Nos. 02-241 & 02-516

IN THE

Supreme Court of the United States

BARBARA GRUTTER,

Petitioner,

—v.—

LEE BOLLINGER, *et al.*,

Respondents.

JENNIFER GRATZ and PATRICK HAMACHER,

Petitioners,

—v.—

LEE BOLLINGER, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF AMHERST, BARNARD, BATES, BOWDOIN, BRYN MAWR, CARLETON, COLBY, CONNECTICUT, DAVIDSON, FRANKLIN & MARSHALL, HAMILTON, HAMPSHIRE, HAVERFORD, MACALESTER, MIDDLEBURY, MOUNT HOLYOKE, OBERLIN, POMONA, SARAH LAWRENCE, SMITH, SWARTHMORE, TRINITY, VASSAR, WELLESLEY, AND WILLIAMS COLLEGES, AND COLGATE, WESLEYAN AND TUFTS UNIVERSITIES, *AMICI CURIAE*, SUPPORTING RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*

Amici curiae are 28 private, highly selective residential colleges whose small size and excellence attract students from around the nation and the world.[1] They provide their students with a liberal education in its broadest sense – a rich, deep training in diverse subject matters, in residential settings where education is intended to take place not only in the classroom but throughout four years on campus with classmates from different backgrounds and with different experiences, who arrive with different viewpoints.

Because of their excellence, each of the *amici* colleges is highly regarded and besieged with applications from well-qualified high school seniors. Because of their size, they offer admission to only a small fraction of qualified applicants, whom they select not mechanically by SAT score but taking into account a wide range of factors. Each year, *amici* decide which set of applicants, considered individually and collectively, will take fullest advantage of what the college has to offer, contribute most to the educational process, and use what they have learned for the benefit of the larger society. Each college has, for decades, self-consciously sought to assemble and house on-campus a highly diverse group of students – from different states or different countries, from urban or rural backgrounds, with differing economic circumstances, with different kinds of experience or talent or athletic ability, students who will be the first in their families ever to go to college and legacy students whose parents, grandparents, or even earlier forbears may have attended that same school.

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[1] Three of the *amici*, Colgate, Tufts and Wesleyan, are universities, but their small size, selectivity, and emphasis on a liberal education in a residential setting make their interests identical to those of the *amici* colleges. We refer to *amici* as "colleges" throughout for convenience.

No counsel for a party authored this brief in whole or in part, and no person or entity other than the *amici curiae* made a monetary contribution to its preparation or submission. Letters consenting to the filing of *amici curiae* briefs have been lodged by the parties with the Clerk.

Amici have a direct interest in the outcome of these cases because the Court has apparently considered Title VI of the Civil Rights Act of 1964 to be coextensive with the Fourteenth Amendment. Reversal of the judgment in *Grutter* (the undergraduate case is not really comparable), and any ruling that would restrict *amici's* effort to assemble classes that are diverse in multitudinous respects by the means they have thought best, would directly harm *amici,* the education they provide, and their broader mission to benefit the larger society. To alert the Court to the impact that adoption of the arguments advanced by petitioners and the United States would have on their admissions programs – and of the extent to which the "alternatives" touted by petitioners and the United States are impracticable and illusory for smaller selective institutions, requiring a forced abandonment of selectivity if diversity were to be maintained – *amici* submit this brief.

SUMMARY OF ARGUMENT

"The life of the law has not been logic: it has been experience."[2] The Court should examine petitioners' submission in this case with a view to the experience of operating admissions programs at the nation's selective colleges and universities. The Court should consider the experience of admissions before diversity was highly valued and before race conscious approaches were employed, and the progress toward more equal opportunity since that revolution. It should consider the realities of admitting applicants, to serve a highly selective college's mission, in a society in which race still matters in determining a person's available opportunities and life experience, and

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[2] Oliver Wendell Holmes, Jr., *The Common Law, 5* (1881) (Mark D. Howe ed., 1963). President Grover Cleveland expressed the same thought a few years later, calling for a reduction in the tariff notwithstanding prevailing orthodoxy because "[i]t is a condition which confronts us, not a theory." *Third Annual Message to Congress*, Dec. 6, 1887, available at www.polsci.ucsb.edu/projects/presproject/idgrant/sou_pages/cleveland3su.html.

the effects of discrimination and entrenched segregation still linger. If it does so, it will affirm the judgments below.

African-American students were largely absent, or present in very small numbers, from most selective institutions of higher education, including *amici,* until the 1960's. Only when those schools began to aim for racial diversity among the other kinds of diversity long sought for, did those schools begin to enroll more than token numbers of African-American students. Moreover, research and experience suggests that for small, highly selective, largely private colleges like *amici*, carving out race from all the other kinds of diversity that colleges consciously aim for will have a predictable, substantial resegregating effect, probably moving black students from roughly 5-7% of the student body to 2% or so.

The alternatives suggested by the United States and petitioners – admitting a percentage of each high school class, or focusing on class or economic circumstance without looking at racial background – could not work at small, highly selective schools, if the objective is to enroll a class that is both academically excellent and diverse. Moreover, it would deprive *amici* of precisely the diversity that they value for its contribution to the residential, liberal education they provide. Seeking out and obtaining diversity, including racial diversity, does not violate Title VI and 42 U.S.C. §1981, and does not amount to a quota system. The competition between highly selective schools (for the best students, the best faculty, the most places at the most prestigious graduate and professional schools) provides natural constraining factors.

Both the deference due the educational policies of universities and colleges, *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985), and *Trustees of Dartmouth Coll. v. Woodward,* 17 U.S. 518 (1819), and the respect due under *stare decisis* to the holding in *Bakke* reflected in Justice Powell's opinion, strongly support the judgments below.

ARGUMENT

I. PRIVATE, HIGHLY SELECTIVE COLLEGES HAVE A COMPELLING EDUCATIONAL INTEREST IN ENROLLING HIGHLY DIVERSE – INCLUDING RACIALLY DIVERSE – CLASSES, AND CANNOT DO SO WITHOUT TAKING THE DIVERSITY THEY STRIVE FOR INTO ACCOUNT.

