Nos. 02-241 & 02-516

In the Supreme Court of the United States

BARBARA GRUTTER,

Petitioner,

v.

LEE BOLLINGER, JEFFREY LEHMAN, DENNIS SHIELDS, AND THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN, ET AL.

Respondents.

AND

JENNIFER GRATZ AND PATRICK HAMACHER,

Petitioners,

v.

LEE BOLLINGER, JAMES J. DUDERSTADT, THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN, ET AL.,

Respondents.

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

BRIEF *AMICUS CURIAE* OF THE BLACK WOMEN LAWYERS ASSOCIATION OF GREATER CHICAGO, INC., IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

The Black Women Lawyers Association of Greater Chicago, Inc. ("BWLA") is an association of African-American female lawyers, judges, law professors and law students whose mission is to provide professional support for the continued presence and participation of African-American women in the legal profession. As such, BWLA's interest in these cases is substantial. BWLA is in a unique position to provide a perspective on issues which may not be adequately covered by the parties in their briefs or by the other *Amici* before this Court. Specifically, BWLA's perspective is unique because many of its members have been beneficiaries of college, university and law school admissions programs designed to create diverse applicant pools and student bodies. Additionally, as an organization whose membership includes attorneys, law professors and judges, BWLA is in a unique position to describe the experience of practicing law as an African-American lawyer during the twenty-five years since this Court's decision in the *Bakke* case.

A ruling proscribing the consideration of race as one factor, among many, in admissions decisions would dramatically reduce the number of black students admitted to our nation's institutions of higher learning, and thereby curtail professional and other employment opportunities reserved for those with college and graduate levels of education. As African-American attorneys and judges, our presence in the legal system is critical to the public's perception that our system of justice is fair, open and inclusive. Our opportunity for full participation in the legal system will be determined by the outcome of this case. Finally, a ruling proscribing the consideration of race as a positive factor in admissions would have a devastating impact on efforts

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[1] Letters of consent by the parties to the filing of this brief have been lodged with the Clerk of this Court. Pursuant to rule 37.6, *amicus curiae* affirm that no counsel for any party in this case authored this brief in whole or in part. No person or entity, outside of *amicus curiae*, has made a monetary contribution to the preparation or submission of this brief.

to remedy past and present discrimination against African-Americans and, correspondingly, to eliminate the possibility of ever achieving a day when race no longer matters in America.

SUMMARY OF ARGUMENT

Race still plays a part in the lives of every American. History, statistical evidence, case law, and the personal experiences of our members demonstrate the important role that race plays in America. Race must remain a factor in the higher education admissions process as long as race remains a factor in America.

The focus of this case is on a state university's decision to use race as one factor, among several others, to include underrepresented minorities in its student body. With that focus in mind, we must consider that the educational institution that is seeking to uphold its admissions process which uses race as a factor is the same institution that had barriers to entry for African-Americans and perpetuated a racially hostile environment on its campus for years. Closing the door of opportunity on higher education for African-Americans will have an effect as dismal and lasting as slavery and the segregation laws have had on this country. The University of Michigan's inclusionary admissions processes are narrowly tailored solutions to an American dilemma that has spanned hundreds of years. Although the University itself does not argue that its own history of discrimination serves as a remedial justification for its admissions policies, the Intervenors have made a compelling case, and thus the Court should consider this justification.

In light of substantial evidence of the University of Michigan's specific discriminatory history, and American history itself, no other evidence should be required to justify a race-conscious admissions program designed to include the descendants of slaves in achieving equality of opportunity in this country. One need look no further than an American history book to identify acts of racial discrimination sanctioned under our nation's Constitution in order to justify a remedial admissions policy. Slavery, *de jure* and *de facto* segregation, and Jim Crow laws are undisputed chapters of American history that require no legislative, judicial or administrative determination to prove that they indeed occurred.

Moreover, the Supreme Court itself has had a major role in framing the issues and shaping the impact of race in this country through its decisions in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856), and *Plessy v. Ferguson*, 163 U.S. 537 (1896), among others. As those cases demonstrate, not even this Court was immune from discriminating against African-Americans in this country. Therefore, it comes as no surprise that no segment of American society has been immune from the legacy of discrimination that began with the institution of slavery and continues today in other forms. Proof of racial discrimination in this country is readily available and its continuing effects are sufficient to justify a remedial program designed to alleviate the effects of past discrimination against African-Americans.

