

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

JENNIFER GRATZ, <i>et al.</i> ,)	
)	
Plaintiffs,)	Civil Action No. 97-75231
v.)	Hon. Patrick J. Duggan
LEE BOLLINGER, <i>et al.</i> ,)	Hon. Thomas A. Carlson
)	
Defendants.)	

**BRIEF OF ASSOCIATION OF AMERICAN LAW SCHOOLS, NATIONAL
ASSOCIATION OF STATE UNIVERSITIES AND LAND GRANT COLLEGES,
COMMITTEE ON INSTITUTIONAL COOPERATION
(INDIANA UNIVERSITY, MICHIGAN STATE UNIVERSITY, NORTHWESTERN
UNIVERSITY, THE OHIO STATE UNIVERSITY, PENNSYLVANIA STATE
UNIVERSITY, PURDUE UNIVERSITY, THE UNIVERSITY OF CHICAGO, THE
UNIVERSITY OF ILLINOIS, THE UNIVERSITY OF IOWA, THE UNIVERSITY OF
MICHIGAN, THE UNIVERSITY OF MINNESOTA, AND THE UNIVERSITY OF
WISCONSIN-MADISON) AND WAYNE STATE UNIVERSITY
AS AMICI CURIAE IN SUPPORT OF DEFENDANTS**

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INTEREST OF AMICI CURIAE

Amici are three organizations together representing over 360 institutional members of the professional higher education community. The Association of American Law Schools represents 162 of the nation's law schools. The National Association of State Universities and Land Grant Colleges is the nation's oldest higher education association, currently representing 202 colleges, universities and university systems. The Committee on Institutional Cooperation is an academic consortium of twelve major research universities, including Indiana University, Michigan State University, Northwestern University, The Ohio State University, Pennsylvania State University, Purdue University, the University of Chicago, the University of Illinois, the University of Iowa, the University of Michigan, the University of Minnesota, and the University of Wisconsin-Madison. Wayne State University is a public research university located in Michigan, with the largest graduate student population in the country.

Amici and their members are committed to maintaining and improving the quality of education their institutions provide. They have learned from extensive experience that the quality of education for all students is greatly enhanced when student bodies include persons of diverse backgrounds, interests, and experiences, including diverse racial and ethnic make-ups. Amici therefore believe that a decision adverse to the University of Michigan prohibiting any

consideration of race in the admissions decisions of public institutions of higher education (or private institutions that receive federal funds)¹ will significantly undermine the ability of educational institutions to provide students with the highest quality academic experience and to prepare them to contribute effectively to society after graduation.

¹ Because plaintiffs have filed Title VI claims along with their § 1983 constitutional claims, the rule applicable to the public defendants in these lawsuits will necessarily be applicable to private institutions as well. See *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983).

ARGUMENT

The Supreme Court has long embraced two fundamental principles that govern this dispute. First, it has recognized the pivotal role public schools, including institutions of higher education, play in "the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests." *Ambach v. Norwick*, 441 U.S. 68, 76 (1979). See *Sweatt v. Painter*, 339 U.S. 629, 634 (1950); see also *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 30 (1973) (acknowledging the Court's "abiding respect for the vital role of education in a free society"). This role – part of the public trust – involves the development of people with skills, credentials and values, not merely the recognition and rewarding of student accomplishments earlier in the educational process. Second, the Court has held that higher education institutions have "a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin." *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 320 (1978).

In his controlling opinion in *Bakke*, Justice Powell focused on the important function a diverse student body serves in furthering universities' educational missions. See *id.* at 311-15. He articulated two primary reasons why diversity, including racial and ethnic diversity, materially advances the educational process: (1) "[t]he atmosphere of 'speculation, experiment and creation' – so essential to the quality of higher education – is widely believed to be promoted by a diverse student body," 438 U.S. at 312; and (2) "the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples," *id.* at 313 (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 589, 603 (1967)). In essence, then, Justice Powell recognized that diversity contributes fundamentally both to the cognitive learning process *inside* the academic setting and to the fostering of values

and skills that enable students to make effective societal contributions *outside* of the educational environment -- the twin missions of higher education. Fortifying these principles is the understanding that an educational institution must be permitted to exercise its discretion "to determine for itself . . . who may teach, what may be taught, how it shall be taught, and who may be admitted to study," in order to further the First Amendment interest in preserving educators ability to foster a "robust exchange of ideas" through the selection of a diverse student body. *Id.* at 312.