During the late 1960's, as American society was coming to grips with the exclusion of African-Americans from many of the institutions and benefits of American life, *amici* took note of how few such students they had enrolled and began to seek out and enroll students from historically disadvantaged groups. The educational benefits that selective colleges have perceived from those efforts, and their assessment that substantial resegregation would likely follow were the Court to preclude any consideration (no matter how nuanced) of racial or ethnic diversity in assembling classes, are accurately reflected in reports submitted below of former Princeton President William G. Bowen and former Harvard President Derek Bok in the district court. Their pathbreaking work, *The Shape of the River*, is the Brandeis brief that *amici* would file (but for page limitations) and to which the Court should attend if it would follow Holmes' dictum to be guided by experience.

Petitioners' arguments, if accepted, would harm the education offered at highly selective institutions, and the nostrums they offer to alleviate those harms are not realistic.

A. Private, Highly Selective Colleges Are Committed To Obtaining The Educational Benefits Of Diversity, Including Racial Diversity.

Petitioners argue that diversity is not a compelling interest that institutions of higher education may pursue. The authorities they rely on, however, are not *educational* authorities, but rather judicial decisions in inapposite, non-educational contexts. In considering petitioners' challenge, the beginning of wisdom is to recognize, as Justice Powell

and a majority of the Court did in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978), that *educators* have set the relevant policies. There are sound *educational* reasons (and others as well) why higher education institutions of all sorts – not only those subject to legislative direction, but also private, highly selective ones – have virtually without exception concluded that *many different kinds of diversity, including racial diversity,* best create the circumstances for the learning required in the 21st century, and that the schools should therefore try to obtain that diversity.

The point is so basic, and the agreement of educators is so broad,[3] that *amici* need not argue it at length. Diversity in all its aspects is one of the factors that make American colleges and universities unique, educationally superior, and the envy of the world. There is a reason why students beat a path to schools where diversity is celebrated and sought out, and why those schools are widely judged to provide excellence beyond the capacities of narrower institutions.

The Amherst Trustees' 1996 Statement on Diversity is representative of the views of *amici* generally:

> We will continue to give special importance to the inclusion within our student body, our faculty and our staff of talented persons from groups that have experienced prejudice and disadvantage. We do so for the simplest, but most urgent, of reasons: because the best and brightest people are found in many places, not few; because our classrooms and residence halls are places of dialogue, not monologue; because teaching and learning at their best are

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[3] *See, e.g.,* Association of American Universities, *AAU Diversity Statement on the Importance of Diversity in University Admissions* (by presidents of its 62 member institutions), Apr. 14, 1997, available at http://www.aau.edu/issues/Diversity4.14.97.html.

> conversations with persons other than ourselves about ideas other than our own.[4]

That understanding is not newly minted; as its president recently observed, Oberlin College, which almost uniquely among *amici* has been steadily attentive to the importance of enrolling black Americans since well before the Civil War, discovered "as early as the 1830s" that "bringing together students with different backgrounds and experiences brought about learning and positive social change."[5]

The proposition that racial diversity, among other kinds of diversity, is important to education in our nation's colleges and universities, or at least that they may reasonably so conclude, is supported by thoughtful, experienced leaders like former Presidents Bowen and Bok and former Stanford Provost Condoleezza Rice,[6] other selective colleges and universities and professional associations (which we understand are also filing briefs), faculty, and Boards of Trustees. Their impressively unanimous judgments, supported by common sense and experience, concerning educational benefits, cannot be displaced by sterile citations to inapposite cases.

Why is an education "characterized by encounters with difference" so vital? Because, as Carleton President Robert A. Oden, Jr. recently said, "we know, with Robert Kagan, that 'the single greatest source of growth and development is the experience of difference, discrepancy, anomaly," and "the free and uncensored play of ideas and opinions and arguments and positions is central to the fabric of a liberal arts education and a college peopled by those representing

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[4] www.amherst.edu/fac_serv/aaction/diversity.html.

[5] Oberlin Alumni Magazine (Winter, 2002-03), p. 2. As early as 1835, Oberlin began making special efforts to admit and matriculate students of color. The suggestion that upon enactment of the 1866 Civil Rights Statute Oberlin was violating the law – which is what petitioners' case amounts to – is a terrible misreading of history.

[6] Neil A. Lewis, *Bush Adviser Backs Use of Race in College Admissions*, N.Y. Times, Jan. 18, 2003, at A14.

and trying out such ideas and opinions and arguments is a finer college for the presence of these people." He also noted that "a pluralistic, widely representative college is a significant factor in the college choice of the world's most talented students."[7]

And as Swarthmore noted recently, "without a reassertion of our commitment to diversity, [we risk] the erosion of the educational, ethical, and social mission" that makes such colleges unique and valuable.

While the relevant judgments are *educational* judgments, made by educators and those responsible for educational institutions, they are not alone; non-educators too have noted the value of diversity in education, and more broadly the extent to which the value of diversity is publicly valued in most institutions of American life.

In connection with this very case, President Bush has stated that he "strongly support[s] diversity of all kinds, *including racial diversity* in higher education."[8] The *amicus* brief filed by the United States agrees that "Measures that *ensure* diversity, accessibility and opportunity are important components of government's responsibility to its citizens."[9] Deliberately seeking out diversity in race-conscious ways, and not merely hoping it magically arrives, has long been the rule in the judicial appointment process in state and federal courts over the past two decades; for political parties (which both seek to enlist candidates who, as a group, are diverse in various ways, including racially

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[7] *Inauguration Convocation Address*, Oct. 25, 2002, available at www.carleton.edu/inauguration/speeches.php3?id=1.

[8] Neil A. Lewis, *Bush And Affirmative Action: Constitutional Questions; President Faults Race Preferences As Admission Tool*, N.Y. Times, Jan. 16, 2003, at A1.

