No. 02-516

IN THE

Supreme Court of the United States

JENNIFER GRATZ AND PATRICK HAMACHER,
PETITIONERS,
v.
LEE BOLLINGER, *et al.*,
RESPONDENTS,
and
EBONY PATTERSON, *et al.*,
RESPONDENTS.

On Writ Of Certiorari Before Judgment To The United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE PATTERSON RESPONDENTS

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Note on Citations to the Record

Citations to "Pet. App." refer to the appendix filed with the petition in this case; "Cir. App." refers to the Joint Appendix filed by the parties in the Sixth Circuit in this case; "J.A." refers to the Joint Appendix filed with petitioners' brief on the merits in this case. One expert report was not reproduced in the Joint Appendix below but was attached to the Final Reply Brief of Intervenors in the Sixth Circuit; it is cited as "Silver & Rudolph."

BRIEF FOR RESPONDENTS PATTERSON *et al.*

STATEMENT OF THE CASE

A. Introduction

This litigation is the current embodiment of the oldest and most central problem in the history of our Republic — the issue of race. Although it is facially about the consideration of race and ethnicity in college and university admissions, it is at bottom a cleverly constructed assault on the ability of public (and, by extension, private) institutions to do anything voluntarily about continued racial inequality throughout the United States.

Plaintiffs mount a seductive argument, juxtaposing "[t]he dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement," *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505-06 (1989), against the view they incorrectly attribute to proponents of affirmative action: that "race matters" for its own sake and should matter permanently. In so doing, Plaintiffs confuse means with ends, claiming for themselves the moral and constitutional high ground while ascribing to their adversaries the legacy of segregationists who pursued policies and practices of racial exclusion. They equate race-consciousness in pursuit of diversity and racial integration with racism, based upon a false syllogism; while race-consciousness is a necessary predicate for racism, it does not follow that all race consciousness is racist.

Without ever openly referring to the phrase from Justice Harlan's famous dissent in *Plessy v. Ferguson*, 63 U.S. 537, 559 (1896), Plaintiffs ask this Court to write the term "color-blind" into the Constitution. It is more than a little ironic that Plaintiffs rest their argument on *Brown v. Board of Educ.*, 347 U.S. 483 (1954), which overturned *Plessy* upon consideration of historical developments since the earlier case was decided, *see* 347 U.S. at 492-93, because Plaintiffs' approach steadfastly

ignores both history and reality:

> In the forties, fifties and early sixties, against the backdrop of laws that used racial distinctions to exclude Negroes from opportunities available to white citizens, it seemed that racial subjugation could be overcome by mandating the application of race-blind law. . . . The opponents of affirmative action have stripped the historical context from the demand for race-blind law. They have fashioned this demand into a new totem and insist on deference to it no matter what its effects upon the very group the fourteenth amendment was created to protect. *Brown* and its progeny do not stand for the abstract principle that [all] governmental distinctions based on race are unconstitutional. Rather, those great cases, forged by the gritty particularities of the struggle against white racism, stand for the proposition that the Constitution prohibits any arrangements imposing racial subjugation — whether such arrangements are ostensibly race-neutral or even ostensibly race-blind.[1]

The "color-blind Constitution" has never been the law. "This Court never has held that race-conscious state decisionmaking is impermissible in *all* circumstances." *Shaw v. Reno*, 509 U.S. 630, 642 (1993) (emphasis in original). Instead, the Court has required a strict and "searching judicial inquiry," *Croson*, 488 U.S. at 493, to determine whether a governmental "decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects" upon a racial group, *Personnel Administrator v. Feeney*, 442 U.S. 256, 279 (1979) (footnotes and citation omitted).

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[1]Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1335-36 (1986) (emphasis in original) (footnotes omitted).

> [T]he purpose of strict 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.

Croson, 488 U.S. at 493 (emphasis added).

Measured by those standards, the race-conscious admissions program at the University of Michigan is both necessary and constitutionally appropriate, for two closely related reasons. *First*, there is a history of past and present discrimination at the University the effects of which continue to be felt today. For understandable reasons,[2] the University is reluctant to acknowledge that history, but Intervenors (whom Plaintiffs ignore in their presentation to this Court) have placed it in the record and argue its significance in this Brief. *Second* — and informed by that history but not dependent upon it — there are powerful educational and civic values that support the University's efforts to assemble a student body that is diverse in many ways, including, specifically, that is racially and ethnically diverse. The University focuses on this justification, and Intervenors join in its arguments and offer additional observations on the compelling interest of diversity as well.

Our Nation undeniably has made significant progress during the last fifty years in attacking the centuries-old legacy of slavery and segregation. That progress has not occurred serendipitously. Nor has it occurred solely as a result of adjudicated findings, or admissions, of discrimination. Much of it has occurred because a consensus has developed that there is a national interest of the highest order in dismantling the

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[2]*See Wygant v. Jackson Bd. of Educ.*, 476 U.S. 274, 291 (1986) (O'Connor, J., concurring).

effects of American *apartheid*, and in turning our Nation's diversity into a strength, rather than a liability. While we can point proudly to the progress made, we cannot yet claim to have arrived at a time when we can abandon our efforts and lay down the burden of race, sanguine in the knowledge that the playing field is at last level, and that we have broken the link between present-day status of those disadvantaged because of race and the genesis of that disadvantage.

Intervenors share the dream of a nation in which race does not matter but submit that it will not become reality by disabling our society from addressing the persisting, continued salience that race still has today. Race remains a significant force in American life today not because of affirmative actions implemented since *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978), but because of past and present discrimination against people of color, that both demands remedy and requires conscious attention. If governments may not take voluntary actions to dissipate the effects of past or present discrimination, as the history at the University of Michigan and other schools show, even the most respected institutions in our society are likely to revert to separate and segregated status. It would be both the ultimate irony and the ultimate tragedy if this Court were to provide the impetus for a return to a racially separate-and-unequal reality in the name of ending race discrimination.

B. Factual Background

Plaintiffs (Petitioners here) applied to the University of Michigan for admission as undergraduates in 1995 and 1997, respectively. During those years and continuing to the present,[3] the University has considered race as one of many factors in making admissions decisions. The trial court granted

[3]The record below closed with the 2000 school year; the 2000 admissions process has since continued in use without material change.

Plaintiffs' motion for summary judgment as to the years 1995-1998, finding the admissions process during those years unconstitutional (Pet. App. 54a, 57a). However, in the order under review the trial court found no constitutional violation as to the 1999 and 2000 school years and accordingly denied Plaintiffs' request for injunctive relief (*id.* at 57a-58a).[4]

1. The disproportionate adverse impact of the University's current selection criteria on minority applicants

The University of Michigan undergraduate program receives 13,500 applications and enrolls approximately 4000 students. (Pet. App. 4a.) No one is admitted unless the University first determines that the applicant is qualified.[5] There are no quotas, numerical targets or goals for enrollment of students from

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[4]The district court also granted summary judgment against Patterson Intervenors (Respondents here), rejecting our argument that the University was justified in considering race in its admissions policy in order to remedy the effects of past and present discrimination. Cir. App. 137-40. On December 2, 2002, this Court denied review of this judgment in *Patterson v. Gratz*, No. 02-571. However, as Plaintiffs conceded in that case, Intervenors are entitled as respondents in the instant matter to argue their remedial justifications in support of the district court's order denying Plaintiffs' request for an injunction. Brief in Opposition to Certiorari at 4, *Patterson v. Gratz* (No. 02-571); *see also infra* at 18.

If the Court upholds the order below based on Intervenors' arguments, it would necessarily have to reverse the district court's summary judgment against Intervenors. Should the Court rely on the University's diversity arguments to sustain the district court's order denying the injunction, it should vacate the judgment against Intervenors as moot.

[5]A "qualified" applicant is one who is expected to achieve passing grades if admitted (Cir. App. 384 [Tr. pp. 37, 39-40]). For purposes of the summary judgment motions under review here, Plaintiffs stipulated that they "assume[d that]" "all of the students admitted to the University are qualified to attend the University" (Cir. App. 4095), including minority students whose race or ethnicity resulted in their being awarded additional points on the selection index described *infra*.

underrepresented minority groups ("UMS"); there is no separate review of applications from such students. Pet. App. 34a-35a, 38a; Cir. App. 1482B.

Although each applicant is considered for admission based upon a flexible, individualized review (see J.A. 223), the admissions staff utilizes a "selection index" to aid in achieving consistency. An applicant's high school grade-point average (GPA) is first adjusted to remove, *inter alia*, non-academic courses. Admissions counselors then assign a range of points to each applicant, up to a total of 150 points, for various factors, including the adjusted GPA (up to 80 points for a 4.0 average), the applicant's score on a standardized test (usually the SAT or ACT) (up to 12 points), and other factors known by the acronym "SCUGA"[6] (J.A. 223-25). Almost 90% of all 1995 applicants had their scores adjusted upward during the SCUGA process.[7]

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[6]In the acronym, "S" refers to characteristics of the applicant's high school; "C" to the curriculum taken by the student; "U" to "unusual" factors about the applicant (see discussion in text *infra*); "G" to the geographic residence of the applicant; and "A" to an applicant's familial relationship to an alumnus/a of the University (J.A. 84-93, 94-103, 104-114) (Guidelines – SCUGA for 1995, 1996 and 1997, respectively). Commencing in 1998, the "SCUGA" system was replaced with a Selection Index using a modified scale and grouping the factors into a different set of categories. The "S" and "C" factors were placed in the "Academic" grouping, and the "G" and "A" factors, along with other criteria originally within the "U" factor (some also being modified slightly) into the "Other Factors" category (see J.A. 182-97). The same set of criteria, except for one minor modification (points awarded for quality of essay changed from one to up to three) were carried forward in 2000 (see J.A. 223-241). For the sake of simplicity, we describe the salient characteristics of the admissions process as reflected in the 2000 Guidelines for calculating the index.

[7]Final Expert Witness Report of Jacob Silver, Ph.D. & James Rudolph, Ph.D. ["Silver & Rudolph"], at 19. (All of the intervenors' expert reports cited in this section were unrebutted by the other parties.)