The fundamental lesson of *Bakke* is that the beneficial effects of diversity on the academic experience -- both in terms of learning outcomes and promotion of democratic values -- distinguish the compelling interest in attaining racial diversity in higher education from the impermissible objective of attaining racial diversity for its own sake. In *Bakke*, Justice Powell rejected the notion that government may prefer "members of any one group for no reason other than race or ethnic origin," because that is simply "discrimination for its own sake," which the "Constitution forbids." *Id.* at 307. Thus, while government may not seek simply to achieve "racial balancing," see *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989), it may pursue a permissible and overarching *institutional* objective. In higher education, as Justice Powell observed, diversity directly furthers fundamental governmental objectives: enriching the academic and intellectual experience of all students so as to enhance their cognitive abilities and promote their civic participation, in a manner that simultaneously promotes other, constitutionally significant values, including respect for the autonomy and institutional competence of educators to develop a well-rounded student body and promotion of the First Amendment interest in the robust exchange of ideas. The Supreme Court has never departed from these central tenets.

I. Educational Institutions Have A Compelling Interest In Diversity, Including Racial And Ethnic Diversity, In The Student Body.

The tight connection between diversity and the mission of higher education is the heart of the constitutional analysis. As shown above, Justice Powell identified three reasons in *Bakke* that colleges and universities have a compelling interest in diversity, including racial and ethnic diversity: (1) such diversity improves actual educational outcomes, (2) it enhances students' ability to be leaders in a pluralistic society, and (3) it advances separate constitutional goals. See *Bakke*, 438 U.S. at 311-15. Since *Bakke*, amici and other educators operating in a variety of institutional settings, as well as academics, scientists and sociologists studying the educational process, consistently have affirmed the important role diversity plays in accomplishing the academy's goals of cognitive development and preparation for leadership in a pluralistic society. Indeed, far from calling *Bakke*'s premises into question, two decades of hindsight only have reinforced their accuracy.

A. Diversity Directly Furthers The Cognitive Learning Process.

As Justice Powell recognized in *Bakke*, "[p]eople do not learn very much when they are surrounded only by the likes of themselves." *Bakke*, 438 U.S. at 312-13 n.48 (quoting William G. Bowen, *Admissions and the Relevance of Race*, Princeton Alumni Wkly., Sept. 26, 1977, at 7, 9 (internal quotation marks omitted)). Rather, "[a] great deal of learning occurs . . . through interactions among students of both sexes[,] of different races, religions, and backgrounds . . . who are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world." *Id.* (quoting Bowen, *supra*, at 9). Experience and research confirm this observation.

1. Educators' Experience Confirms The Value Of Diversity.

Amici and other higher education professionals long have shared the strong belief – born of experience – that diverse student bodies contribute to the educational mission in both formal and informal ways. For example, the 62 leading research universities that make up the Association of American Universities (“AAU”) affirm that “[a] very substantial portion of our curriculum is enhanced by the discourse made possible by the heterogeneous backgrounds of our students.” AAU, *On the Importance of Diversity in University Admissions* (Apr. 14, 1997) (attached at Tab A). In addition, “a significant part of education . . . takes place outside the classroom, in extracurricular activities where students learn how to work together, as well as to compete; how to exercise leadership, as well as to build consensus.” *Id.* This nexus between diversity and the educational mission is reiterated by a coalition of 67 different higher education organizations – representing almost every higher education institution and entity in the country² – as well as by the principal coalition of American law schools, amicus AALS. See AALS, *Statement on Diversity, Equal Opportunity and Affirmative Action*, November 1995 (“Different backgrounds affect the way people see the world. These differences enrich learning [and] scholarship . . . [Diversity is] vital to intellectual pursuits.”) (attached at Tab C).³

Nonetheless, while amici recognize that diversity enhances the cognitive learning process in colleges and universities, they do not believe – nor do the policies of educational in-

² *On the Importance of Diversity in Higher Education* (statement signed by 67 higher education organizations) (“We learn from those whose experience, beliefs, and perspectives are different from our own, and these lessons can be taught best in a richly diverse intellectual and social environment.”) (attached at Tab B).

³ See also American Association of University Professors (“AAUP”), *Diversity & Affirmative Action in Higher Education* (explaining that “the necessity of diversity is stronger in higher education than in any other context”) (attached at Tab D).

situations assume – that members of particular racial or ethnic groups share any particular viewpoints or perspectives. Such race-based stereotypes would clearly violate fundamental constitutional norms. See *J.A. Croson Co.*, 488 U.S. at 493, 510; *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting). Cf. *Shaw v. Hunt*, 517 U.S. 899, 904-05 (1996); *Bush v. Vera*, 517 U.S. 952, 980 (1996) (plurality opinion). Rather, the benefit of racial diversity follows from the fact that race or ethnicity generally (though not always) influences an individual's life experiences, and these experiences, in turn, inform (though do not pre-determine) an individual's perspectives. See William G. Bowen & Derek Bok, *The Shape Of The River* 279 (1998). A racially and ethnically diverse student population is thus significantly more likely than a homogeneous body to produce individuals with a broader range of experiences and perspectives, which will enhance the cognitive learning process.