As Justice Marshall stated in *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978):

> I agree with the judgment of the Court insofar as it permits a university to consider the race of an applicant in making admissions decisions. I do not agree that petitioner's admissions program violates the Constitution. For it must be remembered that, during most of the past 200 years, the Constitution, as interpreted by this Court, did not prohibit the most ingenious and pervasive forms

> of discrimination against the Negro. Now when a State acts to remedy the effects of that legacy of discrimination, I cannot believe that this same Constitution stands as a barrier.

438 U.S. at 387 (1978) (Marshall, J., dissenting). The University of Michigan's admissions processes are not only justified by the need to remedy past and present discrimination; they are also narrowly tailored to do so.[2] The proffered "race-neutral" means have racially discriminatory effects on African-Americans because they act and have acted to exclude African-Americans. Additionally, African-Americans are not stigmatized by programs that include rather than exclude them. Accordingly, the University's admissions programs should be upheld.

ARGUMENT

I. Historical Analysis of Institutionalized Racial Discrimination.

The United States of America is a country that was founded on racial differences—from your birth certificate to your death certificate, race matters. This Court cannot reach a resolution of these cases without considering the historical perspective of race in America and the Court's role in establishing a legal basis for the use of race in America.

Nearly four centuries ago, blacks were kidnaped and forcibly brought to this country to be sold into slavery. For two and a half centuries, African-Americans were held in slavery and deprived of the most basic human rights. Slaves were denied any form of education and, in many states, were legally

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[2] The BWLA recognizes that the University of Michigan contends that it has a compelling state interest in a diverse student body for a number of reasons. We support the University's actions in seeking a diverse student body and we join with other *amici* in support of the University's position. However, we will not address the diversity arguments in this brief.

forbidden to learn how to read. They had no right to vote, to participate in any political activities, to marry or to contract out their services. As property, they could be bought, sold, leased and seized on the whim of their owner. *See generally*, John Hope Franklin, *From Slavery to Freedom* (4th ed. 1974); Richard Kluger, *Simple Justice* 27 (1975).

The Constitution treated a slave as three-fifths of a person for purposes of apportioning Congressional representatives and taxes among the States. U.S. Const. art. I, § 2. The Constitution also contained a clause ensuring that the migration and importation of slaves would not end before 1808. U.S. Const. art. I, § 9. Congress later passed laws that strengthened the institution of slavery. In 1793 and 1850, Congress enacted fugitive slave laws that empowered the federal government to apprehend fugitives and offered no protection against enslavement of northern blacks who had been born free.

This Court facilitated the legal institutionalization of slavery through a succession of cases in the early nineteenth century that continued to confirm the status of blacks as mere property, and thus inherently inferior to whites. *See, e.g.*, *Groves v. Slaughter*, 40 U.S. (15 Pet) 449 (1841); *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825); *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 540 (1842). Perhaps one of the most notorious cases was *Dred Scott v. Sandford,* 60 U.S. (19 How.) 393 (1857). In *Dred Scott*, this Court concluded that blacks were not intended to be included as citizens but were "regarded as beings of an inferior order…altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect…." *Id*. at 407. In 1868, Congress ratified the Fourteenth Amendment. In *The Slaughter House Cases*, 83 U.S. 36, 71-72 (1873), this Court recognized that the "pervading spirit" and purpose of the Fourteenth Amendment was to remedy the evil of slavery. Similarly, early decisions of this Court recognized that the "one pervading purpose" of the Reconstruction Amendments was

"the freedom of the slave race, the security and firm establishment of that freedom and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him." *The Slaughter House Cases*, 83 U.S. at 71; *see also Bakke*, 438 U.S. at 398 (Marshall, J. dissenting); *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 94 (1945); *Nixon v. Herndon*, 273 U.S. 536, 541(1927).

