?

3. May a school district that is not racially segregated and that normally permits a student to attend any high school of her choosing, deny a child admission to her chosen school solely because of her race in an effort to achieve a desired racial balance in particular schools, or does such racial balancing violate the Equal Protection Clause of the Fourteenth Amendment?

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IDENTITY AND INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.2, Pacific Legal Foundation (PLF), the American Civil Rights Institute (ACRI), Center for Equal Opportunity (CEO), and the American Civil Rights Union (ACRU) submit this brief amicus curiae in support of Petitioner Parents Involved in Community Schools.[1] Letters of consent to file this brief were obtained from all parties and have been lodged with the clerk of this Court.

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purposes of engaging in litigation in matters affecting the public interest. PLF has extensive litigation experience in the area of group-based preferences and civil rights. PLF has participated as amicus curiae in numerous cases relevant to the analysis of this case, including *Gratz v. Bollinger*, 539 U.S. 244 (2003), *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Johnson v. California*, 543 U.S. 499 (2005); and *Comfort v. Lynn School Committee*, 418 F.3d 1 (1st Cir. 2005) (*cert. denied*, 126 S. Ct. 798 (2005)).

ACRI and CEO are nonprofit research, education, and public advocacy organizations. Amici devote significant time and resources to the study of the prevalence of racial, ethnic, and gender discrimination by the federal government, the several states, and private entities. They educate the American public about the prevalence of discrimination in American society. Amici publicly advocate the cessation of racial, ethnic, and gender discrimination by the federal government, the several states, and private entities. They have participated as

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[1] Pursuant to Rule 37.6, amici curiae affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

amici curiae in numerous cases relevant to the analysis of this case. ACRU is a nonprofit organization that supports and defends all the rights guaranteed in the federal constitution, as written. ACRU maintains that both basic morality and the constitution require that all Americans be treated equally under the law regardless of race or national origin. Amici participated as amici curiae in this case at all court levels including the Ninth Circuit Court of Appeals.

This case raises important issues of constitutional law. Amici consider this case to be of special significance in that it concerns the fundamental issue of whether racial diversity in noncompetitive K-12 public schools is a compelling governmental interest sufficient to justify discriminating against children.[2] Specifically, Amici will show that the rationale for promoting student body viewpoint diversity in institutions of higher education, as discussed in *Gratz*, 539 U.S. 244, and *Grutter*, 539 U.S. 306, simply has no counterpart in the context of K-12 public schools. Additionally, Amici will show that the "educational benefits" identified in *Grutter* are being used by numerous federal courts to sanction race-based policies in government employment. An outrageous example of how *Grutter* is being misinterpreted is the American Bar Association's (ABA) proposed new race diversity standard for law schools accreditation. It requires public law schools to pursue race diversity in admissions and faculty hiring even if it requires them to break state law. Amici believe that their public policy perspectives and litigation experiences provide an additional viewpoint on the issues presented in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Striving for a predetermined racial balance in its high schools, the Seattle School District (District) uses a race-based

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[2] K-12 indicates kindergarten through 12th grade.

student admissions plan. The District operates ten regular high schools, which vary widely in the quality of the education they provide. *Parents Involved in Cmty. Schools v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1169 (9th Cir. 2005) (*PICS*). Although entering ninth grade students can elect to attend any of them, five high schools are oversubscribed, i.e. they have more applicants than available space. *Id.* The District uses tiebreakers to determine who may attend the oversubscribed schools. The first tiebreaker is to admit siblings of enrolled students. The next tiebreaker is race. If an oversubscribed school's population deviates from the overall racial makeup of Seattle's students (40% white and 60% nonwhite) by more than a set percentage point, the District admits only those students whose race will meet the preferred racial balance. *Id.* at 1170. For the 2000-01 school year, the racial tiebreaker worked to exclude over 300 students, both white and nonwhite, solely because of their race. *Id.* at 1170. Parents filed a lawsuit claiming that the racial tiebreaker violates the students' equal protection rights.

In the decision below, the Ninth Circuit issued an *en banc* decision holding that noncompetitive elementary and secondary public schools may use race as the ultimate factor in assigning students to public schools without violating the Equal Protection Clause. *PICS*, 426 F. 3d at 1169-70. In issuing this far-reaching decision, the court below extended unjustifiably the principles established in *Grutter* for competitive law school admissions, into the context of K-12 public school assignments. By doing so, the Ninth Circuit has reopened the permissibility of allocating educational opportunities on the basis of race throughout this country's 94,000 K-12 public schools, which educate approximately 47.7 million students ranging from 5 to 18 years of age, at an annual cost to taxpayers of more than

$400 billion.[3] Discounting the core concept of equal protection, the Seattle School District (District) is sending the wrong message to our children—that racial identification is more important than respect for individual rights and liberties in today's society.

No decision from this Court sanctions discriminatory student assignments to achieve racial balancing in K-12 public schools. *See Grutter*, 539 U.S. at 330. After *Grutter*, however, the lower courts are in disarray on whether classifying and assigning public school students on the basis of their race satisfies strict scrutiny. The First, Sixth, and now the Ninth Circuits have misapplied *Grutter*'s recognition of the educational benefits of diversity in competitive university admissions to K-12 student assignment plans and ignores the well-established narrowly tailoring principles set out in *Gratz*. In contrast, prior to *Grutter*, the First and Fourth Circuits observed that whether racial diversity was a compelling governmental interest remained an open question, but found that such programs were not narrowly tailored.