In recognizing this link between heterogeneity and diversity of viewpoints, however, it is important to emphasize that there is no neat correlation or pre-defined nexus between racial and ethnic identity and intellectual perspective. No two individuals are influenced in the same way even by a shared experience, such as common membership in an identifiable racial or ethnic group. Each individual's perspective is, therefore, *always* unique. What diversity fosters is thus not an exchange of *group* perspectives, but rather a multitude of *individual* perspectives. See Jonathan R. Alger, *The Educational Value Of Diversity*, 83 *Academe* 20 (Jan./Feb. 1997). The pursuit of a racially and ethnically diverse student body, in other words, is not based on the assumption that individuals who share a common racial or ethnic background will also share common viewpoints that must be represented in the educational setting. Rather, *each* individual member of such a group will have unique perspectives and the *range* of these unique perspec-

tives will be broader -- and the educational experience of *all* students correspondingly richer -- if individuals with diverse backgrounds are included in the composition of the student body.⁴

2. Empirical Studies Confirm The Importance Of Diversity To Cognitive Learning.

In addition to the consistent experience of educators, extensive empirical research conclusively establishes that diversity plays a vital role in fostering cognitive development. "[T]he literature suggests that diversity initiatives positively affect both minority and majority students on campus. Significantly, diversity initiatives have an impact not only on student attitudes and feelings toward intergroup relations on campus, but also on institutional satisfaction, involvement, and academic growth." Association of American Colleges & Universities ("AACU"), *Diversity Works: The Emerging Picture of How Students Benefit*, at v (1997).

Alexander Astin, one of the foremost experts in this area, surveyed 25,000 students in 217 four-year colleges, and found that campus diversity correlates with "widespread beneficial effects on a student's cognitive . . . development." See Alexander W. Astin, *Diversity and Multiculturalism on the Campus: How Are Students Affected?*, 25 *Change* 44, 48 (1993). According to Astin, "the weight of the empirical evidence shows that the actual effects on student development of emphasizing diversity and of student participation in diversity activities are overwhelmingly positive." Alexander W. Astin, *What Matters in College?* 431 (1993). A subsequent study by M.J. Chang, who reviewed data from both a 1985 survey of 11,600 first-years at 300 colleges and universities and a 1989 follow-up survey of the respondents, supports Astin's

⁴ Although educational institutions of course have a compelling interest in the consideration of race only where it is necessary to achieve racial diversity, there is strong evidence that in many cases an absolute prohibition against any consideration of race will dramatically undermine the diversity of selective educational programs. See generally Linda Wightman, *The*

conclusions. Chang's study found that, for all students, but especially for majority students, the "environmental and experiential components of a [racially] diverse campus have positive effects on retention, overall college satisfaction, college GPA, and intellectual and social self-confidence." AACU, *Diversity Works, supra*, at 78 (discussing findings of M.J. Chang, *Racial Diversity in Higher Education: Does a Racially Mixed Student Population Affect Educational Outcomes?* (1996) (unpublished Ph.D. dissertation, UCLA)). And other studies, involving small groups, have found that exposure to racial and ethnic diversity measurably improves cognitive ability, and that members of heterogeneous groups typically devise more creative solutions to problems than members of homogeneous groups.⁵

The expert analysis of higher education students' performance submitted by Professor Patricia Gurin in these lawsuits confirms such results. As detailed in the literature survey in her report, research has demonstrated that most people do the vast majority of their thinking "automatically."⁶ One of the few sources of less automatic, and more reflective thinking, is a significant change in social environment. Such a change tends to create a "cognitive disequilib-

Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions, 72 N.Y.U. L. Rev. 1 (1997).

⁵ See T. Cox, Jr., *Cultural Diversity in Organizations: Theory, Research, and Practice* (1993); P.L. McLeod et al., *Ethnic Diversity and Creativity in Small Groups*, 27 Small Group Research 248 (1996).