The S, C, G, and A factors disproportionately reduce the selection index points awarded to UMS applicants. For example, an applicant will receive up to 10 "S" factor points based in part upon the number of Advanced Placement courses offered at his/her high school (whether or not the applicant took those courses) (J.A. 226). Because "Black and Latino students . . . are more likely to attend [Michigan public] schools that offer fewer such [courses]" (Cir. App. 3481),[8] UMS applicants far less frequently receive "S" points than non-UMS applicants.[9] Moreover, the availability of AP courses directly affects the number of points awarded to applicants based on their performance on standardized tests such as the SAT or ACT, because students who take AP courses tend to have higher scores (Cir. App. 3478-79). Finally, UMS applicants also receive fewer "C" points for taking such courses (see J.A. 229-30) since they are disproportionately unavailable in the public high schools they attend (Cir. App. 3477, 3480).

While all Michigan resident applicants are awarded ten points, those from designated northern counties and small communities in the state receive an *additional* six points (J.A. 232-33). Most of these applicants are non-UMS, because there are very few minority students ["Less than 1 percent of Blacks"] in those counties (Cir. App. 3482; *id.* at 3495-97). In 1995, 7.2% of non-UMS applicants get the additional "G" points, compared to only 1.5% of UMS students. (Silver & Rudolph at 17-18.)

Finally, the "A" factor gives four extra points to the children

[8]38% of African-American students are in schools that offer no such courses, while only 4% of Michigan's white students are enrolled in such public schools (Cir. App. 3480).

[9]35.1% of UMS applicants get one or more "S" points, compared to 50.8% of non-UMS applicants; 11.4% of UMS applicants received two or more "S" points in 1995 compared to 22.4% of non-UMS applicants (Silver & Rudolph at 16).

of alumni; "UMS [applicants] have consistently constituted seven to nine percent less than non-UMS [applicants] who received A-factor points in 1995 through 1997" (Silver & Rudolph, at 18).

The "U" or "Other" category is the only grouping under which race is taken into account: from 1998 forward, a UMS applicant receives 20 points. However, non-minority applicants can also receive 20 points within that same grouping, based on socio-economic disadvantage, the receipt of an athletic scholarship, or as awarded by the Provost in his discretion (see J.A. 241). (An applicant may receive only one award of 20 points for any of these reasons.) (J.A. 231.)

There is no evidence in this record that most — if any — of the SCUGA factors measure an applicant's potential to complete a course of study or are necessary to the University's ability to provide educational services. From 1995 to 1997, for instance, the University's own guidelines stated that "In reality, only the 'C' factor should be added to the GPA" (J.A. 84, 94, 104). Moreover, as noted above, an applicant's ability to earn "C" points, as well as "S" points, reflects what AP courses Michigan public schools have made available at the applicant's school as much as the student's own initiative.

Intervenors' unrebutted evidence showed, however, that (in 1995 and 1997, the years for which data were analyzed), those same SCUGA factors, taken as a whole, "disproportionately benefitt[ed] non-UMS applicants as a group [and] . . . correspondingly disadvantag[ed] UMS applicants as a group"[10]

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[10]The "G" and "A" factors (reflecting birth and residence, matters determined almost exclusively by parents, not students) also disproportionately disadvantage UMS applicants. See *infra* p. 22. The University's 2000 SCUGA Guidelines explain that the "G" factor points for students from northern Michigan counties is intended to provide an "appropriate representation of students" from all counties since Michigan is a "public institution supported by the citizens of Michigan" and that the

— and that "the combined SCUGA increment outweigh[ed] UMS/race as a determinant of admission" (Silver & Rudolph at 19-20) .

2. The University's history of discrimination

Aside from discrimination in the current admissions process, Intervenors presented substantial and uncontroverted evidence that during its entire 185-year history, the University has repeatedly engaged in racially discriminatory and exclusionary practices against UMS students on its campus, the effects of which, to this day, are manifested in their continued underrepresentation on campus and in the University's reputation for discriminatory behavior. These practices included the operation of segregated housing and activities on campus; refusal to take meaningful steps to recruit, enroll, and retain minority students; and deliberate indifference to a campus climate marked by racial hostility and racist actions by University students and even staff. Through the years, the University minimized or sidestepped criticism of its discriminatory practices by the federal government, state legislators, the Regents of the University, civil rights organizations, and its own faculty and students (Cir. App. 2261-83). Only after a series of student protests, led mostly by the few African-American and Latino students on campus, did the University take small steps to recruit and admit a greater number of qualified students of color. However, the University has failed, even in the face of renewed student complaints, to take effective action to end the numerous discriminatory and racially hostile practices that continue to occur on campus. We sketch the history briefly.[11]

The University was founded in 1817. However, it was not

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alumni preference is designed to recognize "the continuing service and support" provided by alumni to the University (J.A. 232-33).

[11] See Cir. App. 2262-2383 (Expert Report of James D. Anderson).

until 1868 that the first African-American students were enrolled. (Cir. App. 2265). The school segregated its own campus housing, and allowed students of color to be excluded from fraternities and sororities into the 1960's. Despite calls in 1949 by the Michigan Civil Rights Congress and again in 1952 by the campus Committee on Student Affairs to alter discriminatory by-laws of campus organizations, University President Harlan Hatcher and other officials flatly refused to do so (Cir. App. 2266), leaving University-recognized organizations free to continue their discriminatory practices with implicit or explicit University sanction.

The University also resisted dismantling segregation in its own housing units. As late as 1958, for example, it decided to continue to "respect the wishes of a student who said that he or she did not wish to live with a student of another race" in a school dormitory (Cir. App. 2268).[12] The University treated foreign students in a markedly different fashion, relying on a "Michigan tradition that segregation of foreign students by nationality is undesirable and that contact with American students is mutually beneficial" to justify the full integration of foreign students into campus life and policies giving them priority over African-American students in both admissions and housing (Cir. App. 2270).

In May, 1963, against this backdrop of exclusion and discrimination, the University established the Ad Hoc Advisory Committee on the Negro in Higher Education (Cir. App. 2274), and the following year that Committee announced the University of Michigan's first "mandate" — the Opportunity Program — described as an effort to recruit and admit "socially disadvantaged" students to the school. While minority

[12]In a letter to the Vice President for Student Affairs, Regent George E. Palmer wrote at the time that "[t]he image the Board of Governors is creating for the incoming freshman, I am afraid, is that we do not care about his racial prejudices." (Cir. App. 2269).

enrollment increased to some degree [13] in the years immediately following, students of color still faced apathy at best, and often active resistance, to their presence at the University[14] and were still excluded from campus activities and university social traditions. (Cir. App. 2274-75, 2276, 3768).

In 1970, intense dissatisfaction with the University's failure to address campus racism and to increase minority enrollment culminated in a series of student strikes. In February of 1970, a student group, which called itself Black Action Movement (BAM), pressed the Regents and the University administration for a substantial increase in African American enrollment, as well as for increased financial aid so that African-American and Latino students, disproportionately poor, could enroll, once admitted. (Cir. App. 2278-80). The proposal won support from many, including then-Governor William Milliken and the Michigan Senate Advisory Committee for University Affairs. However, University administrators rejected it. It was not until after the students went on "strike" that the University finally agreed to pursue limited admissions and recruitment efforts (*id.* at 2284-85), only to abandon them in 1973 (*id.* at 2289).[15]

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[13]In 1954, there were fewer than 200 African Americans attending the University. By 1966, 400 Black students were enrolled, still representing only 1.2 per cent of the total student population of about 32,000. At the same time, nearly 55 per cent of Detroit's 300,000 elementary and secondary school students were African American. (Cir. App. 2265.) In 1960, there were fewer than 50 Latino and Native American undergraduate students combined. *Id.* By 1968, these numbers had increased only to 73 "Spanish" and "American Indian" students (*id.* at 2276).

[14]In a typical example, a prospective African-American applicant walked into the admissions office to request admissions materials but was told by a counselor, without any review of her transcript or qualifications, that she was better suited for community college. Not surprisingly, the applicant concluded that the recommendation was based solely upon her skin color (Cir. App. 3743-46, 3748).

[15]After the strikes, African Americans increased from 3.5 percent of all

During the 1970's, the University experienced widespread and well-publicized racial incidents in campus dormitories that prompted complaints of dehumanizing treatment of African-American students (*id.* at 2293). Numerous investigations, including one conducted by the University, identified racism on the part of University staff as one factor contributing to the tensions (*id.* at 2294-96). The University did little to rectify the situation. Consequently, African-American enrollment at Michigan began to plummet, falling to 4.9 per cent between 1973 and 1983 — its lowest level since 1970 (*id.* at 2291-92).

In 1975, Michigan students of color responded by organizing "BAM II." They requested increased support services for minority students and an effective institutional effort to address the persistent negative racial climate on campus; University President Robben Fleming refused both requests (*id.* at 2298-99). With the University continuing to tolerate acts of discrimination and with no minority recruitment and admissions effort in place, minority enrollment and retention rates continued to decline: between 1976 and 1985, the number of African-American undergraduates at the University declined by a full 34 per cent.[16]

When, in 1980, University sociology professor Walter Allen conducted a study of undergraduates at Michigan, he noted that 85 per cent of African-American students surveyed reported that they had experienced severe racial isolation on campus and racial discrimination by their peers, administrators or professors (*id.* at 2312-13). These findings were included in a report to the University Regents and were repeated when the study was

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students in 1970 to 6.8 percent in 1972. Students with Spanish surnames increased from 0.2 percent in 1970 to 0.6 percent in 1972. (Cir. App. 2286).

[16](Cir. App. 3885 [Niara Surdakasa, Report on Minorities, Handicappers and Women in Michigan's Colleges and Universities, State Superintendent's Special Advisory Committee (1986]).

summarized in the Michigan undergraduate school's magazine, in which Allen stressed the need for a critical mass of African-American students and faculty to protect the students from the harshness of racial discrimination and isolation on campus. (*id.* at 2311).[17]

Highly publicized racist incidents continued to occur on campus, however, *see*, *e.g.*, *id.* at 3759-61, 2320-29, and were considered in a hearing before the Michigan State Legislature at which University officials discussed the challenges of dealing with the hostile climate on campus (*see id.* at 2328). A University investigation into the incidents concluded (*id.* at 2324-25) that the problems extended beyond other students, that "[i]n the classroom students of color encounter instructors who make openly racist comments, inside and outside of class; those persons are the colleagues of faculty of color and the supervisors of staff . . . ."