Grutter's viewpoint diversity rationale cannot be extended to racial diversity in noncompetitive, compulsory K-12 public schools. Racial diversity in K-12 is based on the idea that a child's skin color determines how that child thinks and behaves, a practice denounced as racial stereotyping. *Grutter*, 539 U.S. at 328-29. This Court should grant the Petition for Writ of Certiorari to ensure that public schools provide educational opportunities to all their students without regard to irrelevant, immutable characteristics such as race. In so doing, the Court should clarify that *Grutter* does not sanction naked racial balancing as a compelling state interest.

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[3] Nat'l Ctr. for Educ. Statistics, *Information on Public Schools and School Districts in the United States*, CCD Quick Facts, *at* http://nces.ed.gov/ccd/quickfacts.asp (last visited Oct. 17, 2005).

Further, clarification is necessary because lower federal courts are extending *Grutter*'s analysis to sanction race-based policies in government employment. The misapplication of *Grutter* is highlighted in the ABA's new proposed Standard 211 for law school accreditation. Standard 211 requires race-based diversity in admissions and faculty hiring despite the fact that several states, including California and Florida, ban race as a factor in law schools admissions or hiring. The standard claims that this requirement is consistent with *Grutter*'s analysis, yet nothing in *Grutter* supports such ABA bullying of law schools.

REASONS FOR GRANTING REVIEW

I

THIS COURT MUST RESOLVE THE CONFLICT AMONG THE CIRCUITS ON WHETHER RACE-BASED ASSIGNMENTS TO ACHIEVE RACIAL DIVERSITY IN K-12 PUBLIC SCHOOLS CAN SURVIVE STRICT SCRUTINY

This case raises important, recurring questions relating to the scope of the Equal Protection Clause's prohibition of state-imposed racial discrimination in K-12 public schools. The goal of many of these plans is to achieve racial balancing so that each school's racial composition matches the district-wide racial composition for a given race. This is achieved by sorting, assigning, and busing students according to their racial grouping. Such plans are mere proportional representation by pigmentation to achieve the public school administrator's preferred racial mix of students. The question of whether such race discrimination is permissible under the Equal Protection Clause has hopelessly divided the Circuit Courts of Appeals, and urgently demands resolution by this Court. The Ninth Circuit's holding in the present case validating racial balancing is consistent with recent decisions of the First and Sixth Circuits, but conflicts with the pre-*Grutter* decisions of the First

and Fourth Circuits condemning such racial balancing as violating the Equal Protection Clause.

The need for review by this Court was clearly expressed by the Ninth Circuit, *en banc* panel, when it recognized that "the Supreme Court has never decided a case involving the consideration of race in a voluntary imposed school assignment plan intended to promote racial and ethnically diverse secondary schools." *PICS*, 426 F.3d at 1173. The majority opinion relied upon *Grutter* to provide the necessary constitutional analysis for allowing racial preferences for nonremedial purposes.

> [I]t would be a perverse reading of the Equal Protection Clause that would allow a university . . . to use race when choosing its student body but not allow a public school district . . . to consider a student's race in order to ensure that the high schools within the district attain and maintain diverse student bodies.

Id. at 1176. Picking and choosing from *Grutter*'s hallmarks of narrow tailoring analysis, the Ninth Circuit found the school district's racial tiebreaker program to be narrowly tailored. *Id.* at 1192. Yet, to do so required the majority to reject the *Grutter* and *Gratz* requirement that race was only one of many factors to be considered. "[I]f a noncompetitive, voluntary student assignment plan is otherwise narrowly tailored, a district need not consider each student in a[n] individualized, holistic manner." *Id.* at 1183. As the dissent pointed out. "The importance of this factor is self-evident: individualized consideration serves the primary purpose of the Equal Protection Clause, which protects the individual from group classifications, especially those by race." *Id.* at 1210 (Bea, J. dissenting).

In rejecting individualized consideration, the District does not consider test scores, grades, letters of recommendation, or

personal statements on how the individual student will contribute to student body diversity. The contrast with the law school admissions plan examined in *Grutter* could not be sharper. The District's plan provides for none of the individualized consideration of the plan approved in *Grutter*, and it is even less flexible and more mechanical than the plan struck down in *Gratz*.

The dissent found the racial tiebreaker to be inconsistent with strict scrutiny. It recognized that the only way the "majority can arrive at the opposite conclusion" is by "applying a watered-down standard of review—improperly labeled 'strict scrutiny'—which contains none of the attributes common to our most stringent standard of review . . . . the racial tiebreaker . . . violates the Equal Protection Clause whenever it excludes a student from a school solely on the basis of race" *Id.* at 1197 (Bea, J. dissenting). The dissent concluded that when strict scrutiny is applied, the District's race tiebreaker is unconstitutional because it seeks to accomplish only a predetermined white/nonwhite racial balance, *id.* at 1203, the race tiebreaker operates as a quota system, *id.* at 1213; and it does not satisfy the other narrow tailoring requirements set out in *Grutter* and *Gratz*, *id.* at 1209. In short, the race tiebreaker is nothing more than "simple racial balancing." *Id.* at 1197 (Bea, C.J. dissenting).