[9] U.S. Brief in *Grutter*, at 10 (emphasis added).

diverse); in federal (and many state) cabinet selections; in the service academies; and in the military's officer ranks.[10]

The practical wisdom underlying these practices rebuts petitioners' assertion that diverse viewpoints and opinions can be sufficiently obtained by obtaining diversity in economic circumstances and disadvantage. Those differences are valuable educationally too, but they do not exhaust or reflect all the diversity that students will need to confront, understand, and be able to relate to and work with.

That educational conversations may be different when we speak with those whose experience is different – deeper, more powerful, with a different moral force – is the point made in Justice O'Connor's memoir of Justice Thurgood Marshall, Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur,* 44 Stan. L. Rev. 1217, 1220 (1992). It needs no better confirmation than the recent oral argument in *Virginia v. Black,* a case that reminds us of the lingering influence of color in American society. When a Justice asked, "Aren't you understating the effects of 100 years of lynching?" and added that cross-burning "is unlike any symbol in our society," the power and educational value of the moment – by all accounts one of the most extraordinary this Term – stemmed in part from the particular experience (including, respectfully, the color) of the speaker. It was important for Presidents Johnson and Bush to give the nation that measure of diversity; it is

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[10] Successive presidents since at least 1976 have made plain that appointing more women, blacks, and Hispanic attorneys to the federal bench or the cabinet is a laudable goal, not an equal protection violation. The transformation of state court judiciaries from the virtually all-white membership three decades ago to today's judiciary, which looks much more like the population at large, has been no unplanned for achievement, but the obtaining of diversity deliberately sought out. For the service academies, *see, e.g.,* Adam Clymer, *Service Academies Defend Use of Race in Their Admissions Policies*, N.Y. Times, Jan. 28, 2003, at A17; Albert R. Hunt, *Service Academies: Affirmative Action at Work,* The Wall Street Journal, Jan. 23, 2003, at A15. Both political parties have made a public point of seeking to enlist well-qualified black and Hispanic candidates to run for office.

equally important that *amici* colleges be able to do so as well.

B. Highly Selective Institutions Cannot Obtain The Diversity They Seek Except By Seeking It Directly.

For every aspect of the diversity they seek, *amici* have needed to identify students that can offer it, and consider those potential contributions in the discussion that takes place concerning virtually every serious applicant. To the extent that they seek students with particular backgrounds or talents or interests – international students, legacy students,[11] students interested in as-yet-undersubscribed fields to better occupy recently hired faculty, students interested in newly emerging fields, students with particular musical or artistic or athletic talents, students whose parents have not had the benefits of higher education, students from deprived economic backgrounds or rural areas – the admissions staffs need to, and do, consider those aspects as a small number of admissions personnel read and write comments on each file, and then the larger admission committee *discuss and consider each (or virtually each) student file.*

The overriding task is to assemble the most interesting class of students, ready to learn from one another and from the college's faculty. The factors examined are considered not to allocate benefits according to race, but for how they bear on how committed and successful a student the applicant is likely to be. The primary and secondary educational system in the U.S. is far from a level playing field, and for many, particularly the poor, integration is diminishing, not

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[11] *Amici* each seek to enroll legacy students, without quota. Legacy students more often than not outnumber African-American students at most *amici*. Because of the tiny numbers of African-American graduates before about 1970, the effect of considering legacy background a "plus" is to afford that plus to a group of applicants likely to be all (or nearly all) white.

increasing.[12] Because of the unequal education applicants will have received, highly selective colleges need to be especially alert to evidence of special efforts and accomplishments, offering exceptional promise and motivation, on the part of students who have not had many advantages. Just as colleges consider how privileged an applicant's background was to properly assess the achievement reflected, they need to consider all the obstacles, including racial or ethnic background, that a student may have surmounted as well.

At least for smaller schools like *amici* – which happen to be the size of or even larger than most university professional schools or graduate departments – admission decisions are nuanced, multi-factorial, and not quantitative. No numerical points or weights whatever are assigned for any such factors, including racial or ethnic background; numerical quotas are not set or enforced. The same evaluative procedures are used for all applicants regardless of color or ethnic background; for example, different color files are not used. At most of the *amici* colleges, ongoing tallies of various other factors that are kept do not even include race or ethnic background.

In short, the process for each *amici* college is very similar (if not identical) to the Harvard College program described by Justice Powell in *Bakke* (and similar as well to the program at the Michigan Law School) – facially nondiscriminatory, without any quotas, considering racial or ethnic background as a "plus" in a particular applicant's file without insulating that individual "from comparison with all other candidates for the available seats."

At Amherst, for example, offers extended to students of African-American background in recent years (1993 to 2002) have varied widely, without any notable trend,

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[12] *See* Erica Frankenberg, Chungmei Lee, and Gary Orfield, *A Multiracial Society with Segregated Schools: Are We Losing the Dream?*, Harvard University Civil Rights Project, Jan. 16, 2003, available at http://www.civilrightsproject.harvard.edu/research/reseg03/reseg03_full.php.

ranging between 81 and 125 (out of about 950 offers extended altogether, and resulting in between 24 and 49 matriculated students in a class of about 425). Consideration is given to dozens of factors, including, for example, whether the student has a disability, or athletic ability; comes from a rural, or poor urban, community; or has a family with only limited financial resources, or with little or no college background (*e.g.*, neither parent has a 4-year degree). The other *amici* report similarly wide variation in offers extended, the clearest demonstration that consideration of race as a "plus" does not amount to a quota.

The experience of all *amici* is that they cannot be reasonably assured of having the desired range of talent, or international students, or legacy students, or students from underprivileged backgrounds, without noting and considering those factors when it comes time to discuss each file. It is equally impossible to be reasonably assured of obtaining a class with more than token numbers of African-American or Latino students without making special efforts to attract such applications and then considering those factors as well (albeit in a way that ensures that no factor, including race, is "decisive when compared" with any other candidate, as *Bakke* expressly envisioned). This is true at all the *amici* colleges, and particularly true for those schools (*e.g.*, Bowdoin, Bates, Colby and Carleton) which, because of their location far from urban areas or in states with relatively less diversity themselves, would draw fewer applications from African-American or Latino students.