Soon after these incidents occurred, in 1988 Provost James Duderstadt announced plans for a new initiative. Duderstadt unveiled the "Michigan Mandate," an effort that sought to increase the number of students and faculty of color, to provide "equal opportunity" and "equal access to all educational resources to students from under-represented racial and ethnic" groups (*id.* at 1378-79), to remedy institutional racism on campus (*id.* at 1383), and to promote a more racially and ethnically diverse campus to prepare students for an increasing multicultural world (*id.* at 1376). The Mandate itself acknowledged the "prejudice, bigotry, discrimination and even racism" on the Michigan campus, as well as its goals of "remov[ing] institutional barriers to full participation in the life and leadership of [the] institution" (*id.* at 1390).

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[17]The findings of Allen's study were also echoed in a report issued by Associate Vice President of Academic Affairs Niara Sudarkasa in 1986. (Cir. App. 2320-22).

3. The current negative racial environment

Although implementation of the Michigan Mandate over the last 15 years represents a substantial and continuing change in the University's attitude toward minority students and applicants, it has not in a single generation eradicated the hostile attitudes entrenched by prior discriminatory conduct and indifference. The evidence shows that UMS students continue to be subjected to racially hostile actions and remain significantly isolated.[18] As in previous years, the campus has been plagued by targeted racist actions against African-American and Latino students, including racist graffiti on the hallways of campus buildings and in dorm rooms; racially derogatory remarks and epithets (see, *e.g.*, Cir. App. 3777-79); and racist literature and lettering placed on campus buildings (*id.* at 2393). Discriminatory treatment of UMS students at the hands of University police is also regarded as endemic at the undergraduate college (see *id.* at 2409-10, 3740-41, 3752-53).

A negative racial climate affects minority academic performance, and places limits upon the informal learning, networking, and interacting that takes place with their peers outside the classroom — in dormitories and in extracurricular activities (*id.* at 2422). A negative racial climate tolerated and maintained over several decades — also deters other African-Americans and Latinos from enrolling (*id.* at 2389-91). A study conducted by the University in 1988 revealed that the primary concern expressed by more than one-third of the African Americans and Latinos who chose not to apply as undergraduates was racism on campus (*id.* at 3833, 3840).

Summary of Argument

Intervenors have introduced substantial and undisputed evidence of a history of discrimination at the University of

[18]The negative climate is summarized in the expert reports of Dr. Joe Feagin and Dr. Walter Allen; *see* Cir. App. 2405-12, 2424-28 2472-73.

Michigan the effects of which are still manifest on campus today. This evidence includes, *inter alia*, expert analyses demonstrating the adverse impact upon minority applicants of many of the components of the "selection index" used by staff in the admissions process (if not counterbalanced by the consideration of race as one factor among others), and the longstanding pattern of discrimination and inattention toward students of color at the University.

This showing of both past and present discrimination distinguishes this case from *Bakke* and satisfies the constitutional requirements that this Court has enunciated to justify a race-conscious admissions policy. It is of no legal significance that the University itself has not advanced this ground to sustain its program, because to do so would require admissions against interest that could expose the University to significant liability. In these circumstances, it suffices that the necessary showing is made by some party on the record, as was the case here.

The history of discrimination at the University also strengthens the separate diversity justification that the University advances, and which Intervenors also support. There is a strong public policy, often given effect by this Court, of encouraging voluntary efforts on the part of both public and private actors to redress prior discriminatory conduct.

As the trial court found, the record abounds with support for the proposition that diversity on college and university campuses brings substantial benefits to the entire community and thus rises to the level of a compelling governmental interest. It can hardly be questioned that the enrollment of a diverse student body at institutions of higher learning advances a plethora of interests important to our democratic society. Diversity furthers the purposes of equal protection under the Fourteenth Amendment by recognizing the value of racially and

ethnically integrated environments. It is also consistent with the academic freedoms accorded to universities to determine their own selection processes, which is recognized as a special concern to the First Amendment. The University's admissions policy is thus consistent with *Bakke*, which should be reaffirmed,

Plaintiffs fail to comprehend the value and purpose of diversity. They are gravely mistaken that diversity is predicated upon racial stereotypes and stigmas. The diversity rationale does not assume that students of color (or any students, for that matter) think alike, or will suffer a stigmatic injury because they are admitted through a process that takes race into account as one factor. To state that there is an African-American or Latino experience does not mean that all African Americans or Latinos think alike. Diversity in higher educational settings refutes rather than reinforces such assumptions, and is particularly important today, when most of the students admitted to the University of Michigan have attended largely segregated schools before their admission, and their college experience may be the only chance to learn and interact in a racially integrated environment.

Finally, the University's admissions program is narrowly tailored. It furthers the interests of diversity and is sufficiently flexible that the particular qualifications of each applicant are considered. The record is clear that academic qualifications are by far the most important criteria in making admissions decisions. Race is only one of many factors considered in the process. Despite arguments to the contrary by the United States, race-neutral alternatives to the University's present admissions program do not exist, and in particular the percentage plan approach advocated by the federal government would not function in Michigan (and, early studies show, may be flawed in other parts of the country where it has been implemented).

ARGUMENT

I. Intervenors' Showing Of Past And Present Discriminatory Actions By The University Both Provides A Remedial Basis To Sustain Its Race-Conscious Admissions Policy And Also Strengthens The Diversity Rationale Articulated By The University For That Policy

The court below sustained the University of Michigan's race-conscious undergraduate admissions policy on the basis of the "diversity" rationale enunciated by Justice Powell in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). Intervenors agree with that ruling and join the University of Michigan in defending it. See *infra* Argument II. It bears notice, however, that in *Bakke* itself, the Court reached that rationale because the record before it contained no "judicial, legislative, or [appropriate] administrative findings of constitutional or statutory violations," *id.* at 307 (opinion of Powell, J., announcing the judgment of the Court).

This case is different from *Bakke*. Intervenors *did* introduce substantial evidence of various discriminatory actions by the University, based upon which the court below could have made the appropriate findings that would fully justify, on remedial grounds, the University's admissions process.[19] This evidence is especially significant in light of cases decided since *Bakke*, which establish that race-conscious actions are constitutionally permitted not only when there are "judicial, legislative, or administrative findings of constitutional or statutory violations" but also when a public actor can show a "strong basis in evidence for its conclusion that remedial action was necessary,"

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[19]Indeed, intervention was granted explicitly because, the Sixth Circuit found, "the University is unlikely to present evidence of past discrimination by the University itself or of the disparate impact of some current admissions criteria, and . . . these may be important and relevant factors in determining the legality of a race-conscious admissions policy," *Grutter v. Bollinger*, 188 F.3d 394, 401 (6th Cir. 1999).

City of Richmond v. J.A. Croson Co., 488 U.S. 469, 500 (1989). The "strong basis in evidence" standard does not require a prior adjudicative or legislative finding, or a contemporaneous judicial finding of unlawful discrimination, *see Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 290-93 (1986) (O'Connor, J., concurring in the judgment). A showing of a *prima facie* case is sufficient, *see Croson*, 488 U.S. at 500.

Although the court below rejected Intervenors' contentions that a remedial justification provided an independent basis for the University's admissions policies, this Court is free to affirm an appealed decision on any ground which finds support in the record, regardless of the ground upon which the trial court relied.[20] Plaintiffs' position is that Intervenors' evidence is irrelevant because the University did not adopt it nor claim that it adopted the admissions policy for any remedial purpose. We urge the Court to reject that position.

It is understandable that the University has not advanced a remedial justification for its actions. To call attention to current inequities in its admissions policies, to past discrimination or the perpetuation of past discrimination on its part, or even discrimination by other governmental actors, would require the University to point the finger at itself (or its "parent"), potentially harming its reputation and placing it at risk of legal liability to others, including minority students. *Cf. Wygant*, 476 U.S. at 291 (O'Connor, J., concurring in the judgment) (noting that public employers might be "trapped between the competing

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[20]*See Whitley v. Albers,* 475 U.S. 312, 326 (1986) ("respondent correctly observes that any ground properly raised below may be urged as a basis for affirmance of the Court of Appeals' decision"); *United States v. New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977) ("prevailing party may defend a judgment on any ground which the law and the record permit"); *Langnes v. Green*, 282 U.S. 531, 538-39 (1931) (appellee may, without filing a cross-appeal, advance any theory in support of the judgment that is supported by the record, whether it was ignored by the court below or flatly rejected).

hazards of liability to minorities if affirmative action is *not* taken . . . and liability to nonminorities if affirmative action *is* taken") (emphasis in original). Even to make a showing of a "strong basis in evidence" in these areas carries the same risks.

Although the "strong basis in evidence" formulation announced in *Wygant* and *Croson* was intended to mitigate the disincentive for governmental agencies to assess their past actions and take steps voluntarily to redress any discrimination they identified, potential liability still strongly deters public bodies from themselves articulating remedial objectives because of the legal significance of making out a *prima facie* case.[21] This Court should therefore reject the conclusion below (Pet. App. 72a-76a) that a public body's reluctance to identify its own past discriminatory conduct prevents a court from recognizing a remedial justification for race-conscious action based upon a showing *by another party* of the public body's past discrimination. *Cf. Croson*, 488 U.S. at 492 (holding that a public agency may take race-conscious steps to avoid perpetuating discrimination caused by other public or private entities).

In *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 729

[21] *See, e.g., Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148 (2000) ("a plaintiff's *prima facie* case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated"); *id.* at 143 ("once the defendant meets its burden of production . . . the trier of fact may still consider the evidence establishing the plaintiff's *prima facie* case 'and inferences properly drawn therefrom . . . on the issue of whether the defendant's explanation is pretextual'" (*quoting Texas Dep't of Comty. Affairs v. Burdine*, 450 U.S. 248, 255 (1981)); *In re Employment Discrimination Litig.*, 198 F.3d 1305, 1321-22 (11th Cir. 1999) ("If, after a '*prima facie*' demonstration of discriminatory impact, the employer cannot demonstrate that the challenged practice is a job related business necessity, what explanation can there be for the employer's continued use of the discriminatory practice other than that some invidious purpose is probably at work?").

(1982), the Court rejected the state's claimed remedial justification for operating a nursing school restricted to women, noting that the state "ha[d] made no showing that women lacked opportunities to obtain training in the field of nursing or to attain positions of leadership in that field when the MUW School of Nursing opened its door or that women currently are deprived of such opportunities." *See United States v. Virginia*, 518 U.S. 515, 533-34 (1996). In neither *Hogan* nor *Virginia*, however, were there intervenors who presented evidence that would establish the factual basis for a claim of remedial justification. Where, as here, that showing is made by intervenors, it would seem to exalt form over substance to mandate that it be disregarded.