Similarly, the First Circuit recognized the need for guidance from this Court in *Comfort*, 418 F. 3d 1. In *Comfort*, the concurring opinion noted that using race as the touchstone for transfers may send "the wrong lesson for school boards to teach and students to absorb." 418 F.3d at 28 (Boudin, C.J., concurring). Judge Boudin's hand wringing concurrence recognized:

> If we knew how the Supreme Court would decide the case before us, it would be right to adopt its answer in advance—whatever this court's members might

> prefer. But where the outcome in the Supreme Court is uncertain and past pronouncements were made in contexts different than the one now presented, the appellate court must exercise its own judgment on whether the local plan is constitutionally forbidden.

Id. at 28 (Boudin, C.J., concurring). The dissent noted:

> There is neither a Supreme Court decision squarely addressing whether racial diversity alone may constitute a compelling interest sufficient to justify the government's race-conscious preferences nor one addressing the narrow tailoring of racial classifications in voluntary, non-competitive school transfer plans.

Id. at 29 (Selya, J., dissenting).

Like the Ninth and First Circuits, the Sixth Circuit applied *Grutter*'s compelling interest of student body diversity to a K-12 voluntary race-based student assignment plan. *McFarland v. Jefferson County Pub. Schools*, 416 F.3d 513 (6th Cir. 2005) (petition for writ of certiorari pending, No. 05-915). The Sixth Circuit issued a *per curiam* opinion affirming the district court's judgment. *McFarland v. Jefferson County Pub. Schools*, 330 F. Supp. 2d 834 (D. Ky. 2004). Although the district court noted that the "context of an elementary and secondary school student assignment plan" was "slightly different" from the context of *Grutter*, *id.* at 837, it found that the assignments implicated benefits that "are precisely those articulated and approved of in *Grutter*," *id.* at 853. The *McFarland* court maintained that those benefits flowed specifically from the provision of "racially integrated public schools." *Id.*

In contrast, prior to *Grutter*, three federal appellate court cases have held that nonremedial use of racial preferences in public schools violated the Equal Protection Clause. Those

cases are *Wessmann v. Gittens*, 160 F.3d 790 (1st Cir. 1998); *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698 (4th Cir. 1999), and *Eisenberg v. Montgomery County Pub. Schools*, 197 F.3d 123 (4th Cir. 1999). Each case observed that whether racial diversity was a compelling governmental interest remained an open question.

In *Wessmann*, the First Circuit examined a race-based admissions policy at three "examination schools," where race was made a determining factor. As the *Wessmann* court stated: "The question of precisely what interests government may legitimately invoke to justify race-based classifications is largely unsettled." *Wessmann*, 160 F.3d at 795. The First Circuit assumed, without deciding, that racial diversity may in some cases be a compelling interest sufficient to justify the use of racial preferences in making student assignments. *Id.* at 796. The First Circuit then rejected the school's claim:

> The Policy is, at bottom, a mechanism for racial balancing—and placing our imprimatur on racial balancing risks setting a precedent that is both dangerous to our democratic ideals and almost always constitutionally forbidden. Nor does the School Committee's reliance on alleviating underrepresentation advance its cause. Underrepresentation is merely racial balancing in disguise—another way of suggesting that there may be optimal proportions for the representation of races and ethnic groups in institutions.

Id. at 799 (citations omitted).

In *Tuttle*, 195 F.3d 698, the Fourth Circuit examined whether an oversubscribed public school may use a weighted lottery in admissions to promote racial and ethnic diversity in its student body. The court stated that "[u]ntil the Supreme Court provides decisive guidance, we will assume, without so holding, that diversity may be a compelling governmental

interest and proceed to examine whether the Policy is narrowly tailored to achieve diversity." *Id.* at 705.

In *Eisenberg*, 197 F.3d 123, the Fourth Circuit again addressed whether a school district may deny a student's request to transfer to a magnet school because of his race. The court stated: "*Tuttle* notes that whether diversity is a compelling governmental interest remains unresolved, and in this case, we also choose to leave it unresolved." *Id.* at 130.

Both the First and Fourth Circuits were careful to point out that the type of racial diversity that may be constitutional was different from racial balancing pursued for its own sake. As explained by the First Circuit:

> "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 though important element." A single-minded focus on ethnic diversity "hinders rather than furthers attainment of genuine diversity."

Wessmann, 160 F.3d at 798 (quoting *Bakke*, 438 U.S. at 315 (Powell, J., opinion)).

Applying this analysis, *Wessmann*, *Eisenberg*, and *Tuttle* held that the racial preferences at issue were not narrowly tailored to serve the potentially compelling interest of student body diversity. The Fourth Circuit in *Eisenberg* found:

> In fact, we find that it is mere racial balancing in a pure form, even at its inception . . . . The transfer policy is administered with an end toward maintaining this percentage of racial balance in each school. This is, by definition, racial balancing. As we have only recently held in *Tuttle*, "such nonremedial racial balancing is unconstitutional." . . . Although the transfer policy

> does not necessarily apply "hard and fast quotas," its goal of keeping certain percentages of racial/ethnic groups within each school to ensure diversity is racial balancing.

197 F.3d at 131 (citation and footnotes omitted).

The conflict in the Circuits over the constitutionality of race-based public school assignments highlights an issue of pressing national importance that must be—and can only be—resolved by this court.