⁶ See, e.g., J.A. Bargh, *The Automaticity of Everyday Life*, 10 Advances in Social Cognition 1 (1997).

rium," forcing individuals to think outside the "script" of their past experiences.⁷ When people think less automatically, they think more deeply and, as a result, learn more effectively.⁸

Because of unfortunate but persistent patterns of residential and occupational racial segregation in this country,⁹ many students begin their higher education experience without having had substantial previous contact with individuals of different racial and ethnic backgrounds. Thus, the diversity students experience on campus and in the classroom often presents precisely the sort of altered social environment that lessens their tendency to think "automatically," improving their "reflective judgment" and hence their actual cognitive abilities.¹⁰ As Professor Gurin notes: "Because students in late adolescence and early adulthood are at a critical stage of development, diversity (racial, economic, demographic, and cultural) is crucially important in enabling them to become conscious learners and critical thinkers, and preparing them to become active participants in a democratic society." Expert Report of Patricia Gurin ("Gurin Report") at 102-03 (emphasis deleted).

Professor Gurin's empirical data supports this conclusion. Reviewing "longitudinal" data from a database collecting responses from over 9,000 students in nearly 200 colleges and universities over a period of several years, as well as data from a University of Michigan

⁷ See, e.g., D.N. Ruble, *A Phase Model of Transitions: Cognitive and Motivational Consequences*, 26 *Advances in Experimental Soc. Psych.* 163 (1994); E.J. Langer, *Rethinking the Role of Thought in Social Interaction*, 2 *New Directions in Attribution Res.* 25 (1978).

⁸ See Ruble, *supra* note 6; Langer, *supra* note 6.

⁹ See Nancy Denton, *The Persistence of Segregation: Links Between Residential Segregation and School Segregation*, 80 *Minn. L. Rev.* 795 (1996).

¹⁰ See P.M. King & K.S. Kitchener, *Developing Reflective Judgment: Understanding and Promoting Intellectual Growth and Critical Thinking In Adolescents and Adults* (1994); P.M. King & B.C. Shuford, *A Multicultural View Is a More Cognitively Complex View*, 40 *Am. Behav. Scientist* 153 (1996).

study involving 1,321 students from the university, Gurin found "strong evidence for the impact of diversity on learning outcomes." Gurin Report at 118. Her results showed that students with the greatest diversity in classes and in informal social interactions "showed the greatest engagement in active thinking processes, growth in intellectual engagement and motivation, and growth in intellectual and academic skills." *Id.* Interestingly, while racial diversity had a significant positive effect on learning outcomes for racial minorities, Gurin's results were "especially impressive for white students." *Id.* White students who experienced diversity in classes and in social interactions exhibited the greatest growth in complex thinking abilities and intellectual motivation, results which persisted well past graduation. *See id.* at 118-19. Professor Gurin's study, and the research predating it, empirically validate what those who make their living in higher education already knew: racial and ethnic diversity has significant beneficial effects on actual learning outcomes of all students, minority and majority alike.

The beneficial results of diversity are found not only in the context of undergraduate study, the focal point of most of the research, but also in the context of law school education. "The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned." *Sweatt v. Painter*, 339 U.S. 629, 634 (1950).

Legal education, which is based largely on the interchange of ideas between students and between students and professors, is significantly enhanced by diversity in the student body. As Professor Kent Syverud noted in his expert report, most first-year law schools utilize the Socratic method of teaching, in which professors call on students to answer a series of ques-

tions in rapid fashion. This teaching method "consciously seeks to make the students think, to learn from each other, and to learn to be able to see any set of facts from different points of view. Students are expected to draw upon their own backgrounds and experiences in answering questions and in making arguments." Expert Report of Kent D. Syverud at 266. By challenging students' presuppositions, "[r]acial heterogeneity dramatically enhances the ability of the best active, Socratic teaching to achieve its purposes." *Id.* For instance, Professor Syverud notes, students entering law school often assign to people of different races and ethnic backgrounds viewpoints that are uninformed by experience or direct dialogue with a client or adversary. In a diverse classroom environment, however, "common assumptions about viewpoints of different races are constantly confronted by frank discussion that at times confirms and at times profoundly confounds those assumptions." *Id.* This interactive process broadens students' exposure and enhances their ability to think deeply and reflectively, thus improving their ability to learn.