In arguing for that result, Plaintiffs would have this Court ignore the history of discrimination at the University of Michigan, which they disparagingly label "societal discrimination" that is not actionable, Pet. Br. at 48. (*But see* Brief of NAACP Legal Defense & Educational Fund, Inc. and the American Civil Liberties Union as *Amici Curiae*, *Grutter v. Bollinger*, No. 02-241, at ___.) Upon a closer review the Court will conclude that unlike the evidence in *Bakke* concerning the University of California at Davis medical school, there is, in fact, a history of past — and ongoing — discrimination at the University of Michigan that justifies, on remedial grounds, its race-conscious admissions policies.

A. The University's Consideration Of Race Is Necessary To Counteract Other Factors In Its Admissions Process That Have An Unjustified Adverse Impact On Minority Applicants

No party disputes that key components of the University's admissions criteria work to the systematic disadvantage of African-American, Latino, and other UMS applicants. The "S," "C," "G," and "A" factors unfairly disadvantage such applicants

because they assign points that increase a candidate's chances of admission on the basis of characteristics that are unrelated to an applicant's individual achievement or potential — but which are disproportionately possessed by non-UMS, applicants. Because there is a "strong basis in evidence" to believe that the University's admissions process, if it did not balance out the adverse impact of these factors on UMS applicants by considering racial or ethnic background, would violate regulations promulgated pursuant to Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, the University has a compelling interest in maintaining its current admissions process.

1. The "S," "C," "G," and "A" factors have an unjustified disproportionate adverse impact on UMS applicants to the University

The unrebutted record evidence, summarized *supra* pp. 6-9, establishes the discriminatory impact of the school, curriculum, geography and alumni SCUGA factors on UMS applicants.

First, because UMS applicants disproportionately attend highly segregated[22] Michigan public schools that have relatively low numbers of honors and AP courses, average SAT scores and college-going rates, the use of the "S" (School) factor places them at an unfair disadvantage. Graduates of these schools who seek admission to the University necessarily are awarded few or no "S" factor points (Cir. App. 3478-79; Silver & Rudolph, at 16, Table 16).

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[22]*See, e.g.*, Cir. App. 1951-52, 1964, 1970-76, 1981-91 (Expert Report of Thomas Sugrue, documenting systemic discrimination that has resulted in Michigan's having among the highest rates of school and residential segregation in the nation); Brief of NAACP Legal Defense & Educational Fund, Inc. and the American Civil Liberties Union as *Amici Curiae, Grutter v. Bollinger* (No. 02-241) at 6-13, 14-16.

The "C" (Curriculum) factor, which assigns more points to applicants who have taken more AP, Honors and similar courses, has a like effect. By virtue of the fact that they overwhelmingly are assigned to schools that offer few or none of these courses (especially when compared to offerings in schools in predominantly non-UMS suburban districts), UMS applicants are disproportionately unable to benefit from this factor even if they are achieving at the highest levels at the schools they do attend (Cir. App. 3477, 3480).

The "G" (Geography) and "A" (Alumni) factors also have a similar impact. The "G" factor awards points to applicants who reside in overwhelmingly white areas of one of the most residentially segregated states in the country (Cir. App. 3482; see also *supra* note 22). The "A" factor operates as a "grandfather clause" because it is tied to the University's racially exclusive past.[23] See Cir. App. 3672 (from 1995-98, admission rates for applicants entitled to "A" points were higher than rates for applicants without relatives who graduated from Michigan); *id.* at 3481 (UMS applicants admitted to the University are mainly first-generation college goers); *id.* at 1998 (Census tables showing black/white differences in college attendance and completion in Michigan, 1960-1990); *id.* at 3671 (between 1995 and 1998, more than 75% of white applicants had an alumnus/a relative, compared to only 4% of UMS applicants).

Significantly, these SCUGA factors reward educational *advantage*, far more than individual *merit*. The University itself has recognized that, with the limited exception of the "C"

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[23] *See Meredith v. Fair*, 298 F.2d 696, 701 (5th Cir. 1962) ("We hold that the University's requirement that each candidate for admission furnish alumni certificates is a denial of equal protection of the laws, in its application to Negro candidates. It is a heavy burden on qualified Negro students, because of their race. It is no burden on qualified white students.").

factor, the SCUGA factors are not measures of a Michigan UMS applicant's initiative or academic achievement. See J.A. 84, 94, 104 ("In reality, only the 'C' factor should be added to the GPA."); *id.* at 232 ("G" points awarded to insure "appropriate representation of students from Michigan" since University is "public institution supported by the citizens of Michigan"); *id.* at 233 ("A" points "recognize the continuing service and support provided to the University" by alumni).

Nor is there any evidence that these individual characteristics, or the school characteristics captured by the "S" factor, determine or predict any level of individual performance — including likelihood of completing the program of study — at the University.[24] Moreover, any potential educational justification for use of the "S" or "C" factor alone could not conceivably extend to the triple disadvantage suffered by UMS applicants. Because these students find themselves assigned to mostly segregated schools with disproportionately few AP or Honors courses, their standardized test scores are likely on average to be lower (resulting in fewer points in the selection index), and they will not receive similar "S" or "C" point awards as students in predominantly white Michigan schools that offer more of these courses. As one of Intervenors' expert witnesses noted, UMS applicants are subject to these obstacles to admission even when they have "fully engage[d] the educational offerings made available to them and perform[ed] at a level of excellence" (Cir. App. 3478) .

2. The University has a compelling remedial interest in counteracting the individually and combined discriminatory effect of its SCUGA factors

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[24]While the University determines a school's quality for "S" factor purposes in part by computing the average SAT score of test-takers at an applicant's high school there is reason to question whether this is an appropriate use of the SAT. See Expert Report of Claude Steele, Cir. App. 1928-30 (discussing limitation of use of SATs).

The highly disparate impact of the "S," "C," "G," and "A," factors, as well as of the SCUGA factors in combination (see Silver & Rudolph, at 19-20), justify race-conscious remedial action by the University because there is a "strong basis in evidence" for anticipating that the use of such criteria alone would constitute a violation of regulations promulgated to enforce Title VI. Those regulations prohibit entities receiving federal funds (such as the University) from using standards or criteria that have a racially discriminatory effect. *See* 34 C.F.R. § 100.3(b)(2) (2002).[25] An institution violates these regulations by maintaining a practice that has a statistically significant disparate impact on a particular racial or ethnic group that cannot be shown to be educationally necessary. *See*, *e.g.*, *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988); *Board of Educ. v. Harris*, 444 U.S. 130, 151 (1979).

The evidence previously summarized, which was uncontroverted, demonstrates beyond peradventure that: *first*, in the absence of the inclusion of race as a consideration within the "U" component, the "SCUGA factors" singly and in combination would result non-UMS applicants receiving highly disproportionate numbers of selection index points compared to UMS applicants — and *second*, that neither plaintiffs nor the University has articulated a credible or legally sufficient educational justification for such an admissions system (which is, in fact, the system Plaintiffs wish to impose

[25]That regulation provides: "A recipient . . . may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the *effect* of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin. " 34 C.F.R. § 100.3(b)(2) (emphasis added). The Court has held that while Title VI prohibits only intentional discrimination, these regulations prohibit actions that have an unjustified adverse impact. *See Alexander v. Choate*, 469 U.S. 287, 293 (1985) (discussing *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983)).

upon the University through this litigation).[26]

Michigan's interest in avoiding non-compliance with its Title VI obligations, as it has been able to do by considering race along with other factors in the SCUGA calculations, is surely compelling. Nothing in this Court's jurisprudence suggests that the University must choose between foregoing the use of economically or politically advantageous criteria (such as the "G" and "A" factors) and admitting applicants by lottery, on the one hand, or operating a largely segregated educational program that replicates the high levels of segregation and isolation that characterize public education in grades K-12 throughout the State, on the other. *Cf. Stuart v. Roache*, 951 F.2d 446, 452-56 (1st Cir. 1991) (approving consent decree authorizing race-conscious relief to offset disparate impact produced by earlier use of examinations whose validity was challenged in lawsuit).

B. The University's Historic Discrimination Continues To Affect UMS Enrollment And To Perpetuate A Hostile Racial Climate On Campus

As noted *supra* pp. 11-14, the long-continued pattern of discrimination and indifference toward UMS students and applicants by the University caused minority enrollment to decline and deterred qualified minority high school students from applying. *Cf. Teamsters v. United States*, 431 U.S. 324, 365-66 (1977) (recognizing that company's reputation for

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[26]An acceptable justification must be *necessary* to the educational program, not just related to it in some way. *See* Guidelines for Eliminating Discrimination and Denial of Services on the Basis of Race, Color, National Origin, Sex, and Handicap in Vocational Education Programs, Appendix B to Part 100, 34 C.F.R., § IV.K.(admissions criteria with impact of excluding individuals protected against discrimination by statute must be "validated as essential to *participation* in a given program . . . . Examples of admissions criteria that must meet this test are past academic performance . . . high school diplomas and standardized tests . . . .") (emphasis added).

discrimination may deter minority class members from applying for jobs). Substantial evidence in the record documents this phenomenon. For instance, in 1966 the Defense Department conducted an investigation into the University's compliance with Title VI of the 1964 Civil Rights Act. The Department's report reflected Michigan's reputation as a university "basically for rich white students" and noted that "[t]he minimal number of negroes (*sic*) on the University faculty is a detriment to the public image of the University" (Cir. App. 2270-71).[27] Similarly, the University's long and consistent refusal and failure, until implementation of the Michigan Mandate, to take any serious actions to condemn and reduce racially hostile acts by its own staff and by student peers entrenched perceptions and the climate of antagonism against UMS students on the campus, because that refusal and failure conveyed University officials' implicit endorsement of that climate.[28]

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[27]*See also, e.g.*, Cir. App. 2332-33 (citing 1989 affidavit of Interim University President Robben Fleming stating that extensive racial harassment on campus had led to dramatic declines in minority enrollment), 2346-67 (citing various internal University reports and studies) 2328-29 (Expert Report of Dr. Anderson), 2389-91 (Expert Report of Dr. Feagin), 3769-72 (Stephens deposition), 3382 (Test Score Senders Study).