II

REVIEW IS NECESSARY TO CLARIFY THAT *GRUTTER* DOES NOT COUNTENANCE RACIAL DISCRIMINATION IN K-12 PUBLIC SCHOOL ASSIGNMENTS, GOVERNMENT EMPLOYMENT, OR THE ABA'S PROPOSED ACCREDITATION STANDARD FOR LAW SCHOOLS

The Ninth Circuit's opinion in this case, deferring to the judgment of public school administrators engaged in race-based classification and assignment of students, is fundamentally incompatible with this Court's Equal Protection doctrine. This Court has never held that noncompetitive, compulsory K-12 public schools may voluntarily discriminate against children on the basis of race to achieve racial diversity. Nonetheless, the Ninth Circuit extended the rationale in *Grutter* in an attempt to justify the use of racial discrimination against children. Other lower federal courts have extended *Grutter* to sanction race-based policies in government employment and the ABA has a proposed accreditation standard for law schools requiring race preferences in admissions and faculty hiring even if it requires them to break state laws.

As this Court emphasized in *Grutter*, context matters in strict scrutiny analysis. *Grutter*, 539 U.S. at 308. Within the

context of evaluating an inclusive admissions policy at an elite law school, this Court applied a more relaxed version of strict scrutiny. *Id.* at 327. Although the lower court here claimed that "context matters," it dismissed as inconsequential the contextual differences between competitive admissions to an institution of higher education and assignment of students in noncompetitive elementary and secondary schools. *PICS*, 426 F.3d at 1174-75.

Grutter's relaxed version of strict scrutiny was based on two factors. First, on its face, this Court granted certiorari in *Grutter* to resolve "[w]hether diversity is a compelling interest that can justify the narrowly tailored use of race in selecting applicants for admission to public universities." *Grutter*, 539 U.S. at 322; *see also id.* at 328 ("the law school asks us to recognize, *in the context of higher education*, a compelling state interest in student body diversity"); *id.* (*Grutter*, like *Bakke*, "addressed the use of race *in the context of public higher education*") (emphasis added). *See also*, Paul Horwitz, *Grutter's First Amendment*, 46 B.C. L. Rev. 461, 464 (2005) (*Grutter* "asked only whether there is a 'compelling state interest in student body diversity' in 'the context of higher education'"). Like the court below, the First and Sixth Circuits simply ignored this contextual qualification.[4]

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[4] Angelo N. Ancheta, *Contextual Strict Scrutiny and Race-Conscious Policy Making*, 36 Loy. U. Chi. L.J. 21, 36 (2004) (noting that one question left open by *Grutter* is, "[s]hould elementary and secondary school districts that employ race-conscious diversity plans be granted the same level of deference as institutions of higher education?"). *See also* Jay P. Lechner, *Learning from Experience: Why Racial Diversity Cannot Be a Legally Compelling Interest in Elementary and Secondary Education*, 32 Sw. U. L. Rev. 201, 209 (2003) ("The Supreme Court has never considered whether educational diversity could be a compelling goal of public elementary or secondary education.").

Second, *Grutter*'s First Amendment rationale cannot be extended beyond universities. *Grutter*'s compelling interest analysis was expressly limited to the use of race in admissions in the context of "the expansive freedoms of speech and thought associated with the univ.sity environment . . . a special niche in our constitutional tradition." *Grutter*, 503 U.S. at 329; *accord Bakke*, 438 U.S. at 312 (Powell, J., opinion) (A university's First Amendment right to "[a]cademic freedom" includes "[t]he freedom of the university to make its own judgments as to education" and "the selection of its student body.").

Grutter's compelling state interest analysis simply has no counterpart in K-12 public schools.[5] Students in elementary and secondary schools have a right to admission. *Goss v. Lopez*, 419 U.S. 565, 574 (1975). Unlike universities, the education mission of American public schools is to *teach* fundamental values necessary to maintain a democratic system. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986). *See, e.g.*, Kevin G. Welner, *Locking up the Marketplace of Ideas and Locking Out School Reform: Courts' Imprudent Treatment of Controversial Teaching in America's Public Schools*, 50 UCLA L. Rev. 959, 965 (2003) (Public school "[e]ducation is inculcation, not exposure."). Such instruction necessarily includes less emphasis on the "robust exchange of ideas" in elementary and secondary school education. Joint

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[5] Professor Ancheta notes that *Grutter*'s rationale "may be difficult to extend beyond academic decision making and outside of the higher education context because of the key element of academic freedom under the First Amendment." Angelo N. Ancheta, *supra*, at 47. Although courts have sometimes deferred to public school administrators, this deference, unlike that of *Grutter*, "has not been rooted in academic freedoms typically ascribed to higher education, where the free exchange of ideas and viewpoints is highly valued; indeed, K-12 education is often highly standardized and regimented, particularly in the lower grade levels." *Id.* at 47.

Statement of Constitutional Law Scholars, The Civil Rights Project at Harvard University, *Reaffirming Diversity: A Legal Analysis of the University of Michigan Affirmative Action Cases* 23 (2003), *available at* http://www.civilrightsproject.harvard.edu/policy/legal_docs/Diversity_%20Reaffirmed.pdf (last visited Feb. 7, 2006).