B. Diversity Furthers The Educational Goal Of Preparing Students To Contribute Effectively To Society.

The positive contribution of diversity to the mission of higher education is not limited to improving the learning outcomes of individual students. The "preparation of individuals for participation as citizens" is among the primary purposes of public education in this country, *Ambach v. Norwick*, 441 U.S. 68, 76 (1979), and in order to participate as citizens, individuals must be imbued with "fundamental values necessary to the maintenance of a democratic political system." *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (quoting *Ambach*, 441 U.S. at 76-77). Of these "fundamental values," perhaps none are more important than equality and tolerance. As Justice Powell has stated, we are, indeed, a "Nation of many peoples," *Bakke*, 438 U.S. at 313, and it is therefore a profoundly important duty of our public edu-

ational institutions "to prepare students to live in a pluralistic society," *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971). Institutions of higher education take seriously that duty and have recognized its increasing urgency as society becomes more demographically diverse and socio-economic and political issues become more global. See AACU, *Diversity Works*, *supra*, at 3.

1. Educators' Experiences Confirm The Importance Of Diversity In Preparing Students To Function Effectively In A Pluralistic Society.

The nation's colleges and universities are nearly uniform in their experience that preparing students to live and function in a pluralistic society requires educating them in a diverse environment that includes racial and ethnic diversity. See *On the Importance of Diversity in Higher Education*, *supra* (statement signed by 67 higher education organizations). Leaders of 62 of the nation's foremost research universities – including the University of Michigan – likewise recognize their public responsibility to "educate exceptional people who will serve all of the nation's different communities." AAU, *On the Importance of Diversity in University Admissions*, *supra*.¹¹ For this reason, educators have recognized that "[t]he evaluation of an individual applicant . . . cannot, therefore, be based on a narrow or mainly 'statistical' definition of merit." *Id.* Rather, "[t]he concept of merit must take fully into account not only academic grades and standardized test scores, but also the many unquantifiable human qualities and capacities of individuals, including their promise for continuing future development," *id.*, as well as their "potential for leadership . . . in a heterogeneous democratic society," *id.*

¹¹ See also AAUP, *Diversity & Affirmative Action in Higher Education*, *supra* (noting the importance of diversity in preparing students for "life in the working world").

2. The Empirical Data Substantiates The Nexus Between Racial And Ethnic Diversity And Effective Leadership In A Pluralistic Society.

As with cognitive learning, the considered judgment of higher education professionals that racial and ethnic diversity significantly improves the ability of students to contribute successfully to a pluralistic society is confirmed by extensive empirical data. The empirical proof begins with the understanding that racial isolation breeds stereotypes and prejudice, and that "equal status contact between majority and minority groups in the pursuit of common goals" therefore tends to diminish such prejudice. Gordon W. Allport, *The Nature of Prejudice* 281 (1954). Not surprisingly, this understanding is confirmed by a vast range of social science research.¹² This research shows, however, that it is not just *any* interracial contact that necessarily improves racial relations or prepares students to function effectively in a pluralistic society. Rather, the most beneficial effects on individuals' attitudes arise when there are individualized contacts in which members of different racial and ethnic groups stand on equal footing.¹³ Such conditions clearly are present in the educational environment, where members of different groups share the same status – students – and are in pursuit of the same goal – obtaining an education. As a result, both the formal and informal learning environments facilitate interracial contact that promotes mutual understanding, tolerance and respect – values integral to effective performance in a pluralistic society.

¹² See, e.g., D. Powers & C. Ellison, *Interracial Contact and Black Racial Attitudes: the Contact Hypothesis and Selectivity Bias*, 74 Soc. Forces 205 (1995); Powers & Ellison, *The Contact Hypothesis and Racial Attitudes Among Black Americans*, 75 Soc. Sci. Q. 385 (1994); C. Smith, *Back and to the Future: The Intergroup Contact Hypothesis Revisited*, 64 Sociological Inquiry 438 (1994); L. Sigelman & S. Welch, *The Contact Hypothesis Revisited: Black-White Interaction and Positive Racial Attitudes*, 71 Soc. Forces 781 (1993).

¹³ See W. Stephan & J. Brigham, *Intergroup Contact: Introduction*, 3 J. Soc. Issues 1 (1985); Gurin Report at 109.

Professor Gurin's examination of these "democracy effects" demonstrates that diversity in higher education fosters such values and attitudes. Her study found that students "who experienced diversity in classroom settings and in informal interactions showed the most engagement in various forms of citizenship, and the most engagement with people from different races/cultures." Gurin Report at 126. Likewise, "[d]iversity experiences during college had impressive effects on the extent to which graduates in the national study were living racially or ethnically integrated lives in the post-college world." *Id.* at 133. Similarly, William Bowen and Derek Bok's study of more than 80,000 students at 28 selective colleges and universities in classes entering in 1951, 1976 and 1989 established clearly that diversity significantly improved the ability of students to "get along" with people of different races and cultures throughout their lives. Bowen & Bok, *supra*, at 220-29.