[28]This Court has held educational authorities or employers responsible for racial or gender harassment by supervisors or peers when they fail to respond to complaints by the victims of these actions. *See Gebser v. Lago Vista Ind. Sch. Dist.*, 524 U.S. 274, 290 (1998) (school district is not liable for sexual harassment of student by principal unless official with authority to take corrective action received actual notice of harassment but failed, with deliberate indifference, to do so); *Faragher v. City of Boca Raton*, 524 U.S. 775, 806-08 (1998) (employer's damage liability for supervisor's sexual harassment of employee, in absence of tangible adverse employment action against employee, is subject to affirmative defense that employer took reasonable precautions to prevent harassment and employee unreasonably failed to use that mechanism to avoid harm); *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 646-47 (1999) (adopting "deliberate indifference" standard of *Gebser* as basis for school district liability for peer sexual harassment of student that occurs in school during school hours

The University's interest in eliminating these continuing effects of its own past policies and conduct, as it has sought to do in part through its admissions policy, *see infra* p. 45, is compelling. To the extent that the current campus climate can be regarded as the product of discriminatory actions and attitudes of others — such as non-UMS students — the University is entitled to maintain a properly tailored race-conscious admissions system in order to avoid reinforcing or perpetuating that discrimination, even discrimination by private parties. *Croson*, 488 U.S. at 491-92.

C. The History Of The University's Past And Present Conduct With Discriminatory Impact Should Inform The Court's Consideration Of The Diversity Rationale For Its Current Admissions Procedures

We have argued above that but for the University's explicit consideration of race as one factor among others, the educationally unnecessary disparate adverse impact of the remainder of its admissions procedures and the depressingly persistent discriminatory acts of University officials, resulting from deliberate decision, willful indifference, or mere apathy, justify Michigan's current race-conscious admissions system under the standards of this Court's rulings in *Wygant* and *Croson*. These matters are equally relevant to the Court's consideration of the alternative diversity rationale urged by the

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when perpetrator is subject to district's disciplinary control); *Monteiro v. Temple Union High Sch. Dist.*, 158 F.3d 1022, 1033-34 (9th Cir. 1998) (reversing dismissal of claim that school district violated Title VI when it failed to respond to student's complaint of peer racial harassment); *see also* Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance, 59 Fed. Reg. 11448 (Mar. 10, 1994) (outlining liability of educational institutions for maintaining hostile educational environment). *Cf. Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 457 (1979) ("Each instance of a failure or refusal to fulfill th[e] affirmat9ve duty [to dismantle the former dual system] continues the violation of the Fourteenth Amendment").

University, accepted by the court below, and approved in this Court's ruling in *Bakke* (to which we turn in the next section).

At least in this case, the constitutionality of the diversity rationale cannot be adjudicated in the abstract, as if the conditions of underrepresentation, isolation and hostility toward minority students that have plagued the University to this day had no relationship to traceable, official conduct. That is the essence of Justice Powell's rejection of "societal discrimination" as an adequate underpinning for the University of California's two-track admissions scheme involved in *Bakke*.[29] As Justice Powell's opinion itself recognized, however, the "societal discrimination" rationale was proffered by California entirely distinct from and disconnected from, any recognition of its own discriminatory conduct, which it never even purported to acknowledge. 438 U.S. at 309-10. Justice Powell's analysis of the diversity rationale proffered by California was also made without any reference to prior discrimination, *id.* at 311-20.

Today, Plaintiffs and their *amici* have directly attacked the *Bakke* ruling and seek to have this Court overturn it. In considering their arguments, it is critical to realize that nothing in Justice Powell's opinion can be read to indicate that the

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[29]There are persuasive bases to disagree with Justice Powell's assessment, as the dissenters in *Bakke* did, 438 U.S. at 324, 328-55, 362-73 (opinion of Brennan, White, Marshall & Blackmun, JJ.). *See* Brief of NAACP Legal Defense & Educational Fund, Inc. as *Amici Curiae*, *Grutter v. Bollinger* (No. 02-241). Our point here, however, is that the Court need not resolve that debate in this litigation, because the record evidence demonstrates that the University's prior discriminatory conduct contributes significantly to the current lack of diversity that would prevail in the absence of its race-conscious admissions process. Ignoring that record in assessing the depth and adequacy of the University's interest in achieving diversity today would do more than just blink reality; it would transform constitutional adjudication into a sterile, ahistorical exercise to a degree without any precedent in this Court's jurisprudence.

Court would not have taken account of a record of past discrimination by California that contributed to the isolation and lack of diversity that the Medical School was seeking to alter in deciding that case, if there had been such a record.

We believe that the presence of such evidence would have been considered and relied upon by the *Bakke* Court in upholding the diversity arguments. Whether that is right or wrong, the issue is an open one for *this* Court. The strong tradition of encouraging voluntary efforts to redress past discriminatory conduct, on the part of both private actors[30] and public entities,[31] should not be abandoned in this case. In weighing the diversity rationale, the Court should take account of the strong impetus and justification that Michigan's historical and current discriminatory conduct provides for its efforts to achieve diversity.

II. Diversity Is A Compelling Governmental Interest Sufficient To Support The University Of Michigan's Race-Conscious Admissions Policy

The University presented in the record a wealth of specific data from among the most respected researchers in the country that establishes the value of diversity. That record demonstrates beyond any doubt that a racially diverse campus provides a better education, both in and out of the classroom, than an all-white campus. The evidence further shows that the experience of attending a racially diverse collegiate institution brings measurable benefits to all segments of our society. Based upon this evidence and upon their own experience, a widely varied group of *amici* are submitting briefs testifying to the need to

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[30] *See, e.g., United Steelworkers of America v. Weber*, 443 U.S. 193 (1979).

[31] *See Croson*, 488 U.S. at 492 (opinion of O'Connor, J., Rehnquist, C.J. and White, J.), 519 (opinion of Kennedy, J.), 528 (opinion of Marshall, Brennan & Blackmun, JJ.).

preserve racial diversity in higher education.

Intervenors share the belief that achieving a diverse student body is a compelling governmental interest that fully justifies the University's race-conscious admissions policy, and we join in the arguments set out in its Brief, presenting only some additional considerations here.

A. *Bakke* Compels Rejection Of Plaintiffs' Proposed Interpretation Of The Fourteenth Amendment

1. A majority of the Court in *Bakke* would have sustained the University of Michigan's admissions program

It requires no resort to the interpretive principles of *Marks v. United States*, 430 U.S. 188 (1977) to conclude that a majority of the *Bakke* Court would find the admissions program at the University of Michigan to be supported by a "compelling" governmental interest. For Justice Powell, "the attainment of a diverse student body . . . clearly is a constitutionally permissible goal for an institution of higher education," *Bakke*, 438 U.S. at 311-12. The four Justices who subscribed to the opinion authored by Justice Brennan "agree[d] with Mr. Justice Powell that a plan like the "Harvard" plan [citation omitted] is constitutional under our approach, *at least so long as the use of race to achieve an integrated student body is necessitated by the lingering effects of past discrimination*," *Id.* at 326 n.1 [emphasis added]. For the reasons given *supra* § I (and especially as explained in § I.C.), the condition set forth in the italicized language from Justice Brennan's opinion is unquestionably satisfied in this case.

2. *Bakke* and other decisions support the conclusion that diversity is a compelling governmental interest

Plaintiffs urge the Court to adopt a narrow reading of the

Fourteenth Amendment that would limit consideration of race only to remedy documented instances of discrimination against identified individuals, claiming that this is the proper reading of the Court's seminal ruling in *Bakke*, upon which public and private institutions (educational and other) have relied for a quarter of a century. Such an approach extends far beyond *Bakke* and subsequent opinions and should be rejected.

In *Bakke* itself, the Court vacated the California Supreme Court's injunction and reversed that portion of its judgment holding that the Davis medical school could not constitutionally consider race in any manner in its admissions process. Specifically, in a portion of his opinion, which four other Justices joined, Justice Powell held that the California Supreme Court judgment forbidding any consideration of race in state higher education admissions impermissibly "failed to recognize 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." *Bakke*, 438 U.S. at 320; *see id.* at 325-26 (opinion of Brennan, White, Marshall & Blackmun, JJ.). Thus the Court left the door open for the University of California to establish race-conscious programs in the future. *See id.* at 324-26.

The *Bakke* Court's reversal of this portion of the judgment of the California Supreme Court has not been disturbed in subsequent opinions, which have been read by both this Court and by lower courts and educational institutions as an indication that the Constitution permits sufficient "breathing room" for a properly constructed affirmative action plan.[32] While there have

[32]In *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), for example, Justice Brennan's majority opinion cited *Bakke* for the proposition that "'a diverse student body' contributing to 'a robust exchange of ideas' is a 'constitutionally permissible goal' on which race-conscious university admissions programs may be predicated." *Id.* at 568 (quoting *Bakke*, 438 U.S. at 311-13). Although the Court's decision in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), overruled *Metro Broadcasting* on the

obviously been developments in the Court's equal protection jurisprudence since *Bakke*, the Court has never returned to the subject of university admissions, nor has it "indicated that Justice Powell's approach has lost its vitality in that unique niche of our society," *Smith v. University of Washington Law Sch.*, 233 F.3d 1188, 1200 (9th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001).

3. *Bakke* should be reaffirmed

A "terrible price would [be] paid" for overruling *Bakke* now. *Planned Parenthood v. Casey*, 505 U.S. 833, 864 (1992). The price would be paid by public and private educational institutions throughout the United States that have relied on *Bakke* to enable them to diversify the ranks of higher education. *See, e.g.,* William G. Bowen & Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* ("Bowen & Bok") 8, 252-53 (1998) (citing Association of American Universities' unanimous statement affirming educational value of diversity); Akhil Reed Amar & Neal Kumar Katyal, *Bakke's Fate*, 43 UCLA L. REV. 1745, 1769 (1996) ("An entire generation of Americans has been schooled under *Bakke*-style affirmative action, with the explicit blessing of — indeed, following a how-

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separate issue of whether a lower level of constitutional scrutiny applies to racial preferences enacted by Congress, *see* 515 U.S. at 227-35, *Adarand* did not involve (and the Court did not reject) the proposition that institutions of higher education have a compelling interest in obtaining the educational benefits of a diverse student body. *See id.* at 257-58 (Stevens, J., dissenting). *See also Wygant*, 476 U.S. at 286 (O'Connor, J., concurring) (citing Justice Powell's opinion in *Bakke*, "although its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of education, to support the use of racial considerations in furthering that interest"); *Wessmann v. Gittens*, 160 F.3d 790, 796 (1st Cir. 1998) (precedential value of Justice Powell's *Bakke* opinion should not be disturbed, especially where various individual justices have "from time to time . . .written approvingly of ethnic diversity in comparable settings").

to-do-it manual from — U.S. Reports."); *Scholars' Reply to Professor Fried*, 99 YALE L.J. 163, 166 (1989) ("thousands of public educational institutions, attempting to provide a more diverse group of students and faculty, have, of their own volition, followed Justice Powell's direction . . . to consider minority status as one among many relevant factors").