Likewise, *Grutter's* compelling state interest principles cannot be transferred to government employment. Nonetheless, in *Petit v. City of Chicago*, 352 F.3d 1111 (7th Cir. 2003), the Seventh Circuit relied on *Grutter* to allow race-based decisionmaking in Chicago's Police Department. The court held that "[u]nder the *Grutter* standards," *id.* at 1114, the department had demonstrated a compelling interest "in a diverse population at the rank of sergeant in order to set the proper tone in the department and to earn the trust of the community, which in turn increases police effectiveness in protecting the city." *Id.* at 1115.[6]

An outrageous example of how *Grutter* is being misinterpreted is found in the ABA's proposed diversity standard for law school accreditation. Standard 211 requires law schools to pursue racial and ethnic diversity in admissions and faculty hiring policies. A law school must "demonstrate by concrete action" its commitment to racial diversity. "Interpretations" of Standard 211 states that "the requirements of a constitutional provision or statute that purports to prohibit consideration of gender, race, ethnicity or national origin in admissions or employment decisions is not a justification for a

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[6] *Grutter* has been used to racially balance fire departments. In the unreported decision of *Lomack v. City of New Newark*, No. Civ.A.04-6085(JWB), 2005 WL 2077479 (D.N.J. Aug. 25, 2005), the court relied on *Grutter's* language that education" benefits" derived from a diverse student body to find a similar compelling state interest in achieving the "benefits" of racial diversity in each firehouse of the department.

school's non-compliance with Standard 211." In other words, it is necessary for a law school to comply with Standard 211 despite the fact that several states, including California and Florida, ban race as a factor in admissions or hiring.[7] Equally disturbing is Interpretation 211-2, which states that, "consistent with the Supreme Court's decision in *Grutter v. Bollinger*, a law school may use race and ethnicity in its admissions process to promote equal opportunity and diversity." Nowhere does *Grutter* support such an expansive interpretation. First, *Grutter* held only that racial preferences in higher education are legal when used to promote diversity, not racial balancing. Second, *Grutter* did not hold that any law school may use race in its admission process, but was deferring to the school's "educational judgment that such diversity is essential to its educational mission." *Grutter*, 539 U.S. at 328. Nothing in *Grutter* permits the ABA to bully law schools into discriminating against individuals in admissions and hiring. Proposed Standard 211 is available at http://www.abanet.org/legaled/standards/standards.html (last visited Mar. 9, 2006). A copy of proposed Standard 211 is attached hereto as Exhibit A.

Clearly, this Court's analysis in *Grutter* has resulted in confusion as to the permissible boundaries for race-conscious policies. Some of the questions that are left unresolved are identified by Professor Ancheta:

> If, as the *Grutter* analysis implies, courts may on occasion employ more deferential versions of strict scrutiny, what contexts determine such occasions? Was the Court's contextual scrutiny in *Grutter* specific to higher education when the Court deferred to policy making that was associated with academic

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[7] *See Grutter*, 539 U.S. at 342 ("Universities in California, Florida, and Washington State, where racial preferences in admissions are prohibited by state law, are currently engaged in experimenting with a wide variety of alternative approaches.").

> freedoms rooted in the First Amendment? Or, was context grounded in a distinction between exclusionary and subordinative legislation on the one hand and inclusionary and interactive policies on the other—a distinction that the Court ostensibly rejected in *Croson* and *Adarand* when it ruled that both "invidious" and "benign" racial classifications are subject to strict scrutiny? Or is context to be addressed on an ad hoc, case-by-case basis? Moreover, assuming that context properly determines the rigor of strict scrutiny, how should courts customize their analyses to fit a given context?

Ancheta, *supra*, at 23. Yet bureaucrats now assume that because of *Grutter*, the use of race-conscious policies are permissible in a variety of contexts. J. Kevin Jenkins, Ed.D., *Grutter, Diversity, and Public K-12 Schools*, 182 Ed. Law. Rep. 353, 354 (2004) (*Grutter* provides "clear guidance from the Court: Diversity can be a compelling state interest. That's the green flag."); Joint Statement of Constitutional Law Scholars, *supra*, at 22 ("the *Grutter* Court's strong and expansive language addressing the value of diversity in education and other sectors of American life provides at least partial support for arguing that diversity can be a constitutionally compelling interest in other areas, such as K-12 public education and employment.").

This Court should grant the petition for certiorari in this case to the narrow reach of *Grutter* in determining the special circumstances in which racial diversity qualifies as a compelling state interest.

III

REVIEW IS NECESSARY TO CLARIFY THAT RACIAL BALANCING TO PROMOTE RACIAL DIVERSITY IN K-12 PUBLIC SCHOOLS OFFENDS THE EQUAL PROTECTION CLAUSE

The lower court held that the use of race to promote racial diversity does not violate the Equal Protection Clause. Although the Equal Protection Clause permits some racial classifications under the most limited circumstances, it does not allow racial balancing for the sole purpose of achieving a specified "racial mix" of students that a school district believes is desirable. *Grutter* reaffirmed:

> Because the Fourteenth Amendment protects *persons*, not *groups*, all governmental action based on race—a *group* classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed.

Grutter, 539 U.S. at 326 (quoting *Adarand*, 515 U.S. at 227) (internal quotation marks and citations omitted; emphasis in original). *See also Loving v. Virginia*, 388 U.S. 1, 10 (1967) ("The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States.").