In sum, diversity not only broadens students' exposure to backgrounds and perspectives they may not previously have encountered or considered, but students educated in a diverse environment inevitably learn that individuals of a particular race or ethnicity do not possess homogeneous viewpoints, which further challenges their presuppositions and breaks down racial stereotypes. See AALS, *On the Importance of Diversity in Higher Education, supra* ("Diversity challenges stereotyped preconceptions; it encourages critical thinking; and it helps students learn to communicate effectively with people of varied backgrounds.").

C. Diversity Furthers The Constitutionally Significant Goals Of Preserving Educators' Discretion To Select A Diverse Student Body And The First Amendment Interest In A Robust Exchange Of Ideas.

In addition to advancing the educational development of students in at least two important ways, diversity promotes distinct values of constitutional significance, including re-

spect for the autonomy and institutional competency of educators to select a well-rounded student body, and the core First Amendment interest in the robust exchange of ideas.

Decisions about how best to encourage intellectual dialogue – including those relating to the composition of the student body – are profoundly “academic judgment[s],” and hence entitled to a special measure of respect. *Board of Curators v. Horowitz*, 435 U.S. 78, 89-90 (1978). As the Supreme Court has stated, if, as the law holds, courts generally are not well-situated to review public agency personnel decisions, see *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 (1985) (citing *Bishop v. Wood*, 426 U.S. 341, 349 (1976)), “far less [are they] suited to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions,” *id.* Such decisions, the Court has explained, “require ‘an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decisionmaking.’” *Id.* (quoting *Horowitz*, 435 U.S. at 89-90). For this reason, “[u]niversity faculties must have the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion or graduation.” *Id.* at 225 n.11 (quoting *Horowitz*, 435 U.S. at 96 n.6 (Powell, J., concurring)). See also *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42-43 (1973) (emphasizing court’s “lack of specialized knowledge and expertise” in educational policy, and explaining that “the judiciary is well-advised to refrain from imposing on the States inflexible constitutional restraints” regarding educational policy).

In addition, as Justice Powell observed in *Bakke*, the pursuit of racial diversity promotes a distinct “constitutional interest,” *Bakke*, 438 U.S. at 313 – the First Amendment interest in the “robust exchange of ideas.” See *id.* at 311-13. “Academic freedom,” Justice Powell recognized, “long has been viewed as a special concern of the First Amendment” because the

"Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'" *Id.* at 312. The value of the "robust exchange of ideas" follows from the First Amendment's commitment to the "marketplace of ideas," *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969), which "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public," *Associated Press v. United States*, 326 U.S. 1, 20 (1945). Because the "college classroom with its surrounding environs is peculiarly 'the marketplace of ideas,'" *Healy v. James*, 408 U.S. 169, 180 (1972), in that context there is a "peculiarly" strong constitutional interest context in "the widest possible dissemination of information from diverse . . . sources," *Associated Press*, 326 U.S. at 20.

* * * *

In sum, Justice Powell's controlling opinion in *Bakke*, together with twenty years of experience, establish that colleges and universities have a compelling interest in the pursuit of racial and ethnic diversity, grounded firmly in their educational mission and in other values of constitutional significance.¹⁴ Plaintiffs would have this Court put all of that to one side, and pro-

¹⁴ Although institutions of higher education have a compelling interest in achieving educational diversity, amici recognize that the strength of that interest, in and of itself, will not justify every possible practice or policy for taking race into account. Specifically, the means an institution adopts must be narrowly tailored to achieving the compelling interest. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995); *Bakke*, 438 U.S. at 315 (Powell, J.). Amici leave to the parties, who are more steeped in the factual record, the specific question whether the University of Michigan's admissions processes satisfy the narrow tailoring prong. In conducting this inquiry, however, it is important to recognize that the program at issue in *Bakke* was flawed not because race was taken into account at all, but because non-minority students were "foreclosed from all consideration" for a fixed number of seats for no reason other than race. *Id.* at 318. See also *Johnson v. Transportation Agency*, 480 U.S. 616, 636-38 (1987). Thus, so long as

hibit outright any and all consideration of race in student admissions. As the next section demonstrates, there is no legal basis for such a prohibition.

II. The Supreme Court Has Not Departed From *Bakke's* Recognition That Diversity In Higher Education, Including Racial And Ethnic Diversity, Is A Compelling Interest.