The price would also be paid by the Court itself. We are "only a generation or so removed from the legally enforced segregation which was used to discriminatorily deny African Americans and other minorities access to education." *Grutter v. Bollinger*, 288 F.3d 732, 764 (6th Cir.) (Clay, J., concurring), *cert. granted*, 123 S. Ct. 617 (2002). The pillars of *Brown* and *Bakke* have stood tall enough to allow colleges and universities to afford educational opportunity for a generation to those who have historically been subject to discrimination. To overrule a watershed decision like *Bakke* and its approval of narrowly tailored race-conscious admissions policies "would subvert the Court's legitimacy beyond any serious question." *Casey*, 505 U.S. at 867. It is therefore imperative that the Court adhere to the essence of *Bakke*.

B. Diverse Enrollments In Institutions Of Higher Education Further A Wide Variety Of Interests Important To Democratic Societies Such As Ours

The concept of diversity reflects values that lie at the core of a democratic society, as well as fundamental American constitutional principles.[33] For this reason, governmental actions that foster or preserve diversity unquestionably serve "compelling interests."

The very notion of representative democracy encompasses full and equal participation in the common governance of

[33]Of course, even the United States Constitution was textually inconsistent with democratic values until modified to include the 13th, 14th and 15th Amendments.

society by the members of a variegated *polis*. Thus, for instance, this Court has long recognized voting to be among the most basic rights deserving of constitutional protection. *E.g.*, *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) ("The right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights"). The Court has also given constitutional protection to the opportunity for all citizens — and even non-citizens — to become equipped, through education, with the basic tools and skills necessary to participate in civic affairs. *See*, *e.g.*, *Plyler v. Doe*, 457 U.S. 202, 222 (1982) and cases cited; *id.* at 234 (Blackmun, J., concurring) ("denial of an education . . . places [the individual] at a permanent political disadvantage"). Exclusion from public institutions, or from the opportunity to communicate and associate with other members of the *polis* are, therefore, deeply inconsistent with basic American constitutional values, *see*, *e.g.*, *Terry v. Adams*, 345 U.S. 461 (1953) ("Jaybird" primary); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (gerrymander excluding African Americans from eligibility to vote for Tuskegee, Alabama city government), even if they are supported by the majority of the electorate, *see* *Lucas v. Forty-Fourth Gen'l Assembly of Colorado*, 377 U.S. 713 (1964).[34]

[34]Plaintiffs suggest that the failure to offer each of them admission to the University constitutes the same sort of "exclusion" as was involved in these cases, because it occurred in the context of an admissions process in which race was one among many factors taken into consideration. While there is reason to question whether race had anything to do with plaintiffs' rejection, see *infra* p. 44 n.42 & accompanying text, there is a more significant distinction. The individualized determination to decline to offer admission to specific white applicants did not make the University an exclusive preserve for UMS students. To the contrary, undergraduate enrollment at the University remains heavily white. No one who visited the Michigan campus today would conclude that white applicants as a group were excluded from enrollment at the school. Plaintiffs' facile analogy trivializes the important constitutional principles upon which they seek to rely.

These general principles have been given widespread application in a variety of circumstances, such as those involving the rights of candidates to communicate effectively with the members of the *polis*. *E.g.*, *Buckley v. Valeo*, 424 U.S. 1 (1976). Most significant for the present matter, the Court long ago discerned that in a modern society, an equal or effective educational opportunity cannot be provided within a democracy to a minority in a setting that is isolated from contact with members of the majority and the future leadership of the *polis*. *Sweatt v. Painter*, 339 U.S. 629, 634 (1950):

> The law school to which Texas is willing to admit petitioner excludes from its 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 which he would receive if admitted to the University of Texas Law School.

Against this background, Plaintiffs' contention that actions to achieve diverse student enrollments in public institutions of higher education do not serve compelling governmental interests is nothing short of astonishing.

1. Diversity furthers the purposes of the Fourteenth Amendment

The goal of diversity is of particular importance to Intervenors, who are members of minority groups that historically have been subjected to official prejudice and subordination, because its adoption and effectuation by governmental entities today gives credibility and meaning to the very different aspirations that we today profess as a nation. Diversity is the opposite of the enforced isolation that produced

"discrete and insular minorities," precluded from protecting their interests in the political process, whom this Court suggested in *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938), were in need of special judicial solicitude. As this Court has recognized, in a multi-racial society, diversity is integration.

Underlying the rationale in *Sweatt* and *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950) is the notion that there is value in racially and ethnically integrated settings. The Court understood, in those cases, that the "intellectual commingling of students" — specifically in a racially integrated (and thus racially diverse) setting — aids the institution's students in the "pursuit of effective" education. *McLaurin*, 399 U.S. at 641. The Court also recognized that forbidding African-American students from attending white law schools harmed them because of the specific role that racial segregation played in limiting educational opportunity for minorities. *Sweatt*, 339 U.S. at 634. An integrated educational setting served to promote the mandates of equal protection by providing minority students access to the resources and prestige that accompany attendance at established, competitive schools.

The same holds true for a diverse educational setting. By definition, an institution cannot be racially diverse if it is racially segregated. The added component of diversity, however, is that its benefits flow not only to students suffering the effects of discrimination, but to all students in the institution. See *infra* pp. 38-43. Because diversity furthers the constitutional value of equal protection, it is compelling. *See* Goodwin Liu, *Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test*, 33 HARV. C.R.-C.L. L. REV. 381, 382, 417 (1998) (placing diversity rationale "squarely within the existing norms of equal protection doctrine" and concluding that "promoting educational diversity is fundamental to the task of maintaining

a democratic political system").

2. Diversity furthers important First Amendment interests

In *Bakke*, Justice Powell found that the interest in a diverse student body "clearly is a constitutionally permissible goal for an institution of higher education." *Bakke*, 438 U.S. at 311-12. He noted that "[a]cademic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment." *Id.* at 312. Recognizing that one of the "essential freedoms" of a university is to select "who may be admitted to study," *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in the result), Justice Powell further observed that the national commitment to safeguarding academic freedoms, is "a special concern of the First Amendment." *Bakke*, 438 U.S. at 312 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)). These academic freedoms include the ability of the university to do two things in the context of diversity. First, the university may design a student body that best reflects the academic vigor of the institution and that would best contribute to a "robust exchange of ideas." *Id.*[35] Second, the university may take measures to admit the individuals of its choosing consistent with its design. Indeed, the invocation of the First

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[35]In numerous settings, courts have recognized the instrumental value of diversity. *See, e.g., Wittmer v. Peters*, 87 F.3d 916, 918 (7th Cir. 1996) (finding that a correctional boot camp's mission of pacification and reformation of its population was a compelling interest justifying the consideration of race in staff appointments); *Hunter ex rel. Brandt v. Regents of the Univ. of Cal.*, 190 F.3d 1061, 1064 n.6 (9th Cir. 1999) (holding that the "operation of a research-oriented elementary school dedicated to improving the quality of education in urban public schools" is a sufficiently compelling interest); *see also United States v. Ovalle*, 136 F.3d 1092, 1107 (6th Cir. 1998) (recognizing the important, thus compelling, interest of a jury pool's reflecting the diversity of the community).

Amendment in this way presents a "countervailing" constitutional principle to the Fourteenth Amendment. *Bakke*, 438 U.S. at 313. Therefore, notions of academic freedom, ensconced as they are in the First Amendment, render diversity an interest "of *paramount* importance," in the fulfillment of a university's educational mission, and thus sufficiently compelling to justify the competitive consideration of race to achieve that mission. *Id.* (emphasis added).

C. Plaintiffs Profoundly Misunderstand Or Misrepresent The Value And Purposes Of Diversity Within Educational Institutions

Plaintiffs contend that diversity depends upon and fosters racial stereotyping, and that the only diversity that could be considered compelling is "intellectual diversity." They posit a binary choice between "intellectual diversity" and "racial diversity" that is both false and a misrepresentation of the analysis set forth in Justice Powell's opinion in *Bakke*.

Justice Powell concluded that it was constitutional for a university to consider "a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Id.* at 315. According to Justice Powell, a student "with a particular background — whether it be ethnic, geographic, culturally advantaged, or disadvantaged — may bring . . . experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity." *Id.* at 314. This is a specific recognition that students of differing racial and ethnic background bring to a university a diversity of experiences, outlooks, and ideas, and that all of these factors (and not just one's intellectual views) are constitutive elements of academic diversity.

Implicit in both *Bakke* and *Sweatt* is the proposition that race and ethnicity can indeed influence one's "experiences, outlooks,

and ideas." This diversity is not compelling simply because it ensures different viewpoints on intellectual arguments in the classroom. It is instead compelling, in part, because it ensures that students are exposed to peers with different experiences that inform their education, both in the classroom and in extracurricular activities, in dorm rooms, and in other places that are a critical part of the college experience.

To assert that people of different races have a common experiential base, or more particularly that people from racial and ethnic minorities have a different experiential base than people who are white is hardly a novel proposition. For example, both Justice Marshall and Justice Thomas have spoken movingly about the importance of race in shaping them as people, though the views each has expressed on many issues may be different.[36] Other Justices have spoken of the effect on the Court of simply having African-American Justices.[37]

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[36]*See e.g.*, Juan Williams, *A Question of Fairness*, ATLANTIC MONTHLY, Feb. 1987 at 70; *Hearing of the Senate Judiciary Comm. on the Nomination of Clarence Thomas to the Supreme Court*, 102nd Cong. 260 (1991). As noted in the *amici* brief filed by current law students at accredited American law schools in *Grutter*, "Justice Thomas' recent remarks concerning the meaning of cross-burning may not be shared by all African-Americans, [but] they were uniquely powerful because of the fact that he grew up as an African-American in the rural, segregated South." Brief of 13,000+Current Law Students At Accredited American Law Schools As *Amici Curiae* In Support Of Respondents, *Grutter v. Bollinger* (No. 02-241) at 4 (citing transcript of oral argument in *Virginia v. Black*, No. 01-1107 (Dec. 11, 2002) at 21-23).