In *Adarand*, this Court reiterated that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Adarand*, 515 U.S. at 214 (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). This Court stated that free people "should tolerate no retreat from the principle that government may treat people

differently because of their race only for the most compelling reasons." *Adarand*, 515 U.S. at 227. This intolerance is necessary because government racial discrimination of any sort is inherently suspect, since racial characteristics are almost never an appropriate consideration for the government. *Id.* at 216.

> [T]he central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States. This strong policy renders racial classifications "constitutionally suspect," and subject to the "most rigid scrutiny," and "in most circumstances irrelevant" to any constitutionally acceptable legislative purpose.

Id. (citations omitted). This includes "so-called" neutral policies that "burden or benefit the races equally." *Shaw v. Reno*, 509 U.S. 630, 651 (1993); *see also, Loving*, 388 U.S. at 8 (rejecting that a miscegenation statute did not discriminate because it "punish[ed] equally both the white and the negro participants in an interracial marriage."). Indeed, this Court rejected the notion that separate can ever be equal—or "neutral"—in *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954), and refused to resurrect it in *Johnson*, 543 U.S. at 499.

The Ninth Circuit misses this point. The District's racial tiebreaker is a mechanism to achieve a preferred racial mix of students. As the dissent points out, the racial "tiebreaker aims for a rigid, predetermined ratio of white and nonwhite students, and thus operates to reach 'a fixed number or percentage." *PICS*, 426 F.3d at 1213 (Bea, J. dissenting). In *Gratz*, this Court specifically rejected such a plan as not narrowly tailored. "[T]he University's policy, which automatically distributes [20%] . . . of the points needed to guarantee admission, to every single 'underrepresented minority applicant solely because of race, is not narrowly tailored." *Gratz*, 539 U.S. at 271-72. As this Court said in *Grutter*, this is nothing more than "racial

balancing, which is patently unconstitutional." *Grutter*, 539 U.S. at 330.

Put simply, the District's racial tiebreaker is an unconstitutional quota because it establishes a predetermined, preferred ratio of white and nonwhite students. The District's goal of racial diversity is based on the stereotype that all white students think and act alike and that all nonwhite children think and act alike. It inflicts undue harm on both white and nonwhite students alike. This Court should address the important national issue of whether the use of race to promote racial diversity in K-12 public schools violates the Equal Protection Clause.

CONCLUSION

For the foregoing reasons, amici respectfully request that this Court grant the writ of certiorari.

DATED: March, 2006.

Respectfully submitted,

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EXHIBIT

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Exhibit A–1

February 16, 2006

MEMORANDUM

TO: **Deans of ABA-Approved Law Schools**

FROM: **John Sebert, Consultant on Legal Education**

SUBJECT: **Revisions of Standards 210-212 and Associated Interpretations Approved by the Council at its Meeting of February 11, 2006**

As part of a comprehensive review of the Standards, the Standards Review Committee examined Standards 210-212 and the Interpretations of those Standards. Preliminary discussion of proposed changes was begun at the November 2004 meeting of the Committee. The Committee devoted its March 19, 2005, meeting to developing recommendations for presentation to the Council in August. The Committee was greatly assisted in its work by a set of recommendations for revisions prepared by the Section's Diversity Committee. The Standards Review Committee also had before it and considered (as did the Diversity Committee) recommendations for revisions of these Standards sent to the Committee by Gary Palm ("the Palm proposals") on behalf of himself and other members of the Clinical Legal Education Association (CLEA) and the Society of American Law Teachers (SALT).

In August 2005, the Council considered the Committee's recommendations and the Palm proposals, and the Council approved distributing for comment proposed revisions to Standards 210 - 212 and Interpretations of those Standards. The proposed revisions were widely distributed for comment and also were posted on the Section's website. A hearing to elicit comment was held during the AALS Annual Meeting on January 5, 2006, and many individuals appeared to speak to

these proposals at that hearing. Also, a large number of written and e-mail comments were received during the formal comment period. This set of Standards and Interpretations has not been altered for a number of years. The Committee and Council agreed that it was time to re-examine these provisions, especially in light of changes in the law and institutional practices since the existing Standards were adopted. They also concluded that a need existed for greater clarity regarding both what is permitted and what is required by the Standards to provide adequate guidance both to law schools and to the Accreditation Committee.

The Committee established several overarching goals for the proposed revisions:

1. To distinguish the obligations of non-discrimination and equality of opportunity (Standard 210) and the obligations of equal opportunity and diversity (Standard 211).

2. To determine which groups and individuals should be covered by these Standards and Interpretations.

3. To determine what law school activities and actions should be covered by these standards.

At its meeting on January 5, 2006, the Standards Review Committee carefully considered all of the comments that had been received, including the many thoughtful remarks that were made during the January 4 hearing. The Committee also granted Vernellia Randall privileges of the floor so that she could address the Committee during its January 5 meeting.

The Committee presented to the Council its final recommendations for revision of Standards 210 - 212 for review and action at it meeting on February 11, 2006. The Council approved the recommended changes with some modification. The changes approved by the Council will be presented to the American Bar Association House of Delegates

for concurrence at its August meeting. The changes will become effective upon the concurrence by the House of Delegates.

This memorandum discusses the changes. Marked-up and restated versions of the approved revisions to Standards 210 - 212 are attached.