Twentieth century governmental policies, both before and after *Brown v. Board of Educ.*, 347 U.S. 483 (1954*),* have perpetuated the legacy of slavery and state sanctioned segregation and discrimination by erecting barriers that depressed black economic advancement and substantially eliminated opportunities for generations of blacks to amass personal and familial assets. Even with the end of *de jure* segregation in public schools, blacks continued to suffer *de facto* segregation in public schools and the effects of federal policies designed to ensure their status as inferior third-class citizens. For example, for decades, beginning in the 1930's, the Federal Housing Administration ("FHA") actively fostered residential segregation. *See, e.g.,* Kenneth T. Jackson, *Crabgrass Frontier: The Suburbanization of the United States* 196-218 (1985); Gary Orfield, *Federal Policy, Local Power and Metropolitan Segregation*, 89 Pol. Sci. Q. 784-90 (1974-75). FHA Deputy Commissioner Philip Maloney reported in 1967 that in "a number of large urban centers…virtually no minority family housing has been provided through FHA." Orfield, *supra* at 789 (citing Cong. Rec. S15456 (1967)). The FHA also institutionalized overtly discriminatory lending practices that denied black families the opportunities to buy homes and accumulate equity. *See* Kenneth T. Jackson, *supra,* at 213-14 & n.41. This pattern and practice of discrimination in housing continued well into the 20th Century. For example, despite the passage of the Fair Housing Act in 1968 and an amended version in 1988, enforcement of housing anti-discrimination laws continues to be inadequate. *See* U.S.

Commission on Civil Rights, *The Fair Housing Amendments of 1988: The Enforcement Report* 5 (1988); Gary Orfield, *Segregated Housing and School Resegregation in Dismantling Desegregation* 299 (Orfield et. al. eds. 1996).[3]

The University of Texas at Austin did not formally desegregate until 1950 when it admitted a black law student pursuant to this Court's opinion in *Sweatt v. Painter*, 339 U.S. 629 (1950). The first African-American to enroll at Oklahoma State University was admitted as a graduate student in 1949 and received her master's degree in 1952. The University of Virginia admitted its first black undergraduate student in 1955. The University of North Carolina at Chapel Hill admitted black males to its undergraduate school in 1955. Duke University admitted its first black undergraduates in the Class of 1963. Harold A. Franklin became the first African-American student at Auburn University in 1964. Robert Gilbert was Baylor University's first black graduate in 1967. Until the mid-1940s, the University of South Carolina was the only state-supported law school in the South that had ever admitted African-Americans.[4]

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[3] *See also* Brief of NAACP Legal Defense Fund, Inc., as *amicus curiae* in *Adarand Constructors, Inc.* v. *Pena*, No. 93-1841 (1995).

[4] Lydia Lum*, Black Students' Struggles to Integrate Cause Doubts of Acceptance*, Houston Chronicle, August 24, 1997, http://www.chron.com/cgi-bin/auth/story/content/chronicle/metropolitan/hopwood/desegregation.html; Tambra Stevenson, *First Black Student Honored by OSU*, The Daily O'Collegian, April 15, 2002, http://www.ocolly.com/issues/2002_Spring/041502/stories/davis.html; Stephen Power, *Black Graduate Tells Story of Racism, Hatred Factored For Students in the 1950s*, Cavalier Daily, http://www.mcps.org/ss/5thgrade/desegUVA.pdf; Bridgett Williams*, Edith Hubbard: Survivor in the Era of Integration*, CNN.com February 15, 2001, www.cnn.com/fyi/interactive/specials/bhm/story/edith.hubbard.html; http://www.duke.edu/web/bsa/about.htm; http://www.auburn.edu/administration/governance/senate/franklin.html; Ratna Indah, untitled story, January 19, 1999, www3.baylor.edu/Lariat/Archives/1999/19990119/12_black.html; Daria

This historic pattern and practice of racial discrimination against African-Americans in education continued far into the 1970's—contrary to this Court's holding in *Brown* that "separate educational facilities are inherently unequal." *See, e.g. McDaniel v. Barresi*, 402 U.S. 39 (1971) (upholding Clark County, Georgia's mandatory integration plan to remedy past discrimination after a challenge by parents claiming it violated the Equal Protection Clause). Moreover, as recently as 1987, this Court acknowledged that the Alabama Department of Safety's "pervasive, systematic and obstinate discriminatory conduct" justified a narrowly tailored race-conscious remedy. *United States v. Paradise*, 480 U.S. 149, 167 (1987) (plurality opinion). Simply put, the effects of four hundred years of federal- and state-imposed racial discrimination have continued to the present. These effects did not disappear with the legal elimination of *de jure* discrimination.