As Bowen and Bok summarize their research, if more than small numbers of black students are to be enrolled, colleges *have to* be sensitive to race in making admissions decisions. That need "stems directly from continuing disparities in pre-collegiate academic achievements of black and white students" as presently measured.[13] The simple truth, ignored by those who glibly suggest that

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[13] *The Shape of the River*, 51.

color-blind alternatives could be implemented at the most selective colleges without any sharp reduction in diversity, is that "[r]acial disparities in test scores and high school grades are substantial and show no signs of disappearing in the foreseeable future."[14] *Amici* each use grades and standardized tests as an important part of the admissions process (even though they are nowhere dispositive, and at some schools no longer required). "Racial gaps of all kinds remain" even after attempting to control for the influence of other variables.[15]

It follows – as exhaustive and careful research (by Bowen and Bok) and the experience at a selective university that eliminated consideration of race, Berkeley, both confirm – that enforced elimination of the Harvard College approach at highly selective institutions[16] would have drastic resegregating impact. Black enrollment would likely be reduced "by between 50 and 70 percent"; the probability of black applicants obtaining offers would drop to half that of white students; and the percentage of black students matriculating would drop from roughly 7.1% of the student body to roughly 2.1%. Seriously enforced, a race-neutral policy would "presumably take black enrollments...back to early 1960's levels, before colleges and

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[14] *Id.*

[15] "People will debate long and hard, as they should, whether particular gaps reflect unmeasured differences in preparation and previous opportunity, patterns of continuing discrimination, failures of one kind or another in the educational system itself, aspects of the culture of campuses and universities, individual strengths and weaknesses, and so on. But no one can deny that race continues to matter." *The Shape of the River*, 279 n.2; *see generally id.* at 269-74.

[16] Selectivity (the acceptance rate) at *amici* colleges ranges as high as 19% (one offer for every five applicants), and averages 25% to 33%. Even the women's colleges among *amici,* which receive proportionately fewer applications, have many more applicants than spaces. *No amicus* college admits applicants mechanically on the basis of test scores or grades, and none did so prior to the late 1960's.

universities began to make serious efforts to recruit minority students."[17]

C. The Alternatives Suggested By The United States And Petitioners Cannot Work At Smaller Highly Selective Colleges, And Would Compel Them To Trade Selectivity To Obtain Diversity.

The briefs filed by the United States make much of efforts underway in Florida, Texas, and California to attempt to ameliorate the extraordinarily sharp reductions in offers extended to (and matriculations of) students of African-American or Latino/Hispanic background following decisions in those states that race or ethnic background could not be considered as part of the admissions process. *It is vital for the Court to understand that even assuming arguendo that those measures could work in those states – and the reported experience and logic suggest difficulties and reasons for concern – neither they nor any other alternatives of which we are aware could conceivably work at highly selective schools the size of amici.*

First, given how every *amicus* conducts its admission selection process (virtually every folder read by multiple readers, and then evaluated in meetings without mechanical point systems), there is really no possibility of a *race-blind* admission process: *consciousness* of *all* the diversity each applicant would contribute is unavoidable.[18] There is really

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[17] *The Shape of the River*, 31-34, 39, 50-51, 280. *Amici* have considered the analysis of Bowen and Bok, and their own assessments are the same: elimination of the approach held permissible in Justice Powell's *Bakke* opinion, if enforced, would likely result promptly in sharp reductions in the presence of African-American students.

[18] At a few of the *amici,* a small number of applicants with overwhelmingly superior credentials are admitted without committee discussion, but that small exception does not alter the point that all the remaining qualified applicants are competitively evaluated and discussed, with focus on the whole applicant and the likely contribution to, and success at, the school.

no alternative for these colleges but to accept the reality of this *consciousness* of differences (including racial or ethnic background) and to use it intelligently as part of their complex weighing of multiple factors that leads to judgments as to whom to admit.

The alternatives usually suggested to obtain diversity without attending to it – mechanical formulas looking to grades, tests scores, or graduation rank – would radically change the profile of each *amici* college. No small, highly selective college could use the "percentage of each high school class" method adopted by Texas and Florida, or Florida's guarantee of placement to all students who successfully complete a two year degree at a community college.[19] California's efforts to restore at least some of the diversity lost since adoption of its race-neutral admissions policy has led to some restoration of diversity at the less selective institutions, but to sharp drops of African-American and Hispanic students at the more selective institutions – *i.e.*, the ones most comparable to *amici*.[20]

Similarly, it is unrealistic to believe that highly selective schools could retain diversity, while not taking it directly into account, by improving search techniques, or focusing more than they presently do on low socioeconomic rank. "[C]lass-based preferences cannot be substituted

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[19] As has been repeatedly noticed, although not by the United States, the Texas program depends for its very effectiveness on the existence of a huge number of segregated-in-fact schools. If public schools mirrored the community at large, the Texas plan would result in no diversity whatever. Moreover, the plan would seem to discriminate against brighter minority students in better integrated schools, and lead to students with lower SAT/ACT scores and less likely to do well, because it guarantees admission to top 10% students at all a state's worst schools, while effectively shutting out minority students just below 10% at the best schools in the state, even if those students seem better candidates by the assessment of educators. *See The Shape of the River,* 274 (using grades rather than test scores would likely "diminish[] the pool of students who can compete effectively for positions of leadership").