In an effort to escape the force of the Court's holding in *Bakke* authorizing the consideration of race in admissions, see 438 U.S. at 320, and Justice Powell's controlling opinion sanctioning the pursuit of racial and ethnic diversity, see *id.* at 311-15, plaintiffs rest their claim ultimately on the proposition that subsequent Supreme Court decisions have departed from *Bakke* and have established that remedying identifiable discrimination is the only compelling interest justifying consideration of race in governmental decisions. This contention not only entirely ignores the empirical evidence and longstanding experience of educators discussed above, but also is unsupported by the Court's decisions.

To begin with, plaintiffs' claim that recent cases establish that government may consider race *only* for "non-remedial reasons" is simply incorrect as a matter of law. See *Shaw v. Reno*, 509 U.S. 630, 646-47 (1993) (only the excessive use of race in redistricting offends constitutional norms); *Miller v. Johnson*, 515 U.S. 900, 928-29 (1995) (O'Connor, J., concurring) (congressional districts valid "even though race may well have been considered in the redistricting process"); see also *Wittmer v. Peters*, 87 F.3d 916, 919 (7th Cir. 1996).¹⁵ The decision

an educational institution gives a "competitive consideration" of race, its admissions policy does not transgress constitutional norms. See *Bakke*, 438 U.S. at 313, 320.

¹⁵ It is easy to see why the consideration of race cannot be strictly limited to remedial contexts. For example, a law enforcement agency surely could take race into account in choosing which officer to use to infiltrate a criminal group whose members are all of the same race. Cf. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 314 (1986) (Stevens, J., dissenting). Following similar logic, the Seventh Circuit in *Wittmer* specifically rejected the argument that the Supreme Court has established in dicta that only remedial objectives can support race-influenced decisions. See 87 F.3d at 919. As Chief Judge Posner explained for the court, "[i]t is

plaintiffs principally rely on for this claim, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), simply does not speak to *Bakke's* discussion of diversity. The *only* governmental interest asserted in that case was remedying past discrimination in government contracting, and the Court in *Croson* said nothing about the validity of diversity as a governmental interest.

Moreover, even if *Croson* had involved an asserted governmental interest in diversity, the context of government construction contracts differs in crucially important respects from the context of higher education. See generally Akhil Amar & Neal Kumar Katyal, *Bakke's Fate*, 43 U.C.L.A. L. Rev. 1745 (1996). First, the governmental interest in maintaining and improving roadways, while important, is not equivalent to the governmental interest in maintaining and improving the quality of American higher education. See, e.g., *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954) ("[E]ducation is perhaps the most important function of state and local governments."); *Phyller v. Doe*, 457 U.S. 202, 221 (1982) (explaining that education is not "merely some government 'benefit' indistinguishable from other forms of social welfare legislation"). Second, as shown above, there is a *direct* connection between educational diversity and advancing the central goals of higher education, while diversity in government contracting has no bearing on the quality of roadwork. See *J.A. Croson Co.*, 488 U.S. at 512-13 (Stevens, J., concurring). Finally, unlike in government contracting, there are additional constitutionally significant values that are furthered by the consideration of racial and ethnic diversity in the admissions process, namely the preservation of educators' autonomy and the promotion of the marketplace of ideas. See *supra* § LC.

not as if the rectification of past discrimination had a logical or equitable priority over other legitimate goals that discrimination might serve." *Id.* The court thus held that prison boot camps may consider race in hiring security guards, on the basis of expert testimony that the hiring policy promoted the success of the boot camp program. See *id.* at 920-21.

To be sure, *Croson* and other decisions reject interests *other* than attaining diversity that have been offered in support of race-based government decisions, such as the broad goal of alleviating societal discrimination and the idea of providing racially-defined role-models for minority youth. See *J.A. Croson Co.*, 488 U.S. at 497-99; *Wygant*, 476 U.S. at 274-76 (plurality); *id.* at 288 (O'Connor, J., concurring). Those objectives, however, bear no necessary relation to the goal of diversity in higher education, as Justice Powell recognized in *Bakke*. Compare *Bakke*, 438 U.S. at 307-310 (Powell, J.) (remediating societal discrimination is not compelling interest), with *id.* at 311-14 (attaining diversity in higher education is compelling interest). See *Wygant*, 476 U.S. at 288 n.* (O'Connor, J., concurring) ("The goal of providing 'role models' discussed by the courts below should not be confused with the very different goal of promoting racial diversity among the faculty.").

Subsequent decisions, in fact, only have reaffirmed the conclusion that attaining diversity in higher education is a compelling government interest. In *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), overruled on other grounds, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), the Court cited *Bakke* for the proposition that "a 'diverse student body' contributing to a 'robust exchange of ideas' is a 'constitutionally permissible goal' on which a race-conscious university admissions program may be predicated." *Id.* at 568;¹⁶ see *Wygant*, 476 U.S.