II. Statistical Evidence of the Pervasiveness of Racial Discrimination.

Countless studies support our position that race continues to matter in America and that the experience of African-Americans differs fundamentally from the experience of whites. Not only is it fundamentally different, it is one in which our historical status as "beings of an inferior order" still acts as a disadvantage. This is true in housing, education, healthcare, employment, and in every aspect of society. Statistical evidence proves that racial discrimination continues to the present.

For example, this country remains residentially segregated on the basis of race. Black/white segregation in housing remains the most extreme of all residential segregation. Douglas S. Massey & Nancy A. Denton, *American Apartheid*: *Segregation and the Making of the Underclass* 235 (1993); Janny Scott, *Rethinking Segregation Beyond Black and White*,

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Roithmayr*, Barriers to Entry: A Market Lock-In Model of Discrimination,* 86 Va. L. Rev. 727, 755 (2000).

N.Y. Times, July 29, 2001, § 4, at 1, 6. Housing is the market that determines one's schooling, peer groups, safety, jobs, insurance costs, public services, home equity, and, ultimately, wealth. No other ethnic or racial group in the history of the United States has ever, even briefly, experienced the high levels of residential segregation that African-Americans face. Douglas S. Massey, *Residential Segregation and Neighborhood Conditions in U.S. Metropolitan Areas*, in 1 America Becoming 399, 401 (Neil J. Smelser et al. eds., 2001). Moreover, unlike the experience of other ethnic groups, class does not explain the segregation of African-Americans. No matter how socioeconomic status is measured, black residential segregation remains universally high. Massey and Denton, *supra* at 88 *n*. 87 (1993).

Discrimination also persists in employment. African-Americans continue to face the exclusionary barriers created by segregated social networks, information bias, and discrimination.[5] Discrimination in hiring underpins a continued lack of access to employment. Indeed, two economics professors at the University of Chicago Graduate School of Business and Massachusetts Institute of Technology recently conducted a study**,** which found that resumes randomly assigned white-sounding names elicited 50% more callbacks than resumes assigned stereotypically "African-American-sounding names"**.** The study's authors sent out 5,000 resumes in response to 1,300 job postings in *The Boston Globe* and *Chicago Tribune*. The stereotypically African-American and white sounding names were evenly divided so that the only

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[5] *See* Jomills Henry Braddock II & James M. McPartland, *How Minorities Continue to be Excluded from Equal Employment Opportunities: Research on Labor Market and Institutional Barriers*, 43 J. of Soc. Issues 28 (1987) ("Minorities face special difficulties in the employment process not only because they are victims of past discrimination in educational and occupational opportunities, but also because of the specific barriers that qualified individuals often encounter at present because of their membership in a race or ethnic minority group.").

differing factor was the name. T. Shawn Taylor, *What's In A Name? Bias, Sometimes*, Chicago Tribune, December 29, 2002, at page 5. Additionally, for applicants perceived as white, with resumes containing impressive skills, experience, academic degrees and honors received 30% more callbacks than those with low-quality resumes. Unfortunately, similar impressive credentials did not elicit more callbacks for African-Americans. According to the study's authors, a possible interpretation for such a finding is "when employers see a certain honor or skill, they don't put as much weight on it for African-Americans as they do for whites." The study concluded that racial discrimination is an important reason why African-Americans do poorly in the labor market. *Id.*

The current unemployment rate for African-Americans is 10%, for whites it is 5%. *Id*. In 2000, white men and African-American men were employed in managerial and professional (white-collar) occupations at 32 % and 18%, respectively. U.S. Census Bureau, Population Profile of the United States (2000). For women, the percentages were 35% for white women and 25% for African-American women. There are differential earnings for college educated African-Americans and whites. The median income for whites with a bachelor's degree or more was $41,700 in 2000. For African-Americans with a bachelor's degree or more, the median income was $36,600. U.S. Census Bureau, *Population Profile of the United States* (2000).