[20] Stephen Thernstrom and Abigail Thernstrom, *Reflections on The Shape of the River,* 46 UCLA L. Rev. 1583, 1625 (1999).

for race-based policies if the objective is to enroll a class that is both academically excellent and diverse."[21] Search techniques (including obtaining printouts of every minority student at a specified SAT level) are already extraordinarily comprehensive; and it is precisely the "middle class" students from minority backgrounds who, research and experience shows, are most likely to succeed.[22] Substitution "of a class-based system would drastically reduce the quality of the eligible pool of black and Hispanic applicants, seriously impeding the goal of preparing the ablest minority leaders for society and the professions."[23]

Oberlin has given careful consideration to African-Americans from virtually all-black inner city high schools who challenged themselves by taking the most demanding courses available to them (often at local community colleges, as their schools had few demanding courses), even though their SATs were so low as to be likely disqualifying unless they were viewed through the understanding of race-based test gaps. In doing so, with great success, it has found that the SATs, which it generally uses to predict attrition, consistently and substantially over-predict attrition for its African-American students. There is no way to apply its experience that "SATs are not good measures of African-American freshman academic performance" without being race conscious. Oberlin is looking for academic achievement and sees it in these students (and has been proven correct), but could not do so without consideration of the applicant's whole record and background.

Another difficulty with leaving race to chance in achieving diversity is that a "critical mass" of students is important in attracting individual students (just as it is hard to attract a violinist to a school that has no orchestra). This does not mean quotas, but it does mean that it is difficult to

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21 *The Shape of the River*, 46-50.

22 *The Shape of the River*, 46-51.

23 *The Shape of the River*, 51.

attract a student of color to Middlebury or any other rural campus without a critical mass of fellow students.

D. Selecting A Diverse Student Body Does Not Classify Students By Race Or Violate Title VI or §1981, And Without More Imposes No Quota, And Built-In Structural And Competitive Factors Afford Substantial Guarantees Against Abuse.

1. One of the central insights underlying the sharp distinction Justice Powell drew in *Bakke* between the dual-track admissions process operated by the UC-Davis Medical School and the Harvard College approach was that the former could fairly be said to deny the equal protection of law, while the latter could not. A "facial intent to discriminate is evident," and a public university denies equal protection, when it operates two separate processes, for two lines of racially-reserved admission slots. By contrast, "[n]o such facial infirmity exists in an admissions program where race or ethnic background is simply one element – to be weighed fairly against other elements – in the selection process." 438 U.S. at 318.

Even less can the extraordinarily selective, non-quantitative, eclectic, nuanced admissions processes at private selective colleges like *amici* be said to violate Title VI. Private colleges that carefully and individually consider all aspects of an applicant's background, *including* (but hardly limited to) racial or ethnic background, economic circumstances, family educational background, and the like, do not thereby deny unadmitted students the benefits of participation "on grounds of race, color, or national origin." When colleges and universities decide that the advantages of diversity warrant the admission of some international students, or (for example) look to ensure some presence of students from Japan, Korea, and China, they are not thereby violating their obligations under Title VI, and unadmitted applicants who live in the United States have no private right of action under Title VI by reason of any "exclusion"

by reason of national origin. By exactly that same reasoning, the kind of consideration expressly permitted by *Bakke* of all aspects of a candidate's background, including but not limited to racial or ethnic background, in the service of "attaining the goal of a heterogeneous student body," 438 U.S. at 314, does not reflect any "racial intent to discriminate," and violates no rights under either 42 U.S.C. §1981 or Title VI.

2. Petitioners are trying to eliminate any room for consideration of racial background along with myriad other factors by labeling it a "quota" and hoping the label sticks. But the consideration of race at neither Michigan's Law School (whose admissions procedures are similar in many respects to *amici*'s), nor at its undergraduate college (which because of its huge size is not comparable), amounts to a quota as understood in *Bakke* or in any meaningful sense.

In any event, *amici*'s own consciousness of race as one of the many factors to be included within the student body does not amount to a quota system, and it is important that the court not be deceived by petitioners' use of the term. A quota is a preset number (or narrow range) reserved for some applicants or limiting offers to another. Results that are fairly reached without such an allocation process, goals that are aimed for but often not met, and the widely varying numbers of offers to African-American and Latino applicants which depend on competitive consideration of applicants who may each present talents, backgrounds, or achievements that the schools are hoping to include, reflect no "quota."[24] It makes no sense to say that our electoral process has a "quota" for Republicans (or Democrats) because their vote tallies have varied narrowly in the last few elections between 48% and 52%.

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[24] At each *amicus* college, the percentage of African-American students admitted and matriculated is significantly less than the percentage of such students in the general high school population, which also demonstrates the absence of any quota or "entitlement."

3. In a variety of contexts, some justices of this Court have expressed concern that racial preferences may be self-perpetuating, or become fixed (or even expanding) entitlements. Whatever may be the case when government (with its natural monopoly and lack of competitiveness) adopts quotas, no such tendency has been seen or is likely in the case of highly selective colleges.

The extraordinary competition among private colleges and universities – for the best applicants, the best matriculants, the best faculty, the most foundation support, the most important fellowships for its graduates, the most and largest government grants – operates as a constant check on any abuse. Every institution has a powerful incentive to improve the intellectual capacity of its student body, class by class. The natural constraining power of this competitive quest for excellence virtually guarantees that affirmative action, as practiced at *amici* and sister institutions, has the genuine purpose of finding that sector of the best and the brightest whom present testing methods are not properly identifying, not filling (or trying to expand) any quota.

Nor will these efforts become entrenched. Over the past twenty years, the sharply increasing numbers of Asian-American applicants, the convergence of their test scores, and their interest in particular schools, have enabled some highly selective schools to matriculate Asian Americans in sizeable numbers without any focus on doing so. As the black middle class expands and the educational opportunities available to black students improve, there is reason to expect a narrowing of the test score gaps that have created the need to consider race among other diversity factors. Between 1976 and 1989, average SAT scores of black matriculants at selective schools went up 68 points, "a larger gain than that of white matriculants."[25]

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[25] *The Shape of the River*, 289.

II. THE COMMITMENT TO BROADLY INCLUDE STUDENTS FROM GROUPS WHICH HAD BEEN SYSTEMATICALLY DISADVANTAGED AND EFFECTIVELY EXCLUDED HAS BROUGHT MYRIAD BENEFITS WHICH THE COURT SHOULD RESPECT AND SAFEGUARD.

A. The Recognition That Classes Were Not Racially Or Ethnically Diverse, And The Commitment To Efforts To Obtain A Broader Diversity By Attending To Students Who Had Been Systematically Excluded.