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Standard 211. Equal Opportunity and Diversity

Standard 211 had been primarily directed to the admission of students, although actions by the Accreditation Committee have extended its reach to faculty. The revisions make explicit that the Standard also applies to faculty and staff. While equal opportunity and diversity may have different foundations (equal opportunity in social justice and diversity in educational policy), the two have become connected in practice and the revisions to the Standard recognize that connection.

The requirement of the Standard is stated in terms of a commitment that is demonstrated by concrete action. There was extended discussion on this issue, both when the Committee and Council were developing the proposed revisions in 2005 and in the comments on those proposals. Some urged that the Standard be stated in terms of results and also suggested that the Standard should build on the language of the *Grutter* case and require that law schools have a "critical mass" of students from traditionally underrepresented groups. Evidence was provided to show continuing underrepresentation in law school and in the legal profession of individuals from groups that have been historically discriminated against, and the argument was made that only a "results test" could ensure that there would be substantial progress toward increasing access to legal education and the profession.

The Council was persuaded that it would be infeasible to develop and enforce a Standard that is based on requiring

schools to attain a "critical mass" of persons from underrepresented groups, both because of the difficulty of defining "critical mass" and because of the widely varying demographics of the markets in which different law schools recruit their student bodies. The Council believes that the Standard should require a commitment demonstrable by concrete action. Because the core of the requirement extends beyond mere effort, the term "effort" was deleted from the title of the Section.

The Council also recognized that the results achieved are very relevant, though not necessarily dispositive, in evaluating effort and commitment. Thus the second sentence of proposed Interpretation 211-3 was revised to provide: "The determination of a law school's satisfaction of such obligations is based on the totality of the law school's actions and the results achieved." The Council understands that this sentence is consistent with the current practice of the Accreditation Committee, which does consider the diversity results that a school has achieved as a factor in evaluating the school's compliance with current Standard 211.

In section (a) "qualified" has been deleted as unnecessary given other Standards regarding student selection and retention. "Underrepresented" was added to qualify "groups" covered to be consistent with the equal opportunity element. Specific language was added to make it clear that a law school must demonstrate a commitment to having a student body that is diverse with respect to gender, race and ethnicity.

A new section (b) makes clear that a law school must demonstrate a commitment to having a faculty and staff that are diverse with respect to gender, race and ethnicity.

New Interpretation 211-1

The Council approved this new Interpretation, which was added to the Committee's recommended changes at its January

2006 meeting. The purpose is to make it clear that a constitutional or statutory provision prohibiting a school from considering race in making admissions or other decisions does not insulate the school from the obligation of the Standard to demonstrate a commitment to have a diverse student body, faculty and staff. The Council understands that this Interpretation is consistent with the current practice of the Accreditation Committee under the current Standards.

New Interpretation 211-2

The Committee proposed, and the Council approved, some revisions of the proposed Interpretation that was distributed for comment. The revised first sentence relies more clearly on *Grutter* for the proposition that a school may use race and ethnicity in its admissions standards and deletes as unnecessary the initially proposed language "so long as it does so in a lawful manner." The Interpretation also indicates that, as part of school's effort to satisfy the basic requirements of Standard 211, schools "shall take concrete actions to enroll a diverse student body" that promotes cross-cultural understanding, helps break down racial and ethnic stereotypes, and enables students better to understand persons of different races, ethnic groups and backgrounds. In the version that was distributed for comment, the verb was "should". The Council approved the use of "shall" in order to be consistent with the black-letter, which establishes an obligation ("shall") to have a commitment to having a diverse faculty, staff and student body.

New Interpretation 211-3

The interpretation revises former Interpretation 211-1. It retains the language that meeting the requirements of the Standard will be determined by the totality of the law school's action, but replaces with a more general statement the prior list of actions that might demonstrate commitment to diversity. This change recognizes and encourages flexibility and innovation on the part of law schools in meeting the

requirement. The only change in this Interpretation from that distributed for comment is the addition of the phrase "and the results achieved" at the end of the second sentence. As explained above, the purpose of this addition is to make it clear that the results achieved are relevant, although not dispositive, in determining a school's compliance with the Standard.

Current Interpretation 211-2

As initially recommended, this Interpretation has been deleted. The Council agreed with the recommendation of the Committee that requiring a law school to prepare a written diversity plan imposed an unnecessary burden on law schools. In addition, conscientious application of the existing diversity plan requirement by the Accreditation Committee has on occasion led to the anomalous result of citing a school for non-compliance with the diversity plan requirement when the school has nonetheless been successful in achieving significant diversity in its faculty and student body. The proposed revised Standard requires that a school demonstrate by concrete action a commitment to diversity, so if a school has not succeeded in attaining a diverse faculty or student body the absence of a written plan still could be a factor in a determination by the Accreditation Committee that the school had not satisfied the requirements of the Standard. In the written comments and the hearing, there was no criticism of the Committee's proposal to delete Interpretation 211-2.

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[MARKED-UP]

. . .

Standard 211. EQUAL OPPORTUNITY AND DIVERSITY ~~EFFORT~~.