Unsurprisingly, there are significant disparities in household income resulting from a legacy of past and present racial discrimination in housing and employment. African-Americans earn less than whites in virtually every occupational group. Joseph Lupton & Frank Stafford, *Household Financial Wealth, (Thousands of 1999 Dollars)*, Institute for Social Research (Jan. 2000). The median household income for whites was $44,366 in 1999, compared with $27,910 for African-Americans. *Id.* For every dollar of wealth the median white household held in 1999, the median black household held 9 cents. *Id*. Net worth

for the median black household declined between 1994 and 1999 while net worth for white households increased 20%. *Id.*

Income disparities are further compounded when African-Americans pay more for financial services than their white counterparts. African-Americans paid on average more than double the discretionary finance charges than white automobile buyers with comparable credit ratings. *See* Diana B. Henriques, *Nissan's Loan Cost, Racial Tie Revealed*, The N.Y. Times, July 4, 2001. A statistical study conducted by Professor Mark Cohen of Vanderbilt University of 300,000 car loans arranged through Nissan dealers from March 1993 to September of 2000, shows that black customers in 33 states consistently paid more than white customers, regardless of their credit histories. *Id.* More specifically, African-American customers with the best credit rating paid on average $660 for discretionary finance charges on auto loans, while white customers spent $299 according to the study. African-American customers with the worst credit risks paid $1,100, while similar white customers paid $800. *Id.*

In African-American neighborhoods, sub-prime lenders now account for more than half of all refinanced loans, compared to just 9 % in predominantly white neighborhoods. From 1995 to 2000, the number of sub-prime purchase loans to African-American home buyers rose 714 %, while the number of prime conventional purchase loans fell 2.5 percent. Association of Community Organizations for Reform Now (ACORN) *"Separate But Equal: Predatory Lending in America"* (2002).

As shown above, every major indicator demonstrates that African-Americans, regardless of socioeconomic status, continue to experience the effects of racial discrimination. This is true even in the healthcare field. A report in the Journal of the American Medical Association found that blacks enrolled in Medicare managed-care plans received a poorer quality of care than white enrollees. More specifically, African-Americans over age 65 are 10% less likely to receive medications called beta-blockers to prevent repeat heart attacks. Blacks enrolled in

Medicare managed-care plans are 21 percent less likely than whites to receive follow-up help after hospitalizations for mental illnesses. Blacks are also 7% less likely to receive eye exams to prevent blindness from glaucoma resulting from diabetes. Several factors are generally associated with inferior medical care, including lower socioeconomic status. But the researchers found that after correcting for these factors, significant racial disparities persisted. Harold Freeman and Eric C. Schneider, *Racial Disparities in the Quality of Care for Enrollees in Medicare Managed Care*, Journal of the American Medical Association 1288 (March 14, 2002). Moreover, the New England Journal of Medicine reported in a study involving African-American and white actors playing patients, physicians were significantly less likely to recommend cardiac catheterization for African-American females than for white females, white males and African-American males exhibiting the same symptoms. Kevin A. Schulman, *The Effect of Race and Sex on Physicians: Recommendations for Cardiac Catheterization,* The New England Journal of Medicine 618 (February 25, 1999). Even pain medications are prescribed at differing rates for white and black patients. Carol S. Weisse, *et al*., *Do Gender and Race Affect Decisions About Pain Management*, Journal of General Internal Medicine 211 (April 2001) (study found that male physicians prescribed twice the level of pain medication for white patients than black patients.).

The above statistics provide ample evidence establishing the overwhelming present-day discrimination faced by African-Americans in all facets of our lives. The one factor that has served to narrow the professional, housing, and economic gaps is access to higher education. As the statistics set forth above establish, without race as a criteria in admissions, the doors to economic opportunity through higher education will be closed.

III. The Experience of Black Women Lawyers in the 20th and 21st Centuries—A Difference in Kind and Not Just Degree.

Petitioners and certain *amici* argue that race should not be used as a factor to deal with "societal discrimination." Use of the term "societal discrimination" diminishes the pervasive nature of the discrimination faced by African-American lawyers and fails to accurately describe our experiences and the depth with which racial discrimination continues to affect us. Justice Marshall wrote in *Bakke* that "[t]he experience of Negroes in America has been different in kind, not just in degree from that of other ethnic groups." 438 U.S. at 400 (Marshall, J., dissenting). The collective experience of our members corroborates Justice Marshall's observation. Below, we provide a representative sample of some of the experiences of a few of our members to demonstrate to this Court that despite the acquisition of both undergraduate and graduate degrees, race acts as a significant disadvantage for African-American lawyers.