The interest in educating students from all reaches of American society, and the understanding that doing so can be vital to the educational mission of colleges or other institutions of higher education, has deep roots, and cannot be dismissed as late-twentieth century social engineering.

Hamilton was established as Hamilton Oneida College in 1793 as "an institution for the education of American *and Indian youth.*" Dartmouth's charter created a college "for the education and instruction of youth of the Indian tribes, and also of English youth and others." Oberlin resolved in 1835 that "the education of people of color is a matter of great interest and should be encouraged and sustained in this institution."[26] Bates was founded by abolitionists in 1855 who resolved immediately to admit students without regard to race, religion, national origin, or sex.[27] Middlebury graduated a black student in 1823, and Amherst and Bowdoin followed in 1826 and 1833.[28] In short, even while most African-Americans were still

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[26] By 1900, Oberlin had graduated 128 African-Americans, nearly half of *all* black college graduates in the United States. Surely Oberlin's race-conscious efforts would not properly have been held to violate the 1866 Civil Rights Act upon its enactment.

[27] An early beneficiary of Bates' efforts, Rev. Benjamin E. Mays, a child of freed slaves, graduated from Bates in 1920, went on to become president of Morehouse College, and was described by Martin Luther King Jr. as "my spiritual mentor and my intellectual father."

[28] Harold Wade, Jr., *Black Men of Amherst*, p. 5.

enslaved, some New England colleges announced or reflected a very longstanding interest in recruiting a diverse student body in the service of their educational missions.

However, at all the *amici* (and throughout America as well), the simple fact is that African-American young men and women were, until the mid-1960's, absent or rare at every one of the *amici* colleges to a degree inexplicable except as a consequence of the underlying discrimination rampant throughout American society and systematic denial of equal opportunity.[29] Even today, with their outreach efforts and consideration of color and ethnic background in the admissions process, *none* of the *amici* colleges enrolls African-American students in anything like their proportion of the high school population.

For the colleges as much as for the rest of American society, the Civil Rights Movement in the 1960's was a watershed, an occasion for taking stock, making commitments, and pursuing them. The trustees and faculty at each college examined the education mission they were charged with serving and considered whether the continued effective absence (or great paucity) of students of color was consistent with education broadly conceived and the public service each college aims to serve. They all concluded that special efforts to attract, enroll, and graduate students from groups historically excluded was an educational, social, and

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[29] No African-American student graduated from Haverford until 1951. No blacks graduated from Amherst from 1939 to 1947, even though under different leadership Amherst had, from 1915 to 1926, enrolled a number of African-American students, including four from the M Street (Dunbar) High School in Washington, D.C who are among its most illustrious and successful graduates by any standard – William Hastie (who after arguing a series of civil rights cases in the Supreme Court became the first African-American federal judge, and later served on the United States Court of Appeals for the Third Circuit), Charles Houston (Dean of the Howard Law School and NAACP Special Counsel who planned the legal strategy that led to *Brown v. Bd. of Educ.),* Charles Drew (who perfected the storage of blood plasma in time to save thousands of lives in World War II), and Mercer Cook (twice a United States Ambassador). Harold Wade, Jr., *Black Men of Amherst*, chs. IV-V.

moral imperative. Not only did the faculty think that including students from African-American backgrounds was an educational imperative; students who were choosing among colleges reached the same judgment, identifying campus diversity as a significant factor motivating their decisions.

In the years since the King assassination sparked reflection and action across American campuses, *amici* have graduated more African-American students than in the previous 175 years. They have done so through the use of race-conscious admissions efforts permitted by *Bakke* – indispensable efforts that Petitioners would foreclose.

B. Thirty-Five Years Later, The Colleges' Experience Demonstrates That Affirmative Action Has Had Educational Benefits – And Benefits For American Society.

Nearly thirty-five years after *amici* college recognized that they were each more insular and less diverse than was educationally wise or socially defensible – and more than they and the students they sought to attract wanted them to be – they have found that their resultant efforts have paid off in numerous respects. The careful, thoughtful, well-considered efforts to attract more students of color to apply to and matriculate at the colleges have enabled the colleges to better accomplish the missions they set for themselves, which include among other things, educating students who, individually and collectively, will contribute most to the educational process, and be most successful in using what they have learned for the benefit of the larger society.

1. Much important data is summarized by Bowen and Bok, who conclude that efforts to expand diversity have paid off handsome educational dividends.[30] Significantly more students (of all races) reported by 1989 (as compared to 1976) that college contributed a great deal to their ability to work effectively and get along well with people from

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[30] *The Shape of the River*, chs. 3-4.

different races and cultures; for white students, the number nearly doubled.[31]

2. *Amici* colleges contribute very substantially to the ranks of graduate students at the nation's leading graduate and professional schools, and their efforts at inclusion have meant more graduate degrees (at more prestigious institutions) for African-American students generally.

Twenty of *amici*, for whom we have data, report that from 1992 through 2001, 179 of their African-American graduates subsequently earned Ph.D.s in science and engineering fields.[32]

A Haverford graduate who benefited from its Minority Scholars Program – which supports the academic achievement of students of color, and has helped create a graduation rate for minority students that closely matches (and sometimes exceeds) the college's overall graduation rate – went on to graduate study in Molecular Biology at Princeton and will return to Haverford next fall as an Assistant Professor of Neurobiology.

3. Two of the most frequently heard criticisms of admissions programs that take race into account, like *amici's* (and like that at the Michigan Law School and the one at Harvard as described by Justice Powell), are simple canards that are easily demolished.

Graduation rates for "affirmative action" students are not lower than the average, so it cannot fairly be charged that valuable resources are being underused. At Amherst, Colgate, and Vassar – as at Harvard and Princeton – the black student graduation rate is over 90%, and higher than the rate for white students.[33] (By contrast, graduation rates

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[31] *The Shape of the River*, 225-40.

[32] The survey was undertaken by the National Science Foundation, and published by the Co-Operative Institutional Research Program at UCLA.