(a) Consistent with sound legal education policy and the Standards, a law school shall demonstrate~~, or have~~

~~carried out and maintained;~~ by concrete action; a commitment to providing full opportunities for the study of law and entry into the profession by ~~qualified~~ members of underrepresented groups, ~~notably~~ particularly racial and ethnic minorities, and a commitment to having a student body that is diverse with respect to gender, race, and ethnicity. ~~which have been victims of discrimination in various forms. This commitment typically includes a special concern for determining the potential of these applicants through the admission process, special recruitment efforts, and a program that assists in meeting the unusual financial needs of many of these students, but a law school is not obligated to apply standards for the award of financial assistance different from those applied to other students.~~

(b) Consistent with sound educational policy and the Standards, a law school shall demonstrate by concrete action a commitment to having a faculty and staff that are diverse with respect to gender, race and ethnicity.

Interpretation 211-1:

The requirement of a constitutional provision or statute that purports to prohibit consideration of gender, race, ethnicity or national origin in admissions or employment decisions is not a justification for a school's non-compliance with Standard 211.

Interpretation 211-2:

Consistent with the U.S. Supreme Court's decision in Grutter v. Bollinger, 529 U.S. 306 (2003), a law school may use race and ethnicity in its admissions process to promote equal opportunity and diversity. Through its admissions policies and practices, a law school shall take concrete actions to enroll a diverse student body that promotes cross-cultural understanding, helps break down racial and ethnic stereotypes,

and enables students to better understand persons of different races, ethnic groups and backgrounds.

Interpretation 211-3:

This Standard does not specify the forms of concrete actions a law school must take to satisfy its equal opportunity and diversity obligations. The determination of a law school's satisfaction of such obligations is based on the totality of the law school's actions and the results achieved. The commitment to providing full educational opportunities for members of underrepresented groups typically includes a special concern for determining the potential of these applicants through the admission process, special recruitment efforts, programs that assist in meeting the academic and financial needs of many of these students and that create a more favorable environment for students from underrepresented groups.

~~***Interpretation 211-1:***~~

~~*This standard does not specify the forms of concrete actions a school must take in order to satisfy its equal employment obligation. The satisfaction of such obligations is based on the totality of its actions. Among the kinds of actions that can demonstrate a school's commitment to providing equal opportunities for the study of law and entry into the profession by qualified members of groups that have been the victims of discrimination are the following:*~~

~~*a. Participating in job fairs and other programs designed to bring minority students to the attention of employers.*~~

~~*b. Establishing procedures to review the experiences of minority graduates to determine whether their employers are affording equal opportunities to members of minority groups for advancement and promotion.*~~

~~*c. Intensifying law school recruitment of minority applicants, particularly at colleges with substantial numbers of minority students.*~~

~~*d. Promoting programs to identify outstanding minority high school students and college undergraduates, and encouraging them to study law.*~~

~~*e. Supporting the activities of the Council on Legal Education Opportunity (CLEO) and other programs that enable more disadvantaged students to attend law school.*~~

~~*f. Creating a more favorable law school environment for minority students by providing academic support services, supporting minority student organizations, promoting contacts with minority lawyers, and hiring minority administrators.*~~

~~*g. Encouraging and participating in the development and expansion of programs to assist minority law graduates to pass the bar.*~~

~~*h. Developing and implementing specific plans designed to increase the number of minority faculty in tenure and tenure track positions by applying a broader range of criteria than may customarily be applied in the employment and tenure of law teachers, consistent with maintaining standards of quality.*~~

~~*i. Developing programs that assist in meeting the unusual financial needs of many minority students, as provided in Standard 211.*~~

~~***Interpretation 211-2:***~~

~~*Each ABA approved law school (1) shall prepare a written plan describing its current program and the efforts it intends to undertake relating to compliance with Standard 211, and (2) maintain a current file which will include the specific actions*~~

~~*which have been taken by the school to comply with its stated plan.*~~

. . .

[RESTATED]

. . .

Standard 211. EQUAL OPPORTUNITY AND DIVERSITY.

(a) Consistent with sound legal education policy and the Standards, a law school shall demonstrate by concrete action a commitment to providing full opportunities for the study of law and entry into the profession by members of underrepresented groups, particularly racial and ethnic minorities, and a commitment to having a student body that is diverse with respect to gender, race, and ethnicity.

(b) Consistent with sound educational policy and the Standards, a law school shall demonstrate by concrete action a commitment to having a faculty and staff that are diverse with respect to gender, race and ethnicity.

Interpretation 211-1:

The requirement of a constitutional provision or statute that purports to prohibit consideration of gender, race, ethnicity or national origin in admissions or employment decisions is not a justification for a school's non-compliance with Standard 211.

Interpretation 211-2:

Consistent with the U.S. Supreme Court's decision in Grutter v. Bollinger, 529 U.S. 306 (2003), a law school may use race and ethnicity in its admissions process to promote equal opportunity and diversity. Through its admissions policies and practices, a law school shall take concrete actions to enroll a diverse student body that promotes cross-cultural

understanding, helps break down racial and ethnic stereotypes, and enables students to better understand persons of different races, ethnic groups and backgrounds.

Interpretation 211-3:

This Standard does not specify the forms of concrete actions a law school must take to satisfy its equal opportunity and diversity obligations. The determination of a law school's satisfaction of such obligations is based on the totality of the law school's actions and the results achieved. The commitment to providing full educational opportunities for members of underrepresented groups typically includes a special concern for determining the potential of these applicants through the admission process, special recruitment efforts, programs that assist in meeting the academic and financial needs of many of these students and that create a more favorable environment for students from underrepresented groups.

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