¹⁶ *Adarand* overruled *Metro Broadcasting* only insofar as the latter applied a standard of intermediate scrutiny instead of strict scrutiny. See *Adarand*, 515 U.S. at 227. Consequently, *Adarand* does not affect *Metro Broadcasting's* discussion of *Bakke*, or its support of the government's interest in considering race in issuing broadcast licenses in furtherance of the goal of diverse programming. See 515 U.S. at 258 (Stevens, J., dissenting) ("The proposition that fostering diversity may provide a sufficient interest to justify such a program is *not* inconsistent with the Court's holding today – indeed, the question is not remotely presented in this case – and I do not take the Court's opinion to diminish that aspect of our decision in *Metro Broadcasting*."). In fact, the dissent in *Metro Broadcasting* – upon which plaintiffs rely – cites Justice Powell's opinion in *Bakke* for the proposition that "race-conscious measures might be employed

at 286 (O'Connor, J., concurring) ("[A]lthough 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 higher education, to support the use of racial considerations in furthering that interest.") (citing *Bakke*, 438 U.S. at 311-15 (Powell, J.)). Other courts have followed *Bakke* in determining that attainment of racial and ethnic diversity in education constitutes a compelling government interest. See *Smith v. Univ. of Wash. Law Sch.*, No. 97-335Z (W.D. Wash. Feb. 12, 1999) (attached at Tab E); *Eisenberg v. Montgomery County Pub. Schs.*, 19 F. Supp. 2d 449, 453 (D. Md. 1998); *Davis v. Halpern*, 768 F. Supp. 968, 975-79 (E.D.N.Y. 1991). In short, plaintiffs' claim that Justice Powell's controlling analysis in *Bakke* has been supplanted by dicta in subsequent cases misapprehends those cases, and should be rejected.¹⁷

* * * *

The continued implementation of *Bakke*-endorsed admissions policies by higher educational institutions is critical to the advancement of fundamental educational objectives. For

to further diversity only if race were one of many aspects of background sought and considered relevant to achieving a diverse student body," thus plainly contemplating the consideration of race in university admissions decisions in order to achieve diversity. *Metro Broadcasting*, 497 U.S. at 621 (O'Connor, J., dissenting) (citing *Bakke*, 438 U.S. at 314 (Powell, J.)).

¹⁷ The analysis in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), was fundamentally wrong. *Hopwood*'s conclusion that dicta in subsequent Supreme Court opinions implicitly rejects Justice Powell's analysis in *Bakke* relies entirely on language in decisions — and dissents — that simply do not address the governmental interest in diversity in higher education. See 78 F.3d at 944-48. *Hopwood* rests ultimately on a determination that no Supreme Court case "since *Bakke* has accepted diversity as a compelling state interest under a strict scrutiny analysis." *Id.* at 944. The salient point, however, is that Justice Powell's controlling opinion in *Bakke* itself upheld diversity as a compelling governmental interest under strict scrutiny, and no subsequent decision has rejected — or even questioned — his analysis. Perhaps most significantly, *Hopwood* did not attempt any assessment of the benefits of racial and ethnic diversity in higher education and whether those benefits justify the consideration of race in admissions decisions. See *Adarand*, 515 U.S. at 228 (courts applying strict scrutiny must "carefully examin[e] the interest asserted by the government" and "the evidence offered to show" the use of race is necessary, in order "to distinguish legitimate from illegitimate uses of race in government decisionmaking").

more than two decades, the nation's selective colleges and universities not only have made admissions decisions in reliance on *Bakke*, they have implemented outreach efforts, shaped their financial aid policies, hired faculty, planned curricula, organized student life – in short, they have made every fundamental decision an institution of higher education could make – in reliance on the freedom and ability to pursue and obtain a diverse student body. A retreat from *Bakke* now would seriously disrupt the settled expectations of the many individuals and institutions who have organized their affairs around its teachings, see *Adarand*, 515 U.S. at 233-34 (plurality); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995), and would severely undermine the efforts of these institutions to provide the highest quality education for all students.

CONCLUSION

For the reasons stated, this Court should hold that diversity in higher education, including racial and ethnic diversity, is a compelling governmental interest.

Respectfully submitted,

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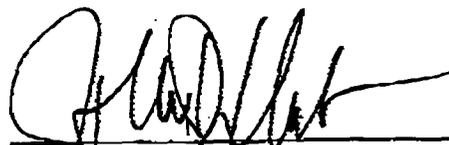
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