[33] The Journal of Blacks in Higher Education, *The Wide Disparity in Black Student Graduation Rates at the Nation's Most Selective Colleges and Universities*, Autumn 2002, p. 90.

at even the best of the historically black colleges are substantially lower.)

The consideration of race does not mean that some students of lesser merit are admitted over more "meritorious" students. At *amici* and other highly selective colleges, merit has never been defined purely by test scores. By any measure, the students who have been admitted under the diversity-seeking, race-conscious process that *amici* have employed in reliance on *Bakke* have met the colleges' highest expectations.

Consider, for example, Ted Shaw (Wesleyan '72) and Hugh Price (Amherst '63). Mr. Shaw, one of the counsel for intervenors in *Gratz,* benefited from Cardinal Cooke's early affirmative action efforts to develop leadership skills in young blacks in Catholic schools in New York City, and attended Wesleyan shortly after its post-King assassination commitment to make the student body more racially diverse. He has made exactly the kind of contribution (service in the Department of Justice Civil Rights Division, teaching at the University of Michigan Law School, and practicing civil rights law in this and other courts) that Wesleyan hopes its students will make. He now serves as a Wesleyan trustee.[34]

Similar contributions have been made by Mr. Price. After graduating from Yale Law School, he served as the first executive director of the Black Coalition of New Haven; was for six years as senior vice president of WNET/Thirteen in New York, the nation's largest public television station; was vice president of the Rockefeller Foundation; and has been president of the National Urban League since 1994.[35]

Peter J. Gomes, Bates '65, is University Minister and Plummer Professor of Christian Morals, Harvard University, a Bates Trustee, and a prolific author on topics

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[34] *Ted Shaw '76: Winning the Fight for Social Justice?*, Wesleyan, Winter 1996, pp. 1-4.

[35] Amherst, Summer 1994, p. 6.

of Biblical and Christian Ethics.[36] Notwithstanding its commitment and efforts, Bates "has had very limited success in attracting black students," and only 1.9% of its students are African-American.[37] Are those efforts now to be held unlawful, and the contributions of Bates to the education of leaders like Rev. Gomes forbidden, because Bates considers race along with all the other aspects of a candidate's background?

Beverly Daniel Tatum, Wesleyan '75, formerly acting President of Mount Holyoke, is President of Spelman College. She has written *Why Are All The Black Kids Sitting Together in the Cafeteria?: And Other Conversations About Race* (1997), and *Assimilation Blues: Black Families in a White Community* (1987).[38] Her achievements make plain the educational benefits of looking for and including students like these at *amici*, and explain why the colleges believe so passionately that their missions demand – and the law should not prohibit – efforts to educate and send back into the world those who might not, but for consideration of their whole background, be noticed, or sought out, or admitted.

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[36] Referring to the admission staff who reviewed his application, Rev. Gomes observed: "They invested in the raw stuff of human flesh and, in many cases, my own included, they should have said, 'If we go strictly by the numbers, and strictly by the record, and strictly by the achievements posted, this is a man who would be much happier in Orono than in Lewiston.'", Bates College, *Taking a Chance on Our Future,* Oct. 26, 2002, available at http://www.bates.edu/homecoming-gomes-address.xml.

[37] *The Journal of Blacks in Higher Education*, available at http://www.jbhe.com/features/38_leading_colleges.html.

[38] *Talking about Race with Beverly Daniel Tatum '75*, Wesleyan, Summer 1998, pp. 5-9.

III. BARRING INSTITUTIONS OF HIGHER EDUCATION FROM MAINTAINING THEIR OWN ADMISSION CRITERIA WOULD VIOLATE VITAL PRINCIPLES OF ACADEMIC FREEDOM AND INSTITUTIONAL AUTONOMY, AS WELL AS STARE DECISIS.

Petitioners' quest to displace the educational judgments of the University of Michigan – and, make no mistake about it, the educational judgments of *amici* and private colleges and universities generally – is at war with two fundamental principles of constitutional law: the rule that "Considerations of profound importance counsel restrained judicial review of the substance of academic decisions," *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985), and the rule of *stare decisis*.

1. The rule of judicial restraint that underlies *Ewing*, which provides a substantial barrier to petitioners' campaign here, rests in part on the First Amendment. The *Ewing* Court noted its "reluctance to trench on the prerogatives of state and local educational institutions and our responsibility to safeguard their academic freedom, "a special concern of the First Amendment." *Keyishian v. Bd. of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 603 (1967). Academic freedom includes the "discretion to determine, on academic grounds, who may be admitted to study," "one of 'the four essential freedoms' of a university. *Bakke,* 438 U.S. at 312 (opinion of Powell, J.)." *Ewing*, 474 U.S. at 226 n.12 (citations omitted).

But the judicial restraint commanded by *Ewing* has even older and deeper roots, reaching back to *Trustees of Dartmouth Coll. v. Woodward,* 17 U.S. 518 (1819), and the Court's recognition there that a free society requires public and private spheres, and limitations on governmental intrusion and control so as to preserve those key distinctions. "Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students . . . but also . . . on autonomous decisionmaking by the academy itself . . . ." *Ewing*, 474 U.S. at 226 n.12

(citations omitted). Only a "hands off" policy leaves schools free to reform, experiment, refine, and thereby offer to the whole society the improvements that result from a free market in ideas and practices.