[37]For example, Justice Scalia said, "Marshall could be a persuasive force by just sitting there. . . . He wouldn't have had to open his mouth to affect the nature of the conference and how seriously the conference would take matters of race." Juan Williams, *Thurgood Marshall: American Revolutionary*, 388-89 (1998); *see also* Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 1217 (1992); Anthony Kennedy, *The Voice of Thurgood Marshall*, 44 STAN. L. REV. 1221 (1992).

The recent national debate over racial profiling has also illustrated the different experiential base of people from racial and ethnic minorities. There is considerable evidence that many police departments stop African-American or Latino motorists more often (all other factors being equal) than they do white motorists, that African-American or Latino shoppers are more often followed by security guards, and that Latinos are more often stopped by immigration officials.[38]

Not all African Americans or Latinos will have each of these experiences. Not all will draw the same conclusions about the existence or the validity of such practices. However, every African American or Latino will have to consider this phenomenon, recognizing that there is a possibility that he or she will be subject to it. That consideration will have a different quality than the identical consideration of a white American. In short, African-American and Latino people have different experiences than their white counterparts precisely because of the powerful role that race continues to play in this country. These experiences are, in part, historical and, in part, continue

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[38]*See, e.g.,* Peter Verniero, *Interim Report of the State Police Review Team Regarding Allegations of Racial Profiling*, 1999 N.J. ATT'Y GEN. REP. 27 ("[T]he overwhelming majority of searches (77.2%) involved black or Hispanic persons."); Elliot Spitzer, *The New York City Police Department's "Stop and Frisk" Practices*, 1999 N.Y. ATT'Y GEN. REP. 94-95 (finding that blacks comprise 25.6% of New York's population, but 50.6% of all persons stopped were black; Hispanics comprise 23.7% of New York's population, but 33% of all persons stopped were Hispanic; whites comprise 43.4% of the City's population but only 12.9% of all persons stopped); *See also Grutter v. Bollinger*, 288 F.3d 732, 764-65 (6th Cir. 2002) (Clay, J., concurring); *United States v. Montero-Camargo*, 208 F.3d 1122, 1131-32 (9th Cir.) (*en banc*), *cert. denied sub nom. Sanchez-Guillen v. United States*, 531 U.S. 889 (2000); *Washington v. Lambert*, 98 F.3d 1181, 1188 (9th Cir. 1996); Deseriee A. Kennedy, *Consumer Discrimination: The Limitations of Federal Civil Rights Protection*, 66 Mo. L. Rev. 275 (2001) (describing differential treatment experienced by numerous minority shoppers).

today.[39]

A prime benefit of racial diversity on college campuses is to make the point that, notwithstanding common *or* different experiences, not all African Americans, or Latinos, or white persons, think alike.[40] As one commentator has noted, "the diversity rationale contemplates that educational benefits flow from both interracial and *intra*-racial diversity." Goodwin Liu, *supra,* 33 HARV. C.R.-C.L. L. REV. AT 426.[41] Diversity thus

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[39]See Cir. App. 1946-2043 (Expert Report of Thomas Sugrue); *id.* at 1523-70 (Expert Report of Albert Camarillo; *id.* at 1571-1647 (Expert Report of Eric Foner); *Georgia v. McCollum*, 505 U.S. 42, 68 (1992) (O'Connor, J., dissenting) ("It is by now clear that conscious and unconscious racism can affect the way white jurors perceive minority defendants and the facts presented at their trials, perhaps determining the verdict of guilt or innocence."); *id.* at 69 (recognizing "a world where the outcome of a minority defendant's trial may turn on the misconceptions or biases of white jurors"); *Peters v. Kiff*, 407 U.S. 493, 503-04 (1972) ("[W]e are unwilling to make the assumption that the exclusion of Negroes has relevance only for issues involving race . . . [Their] exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented."); *Grutter*, 288 F.3d at 764 ("Notwithstanding the fact that the black applicant may be similarly situated financially to the affluent white candidates, this black applicant may very well bring to the student body life experiences rich in the African-American traditions emulating the struggle the black race has endured in order for the black applicant even to have the opportunities and privileges to learn.") (Clay, J., concurring).

[40]*See* Bowen & Bok, at 280 ("The black student with high grades from Andover may challenge the stereotypes of many classmates just as much as the black student from the South Bronx."); Sheila Foster, *Difference and Equality: A Critical Assessment of the Concept of "Diversity,"* 1993 WIS. L. REV. 105, 140 (1993) ("although race is a proxy for a different experience in this society, it does not necessarily create an ethnic conglomerate with a monolithic viewpoint about that experience. Nor does it create one essential experience based on color.").

[41]*See also* Amar & Katyal, *Bakke's Fate*, 43 UCLA L. Rev. at 1763 n.87 (noting that "Justice Powell's *Bakke* Appendix pointedly quoted

works to *reduce*, not *reinforce*, the stereotyping that remains all too common in our nation today given the high levels of segregation and isolation in housing and pre-collegiate education. See Brief of NAACP Legal Defense & Educational Fund, Inc. and the American Civil Liberties Union as *Amici Curiae*, *Grutter v. Bollinger* (No. 02-241), at 13-17; Brief of Equal Employment Advisory Council as *Amicus Curiae* in Support of Neither Party, *Grutter v. Bollinger* (No. 02-241).

It can hardly be disputed that "[p]eople do not learn very much when they are surrounded only by the likes of themselves." Cir. App. 1501; *see also* Bok & Bowen at 229 ("The four years spent at a residential college have long offered a time and a place for extensive interaction around the clock. When one considers the natural tendency on the part of students to associate with (and especially to live with) individuals like oneself, it is likely that many students encounter a wider range of people in college than they will ever see again on such an intimate, day-by-day basis."). Since most of the students admitted to the University of Michigan have not attended racially integrated primary and secondary schools, Cir. App. at 1985-89, their University experience may be the only "opportunity to disrupt an insidious cycle of lifetime segregation," Cir. App. at 1681.

Ultimately, as the Court has observed: "Attending an ethnically diverse school may help . . . prepar[e] minority children 'for citizenship in our pluralistic society,' while, we may hope, teaching members of the racial majority 'to live in harmony and mutual respect' with children of minority heritage." *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 472-73 (1982) (citations omitted). It is not too much to pose the following question: "If a far-flung democratic republic as

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Harvard's recognition of the importance of intra- as well as inter-racial diversity") (citing *Bakke*, 438 U.S. at 324) (appendix to the opinion of Powell, J.).

diverse — and at times divided — as [early twenty-first] century America is to survive and flourish, it must cultivate some common spaces where citizens from every corner of society can come together to learn how others live, how others think, how others feel. If not in public universities, where? If not in young adulthood, when?" Amar & Katyal, *Bakke's Fate*, 43 UCLA L. Rev. at 1749.

III. The University's Race-Conscious Admissions Process Is Narrowly Tailored

A. The University's Plus-Factor Admissions Program Furthers Diversity, Is Flexible, And Does Not Insulate Individual Applicants From Comparison With Others

The admissions program sustained below is narrowly tailored because it is necessary to further the asserted compelling interest; it flexibly considers race; and it does not pose an undue burden on non-beneficiaries. It thus comports with the criteria articulated by Justice Powell, who suggested that, in evaluating the scope of a race-conscious admissions program, a court should consider (1) whether the manner of considering race under the admissions program furthers the asserted diversity interest; (2) whether the program insulates individual applicants from comparison with all other applicants for the available seats; and (3) whether the program is sufficiently flexible to consider all elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration. *Bakke*, 438 U.S. at 315-17. *See also Croson*, 488 U.S. at 489, 504-10 (discussing narrow tailoring requirements for set-aside programs). The inclusion of race or ethnicity as one among the "U" factors that is taken into consideration along with the multiplicity of other factors distinguishes the Michigan approach from the two-track model that the Court struck down in *Bakke*.

Unlike the Davis medical school's plan, no seats at Michigan are reserved for UMS students, and white applicants are competitively considered for all places in an entering class. One expert witness estimated through regression equations that if race were eliminated entirely from the University's admissions process, UMS enrollments would plummet but the statistical probability of admission of any non-UMS applicant would rise by only 0.02 per cent (from 0.61 to 0.63) (Cir. App. 1901). Race is a "very distant third" in determining a candidate's chances for undergraduate admission (Silver & Rudolph, at 7; *see also* Cir. App. 1871). Equally striking, Intervenors' experts closely analyzed admissions in 1995 and 1997 and concluded that the failure to offer admission to the individual Plaintiffs in this case did not result from the consideration given race in the process (Silver & Rudolph, at 10, 13).[42] Thus, the record makes clear that race is not accorded so much weight that it precludes competitive consideration of all applicants.

Not only is the process tailored to balance the negative impact on UMS candidates' chances of admission that result

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[42]The analysis indicated that Jennifer Gratz received only a 0.1 initial adjustment in her GPA, no "S" factor points and no "A" points (Silver & Rudolph, at 11-12). In contrast, in 1995 there were 2,661 applicants who had unadjusted GPAs that were lower than Gratz's but that, when adjusted in accordance with the University's consistent procedure, outranked her adjusted GPA. All of these applicants received offers of admission; and 60% of them were non-UMS students (*id.* at 9-12). The experts concluded that it was "more probable that Gratz was displaced by a non-UMS applicant than by a UMS applicant" (*id.* at 10).

Patrick Hamacher, by contrast, had his GPA initially adjusted upward by 0.2 and also received "S" points based on the high school he attended and "A" points because his mother attended Michigan. However, even as adjusted Hamacher's GPA was only 3.0, leading the experts to find that he had less than a fifty-fifty chance of being admitted and that "race was not a factor in the recalculation of his GPA, nor in his non-admission" (*id.* at 13).

from factors not justified by educational necessity, and which are substantially determined by pervasive past and continuing discrimination,[43] but it is also directly related to and designed to dispel the lingering perception — that was created by the long history of discrimination and indifference that is documented on the record of this litigation — that the University is not open to minority applicants. By facilitating admission of a group of minority students sufficient to enable them to form community and social support networks, race-conscious admissions reduce the racial tensions on campus that are at the core of the University's negative reputation (see Cir. App. 2466); UMS students participating in focus groups conducted by Intervenors' expert witness identified increased numbers of students of color at the school as a crucial step in changing the racial climate (Cir. App. 2424-28).

Finally, it bears repetition that *all* of the candidates admitted to the University as a result of the race-conscious process in effect from 1995 to 2000 (the years for which evidence is available in this record) were qualified for admission and likely to succeed as students at the school. See *supra* note 3 and accompanying text.[44]

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[43]See Brief of NAACP Legal Defense & Educational Fund, Inc. and American Civil Liberties Union as *Amici Curiae*, *Grutter v. Bollinger* (No. 02-241); Brief of NAACP Legal Defense & Educational Fund, Inc. as *Amicus Curiae*, *Adarand Constructors, Inc. v. Mineta*, 534 U.S.103 (2001) (No. 00-730).

[44]Despite the fact that all of the students on campus have been qualified and likely to succeed, Plaintiffs and others contend that students of color are stigmatized by a race-conscious admissions process. This is both a vicious and illogical argument. Any stigma attached to students of color at predominantly white institutions did not originate with race-conscious admissions programs, nor is it likely that it would end with their demise. Rather, the best way to destroy persistent myths of the inferiority of students of color is to create racially integrated environments where qualified individuals of all backgrounds have the opportunity to interact and make informed judgments about one another.

B. Percentage Plans Are An Inadequate Alternative

The United States, in its *amicus* brief, suggests that the University's admissions policies are not narrowly tailored because there are equally effective race-neutral alternatives. Specifically, the United States urges consideration of more aggressive recruitment combined with a percentage plan approach like those employed for the public universities in a number of states, including Florida, Texas, and California. All three States prohibit the use of race as a factor in school admissions.

As a threshold matter, the district court found, based on unrebutted testimony, that Michigan is already doing all it can to recruit under-represented minorities. Pet. App. 42a ("University has attempted to enlarge its pool of under-represented minority applicants through vigorous minority recruitment programs, which have all proved to be unavailing").

Percentage plans present a myriad of problems. *See generally* U.S. Commission on Civil Rights, *Beyond Percentage Plans: The Challenge of Equal Opportunity in Higher Education* (Nov. 2002), available at http://www.usccr.gov/ (hereinafter "USCCR Report"). Early studies indicate that they are not, in fact, equally effective as the approach approved in *Bakke* in achieving diverse enrollments

Those opposed to race-consciousness in admissions do not explain why applicants who are admitted because they are the children of alumni, or are athletes, or are admitted based on geographical preference, or even socio-economic disadvantage, suffer no similar stigma — or at least are given the chance to overcome doubts by demonstrating their qualifications. *See, e.g.*, Sheila Foster, *supra*, 1993 WIS. L. REV. at 146

Ultimately, the fact that an admittedly qualified African American or Latino student, whose test score is lower than those of a rejected white applicant, is stigmatized, while a comparably qualified white student is not, says far more about the persistence of race and ethnicity as stigma than it does about problems inherent in a race-conscious admissions program.

at the undergraduate level.[45] Moreover, it is sophistry to

[45]For a comparative analysis of all three states' experiences, *see* Catherine L. Horn & Stella M. Flores, *Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences*, The Civil Rights Project, Harvard University (February 2003), *available at* http://www.civilrightsproject.harvard.edu/research/affirmativeaction/tristate.php (concluding that it is incorrect to attribute any significant increase in campus diversity to a percent plan alone, and noting that a variety of race-conscious outreach, recruitment, financial aid and support programs appear to be central to the ability of some campuses to recover even partially from loss of minority students that occurred after abolition of race-conscious admissions programs). Findings of researchers as to each state may be summarized as follows:

Florida: A recent study has concluded that Florida's plan, which guarantees admission to one of its colleges to students who graduate in the top 20% of their high school class, assuming a basic curriculum, is neither race-neutral nor an effective alternative to a race-conscious admissions program. Patricia Marin & Edgar K. Lee, *Appearance and Reality in the Sunshine State: The Talented 20 Program in Florida*, The Civil Rights Project, Harvard University (February 2003), *available at* http://www.civilrightsproject.harvard.edu/research/affirmativeaction/florida.php (major findings include: (1) plan has led to admission of very few students to state university system who would not have been admitted under pre-existing, non-race-conscious rules; (2) plan provided no guarantee of admission to two most highly selective campuses in the system; (3) only an insignificant number of "newly eligible " minority students achieved access to the system; (4) plan includes far more White and Asian students than Blacks and Hispanics, the two groups most underrepresented at the most selective campuses; and (5) the minimal success of the plan relies on race-attentive recruitment, retention, and financial aid policies).

Texas: Since 1998, Texas has provided that the top 10% of students in each high school are guaranteed admission to the undergraduate program of their choice. In 1994, African Americans constituted 5.3% of the minority enrollment at the University of Texas-Austin. That amount dropped to 2.7% as a result of the decision in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996), prohibiting the use of race. As of 2001, it was still only 3%. At the same time, African American students constitute 12% of the state's population. USCCR Report at 23, Figure 2.4.

refer to such plans as "race neutral." Their effectiveness in producing diverse enrollments depends directly upon the existence of a feeder pool of racially segregated schools from which applicants are drawn.[46] Indeed, those who have challenged Michigan's policies here have already indicated that they plan to challenge programs utilizing the percentage plan approach as improperly race-conscious.[47]

Objective analyses of the effect of the prohibition on the use of race and the adoption of the percentage plan have concluded that the "absolute number of [minority] students [negatively] affected is substantial." Maria Tienda, *Closing The Gap?: Admissions & Enrollments at the Texas Public Flagships Before and After Affirmative Action* 14 (Jan. 21, 2003), *available at* http://www.texastop10.princeton.edu/publications/tienda012103.pdf. "Using the pre-*Hopwood* distribution as a standard," 980 fewer African Americans and Hispanics enrolled at the University of Texas and 1179 fewer African Americans and Hispanics enrolled at Texas A&M. *Id.* at 17.

California: California generally guarantees admission to one of its universities (not necessarily to the school of the applicant's choice) to any applicant in the top 12.5% statewide or the top 4% of each California school. *See USCCR Report* at Tables 2.2 and 2.3 and accompanying text. Despite these policies, since the abolition of the affirmative action program, 1600 fewer African American, 4000 fewer Latino, and 675 fewer Native Americans have been admitted to the California system. *Id.* at Table 2.4. "The percentage of students in those minority groups admitted has declined at a time when the percentage of such students in California has increased. [*Id.* at Table 2.5]. The percentage decline has been particularly acute at the system's flagship institutions. *Id.* at Figure 2.2." The drop in minority students at graduate schools has been dramatic. *Id.* at Table 2.6.

[46]Even apart from percentage plans, as two leading commentators have observed: "[i]t is hard to imagine any admissions policy that, in fact, would be perfectly 'race neutral.' Race is associated with so many aspects of life in the United States that virtually every other attribute of the applicant — SAT scores, high school attended, parents' occupation and education — has, as it were, a racial component." Bok and Bowen, at 31 n.15.

[47] *See e.g.* Michael A. Fletcher, *Race Neutral Plans Have Limits in Aiding Diversity, Experts Say*, WASH. POST, Jan. 17, 2003, at A12; Stephanie Cahill, *Skirting the "Race Quota" Label*, ABA Journal *eReport*

The record in this case demonstrates that a percentage plan would not work in Michigan. The University presented substantial evidence that race-neutral admissions policies would result in a sharp drop in the number of minority students, and the trial court credited that evidence. Pet. App. 41a-42a. While it is true that Michigan's high schools are segregated — a necessary (and troublesome) pre-requisite for such plans to work — they are so segregated that African American students are concentrated in a very small number of schools. For instance, in the mid-1990's (1995-98), 91 of 842 public high schools in Michigan (including alternative schools, juvenile centers, etc.) had enrollments 50% or more African-American; 63 schools were 75% or more African-American (Cir. App. 3645-67; *see also id.* at 1987-88).[48]

(Jan. 24, 2003); *available at http://www.abanet.org/journal/ereport/j24affirm.html; see also* Pacific Legal Foundation, *Quotas in UC Admissions Aggressively Challenged, available at* http://www.pacificlegal.org/view_PLFCaseDetail.asp?iID=181&sSubIndex=Operation+End+Bias+%2D+%2D+Enforcing+California%27s+Proposition+209&iParentID=8&sParentName=Securing+Individual+Rights; *cf. Hi-Voltage Wire Works, Inc. v. City of San Jose*, 24 Cal. 4th 537, 560 (2000) (holding that requirement that information about projects available for bids be communicated to potential minority-owned contractors was a "preference" that violated Proposition 209, CAL. CONST. art. I, § 31(a)).

[48]A percentage plan approach is also flawed because it is simply unavailable in many contexts. It is unavailable in graduate schools, and, not surprisingly, plaintiffs do not even mention them in their *Grutter* brief. Although the United States discusses percentage plans most extensively in its *Grutter* brief, none of the States cited by the United States utilize percentage plans for their graduate schools.

Percentage plans are also unavailable in states with few minority high school students. They are not available in states in which high schools are not segregated by race or too segregated by race. They are not available in national universities that draw from all over the country rather than from applicants in a particular state. They are not available in small colleges,

The district court's finding that so-called race-neutral plans will not work in Michigan is not seriously challenged by plaintiffs and is fully supported on the record. The contrary suggestion by the United States, largely unsupported by fact, that purportedly race-neutral percentage plans will ensure diversity without considering race is simply wrong and should be rejected.

CONCLUSION

For the foregoing reasons, the judgment entered by the district court in favor of the University respondents should be affirmed on all grounds, and the judgment entered by the district court with respect to intervenors' claims should be reversed, or alternatively vacated as moot.

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particularly those that are highly selective. See *Brief for Amici* Amherst College *et al., Gratz v. Bollinger* (No. 02-516) They will not work for Native Americans, who are too few in numbers to be adequately represented in such a plan (see Cir. App. 1965-67). Finally, percentage plans reward students who take less challenging courses or transfer to less challenging schools, thus potentially resulting in the potential admission of unqualified students (Cir. App. 1193).

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