The framers wisely placed the nation's colleges and universities, and particularly private institutions generally apart from judicial or even legislative interference. *Trustees of Dartmouth Coll., supra.*

Accordingly, "When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms . . . ." *Ewing*, 474 U.S. at 225; *see also id.* at 228 (courts may displace such judgments, if at all, only if they were found to be such a substantial departure from accepted academic norms or "aberrant"); *cf. Bakke*, 438 U.S. at 318 (Powell, J.) ("in an admissions program where race or ethnic background is simply one element – to be weighed fairly against other elements – in the selection process," good faith "would be presumed").[39]

Private selective colleges and universities have made, individually but with impressive unanimity, a collective judgment that obtaining diversity in their classes, including racial diversity, is a matter of profound educational importance and social importance, and that the way to obtain that diversity is by seeking it, in a process in which the reality of race is considered competitively along with dozens of other factors. Deference to the colleges' educational

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[39] *See also Ewing,* 474 U.S. at 227-28 (asking whether the challenged decision by educators was "beyond the pale of reasoned academic decision-making"). *Cf. Bd. of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 89-90 (1978) (courts are not equipped or authorized to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions - decisions that require "an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decisionmaking").

judgments that diversity is a core component of the education they are seeking to provide is plainly called for. Petitioners and their allies seeking to eliminate racial background from the list of dozens of other factors looked to in assembling a class have not met, and could not conceivably meet, the *Ewing* standard.

Displacement of a college or university's core prerogatives – including the power to decide which set of applicants, considered individually and collectively, will take fullest advantage of what the college has to offer, contribute most to the educational process in college, and be most successful in using what they have learned for the benefit of the larger society[40] – would be an extraordinary departure from the deference that courts have long shown to institutions of higher education generally, and particularly private institutions.

2. *Stare decisis* independently leads to the same judicial restraint required by *Dartmouth College*, *Sweezy*, and *Ewing*. The standards for reversal of *Bakke*'s constitutional holding, as set forth in *Dickerson v. United States*, 530 U.S. 428 (2000), and *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833 (1992), are not nearly met.

After *Bakke,* each of the *amici* (and undoubtedly other selective colleges and universities as well) reviewed their admissions procedures in light of Justice Powell's opinion sketching out a permissible approach (which five justices plainly supported), and set sail accordingly. Enormous reliance interests have built up accordingly. In dozens of ways, the schools where diversity is a significant reality have changed, and invested in change.

The peopling of the college communities with a more diverse group of students has made the colleges different (and better) than they were. Reliance on *Bakke* has had huge impact on the world in which aspiring families and their high school students, and college students, live. *Bakke* has left its mark on recruiting efforts, on relationships with

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[40] *The Shape of the River*, 277.

secondary public and private schools and high school counselors, on support services and programs, on housing choices, and on the curricula, which have broadened and developed to meet the needs and expectations of a more diverse student body. Current students and those matriculated for next year have expectations about being in a diverse community, and not being isolated.

Not only have the colleges invested in reliance on *Bakke;* so too have African-American students and their parents. Thousands of such students have been aiming for admission to the *amici* colleges, or their highly selective university counterparts. Reversal of *Bakke*, and any reversal of judgment in favor of the Michigan Law School, would as a practical matter turn realistic opportunities into lottery chances. Without the ability to take race into account – and even more, with a post-*Grutter* likelihood that differential admission rates in SAT bands would be attacked as *prima facie* evidence of unlawful discrimination – African-American presence on America's most selective campus would plummet, as it did in California.

In short, upending the world that *Bakke* created would interfere substantially with reasonable expectations and long-settled social patterns. That dislocation should weigh heavily against dispatching Justice Powell's opinion and the broadened opportunity it allowed for African-Americans at the nation's most selective colleges.

Extraordinary progress in opening up previously closed educational institutions has occurred since conscious efforts to include black Americans within the circle of those admitted to highly selective educational institutions in the United States began in the 1960's, and were held permissible in *Bakke.*[41] Many thousands of black Americans have graduated, and taken their place in

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[41] Jack Greenberg, *Affirmative Action in Higher Education: Confronting the Condition and Theory*, 43 B.C. L. Rev. 521, 569-71 (2002); *The Journal of Blacks in Higher Education*, available at http://www.jbhe.com/features/38_leading_colleges.html.

American society, and have benefited the society at large by their accomplishments and civic contributions. For the Court to deem their very degrees illegitimate, the basis for their achievements and contributions the product of violations of constitutional or statutory law, would be an extraordinary step, permissible, if at all, only if the constitutional or statutory text or history left no doubt whatever that *Bakke* reached the wrong result.

The Fourteenth Amendment's text does not preclude universities and colleges from considering racial background, *among other factors* and without quotas, in the service of diversifying their student bodies to include students from historically excluded groups (particularly when students from those groups would continue to be excluded if SAT or comparable quantitative tests were relied on as the sole or prime measure of selection). Given the repeated enactment of race-conscious legislation by the Congress that adopted the Fourteenth Amendment in order to close the social gap between blacks and whites, the Court could not fairly conclude that the "original understanding" of the Fourteenth Amendment prohibits what *Bakke* permits.[42] In view of that telling original understanding, it is plainly not possible to say that the holding in *Bakke* – that race may be considered competitively, along with other factors, so long as separate racial tracks are not set up – was plainly wrong.

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The judicial deference owed to colleges and universities, joined to the wise policy of *stare decisis*, counsels against any resolution of these cases that would interfere with the powers of colleges and universities generally – and particularly private institutions – to experiment and pursue

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[42] Eric Schnapper, *Affirmative Action And The Legislative History Of The Fourteenth Amendment*, 71 Va. L. Rev. 753, 784-85 (1985); Jed Rubenfeld, *Affirmative Action*, 107 Yale L.J. 427, 429-32 (1997); Jack Greenberg, *Affirmative Action in Higher Education: Confronting the Condition and Theory*, 43 B.C. L. Rev. 521, 577 & n. 322 (2002).

their own judgments as to how to best use their resources for educational and charitable purposes, even when doing so entails some consideration of racial background as one factor, among many, to be considered and weighed competitively with many others.

CONCLUSION

Academic freedom and the deference due educational judgments leave colleges and universities free to select those students who, in their judgment and as *Bakke* contemplated, will, individually and collectively, take fullest advantage of what the college has to offer, contribute most to the educational process, and use what they have learned for the benefit of the larger society. The Fourteenth Amendment, Title VI, and 42 U.S.C. §1981 do not prohibit colleges and universities from taking into account race or ethnic background as factors to be competitively evaluated and considered in admission decisions, without quotas. The judgments below should be affirmed.

Respectfully submitted,

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