One of our members describes growing up in Chicago during the late 1970's and early 1980's and attending college after *Bakke* as follows:

> In approximately the eighth grade, I moved to a very segregated neighborhood on the south side of Chicago. The neighborhood was predominantly white. My family was the first black family on our block. I was one of only 8 black students in my eighth grade class. I was called "Nigger" and "little black girl" and shunned by all but the other black students in the class. Within one year of my family moving to our block, every white family on the block moved out and was replaced by black families. Not only my block changed over racially, but the entire neighborhood changed from white to black. During the first year however, the police were at our house constantly due to the racial harassment my family faced.

> On several occasions, we were awakened to crosses burning in the yard. One night, someone set our garage on fire, which caused the gas lawnmower inside to catch fire.
>
> In the late 1970's, when I graduated from high school, I went to the largest public university in our state. I was the only black person in my field of study. I was the only black person in classes in my major. Once, in a standing room only lecture hall, white students chose to stand as opposed to sitting down in the empty seats next to me on either side or behind or in front of me.

Another of our members described her experience growing up in Chicago and attending college and law school and practicing law since *Bakke* as follows:

> I grew up on the South side of Chicago in an all-black segregated neighborhood and attended public elementary and high schools in Chicago. In order to attend a better high school, my mother sent me to an integrated school outside my neighborhood. I finished near the top of my high school class and graduated from Harvard College with honors in 1977. Before I applied to college, I did not know anyone who had gone to Harvard or to college in the Boston area. I also graduated from Harvard Law School in 1982. I am a beneficiary of race-conscious admissions and I do not feel stigmatized by that fact. No one in my family attended Harvard. I am the first lawyer in my family.
>
> Since law school, I have worked in the legal departments of two Fortune 200 companies, two large law firms, one small law firm and a government legal department. In most of my jobs since law school, I have been the only black lawyer or one of less than a handful of lawyers. On a few occasions, I was the first black lawyer or first black female attorney to work at that company or firm. During my 21 years of practicing law,

> I have rarely been in a meeting in a business setting where another black person was present. These experiences made me feel very isolated and alone. For most of the white people with whom I have worked, their experience with me is their first meaningful experience with a black lawyer and, as a result, I often have to spend time and energy trying to dispel the stereotypical assumptions they have about black women lawyers or black people, in general. I attribute all I have accomplished in my legal career to my hard work and the opportunity to attend Harvard College and Harvard Law School.

Another of our members describes her experience of attending law school in the South during the 1970's and her experience in the practice of law:

> In 1973, I happened to catch a glimpse of a TV interview of a black Congresswoman who commented that she was a lawyer. I thought, "she looks like me. Maybe I could be a lawyer too." I did not know one black woman lawyer. I had no role models. I had a husband and two small children. But I applied to law school anyway and was wait-listed. Full of self-doubt, I was scared to death that I would not get in and even more scared that I would. I got in and for the first time in my life I had black classmates and I honestly believe that I would not have made it through that first year without their encouragement and support. I did well. After my second year of law school, we moved to the South. I had to transfer. I made an appointment with the dean of the state's flagship law school who told me there was absolutely no place for me there. I persevered and found my way to the school's affirmative action committee. I got in. For two years, I was ignored by virtually all of my white classmates and only tolerated by most of my professors. Fortunately, I received support from the other

> black students and I learned to function and even thrive in an atmosphere of cold southern racism.
>
> For the past 23 years, I have practiced law in a government agency. In our office, there are approximately 40 lawyers, including three black women. It has primarily been an atmosphere of benign neglect. However, I have found my way and have had a rewarding career investigating and litigating fairly complicated cases. One of my daughters graduated with honors from a well-known law school. She practices public interest law.

This member describes her experience with desegregation in the South and her experience in the practice of law:

> In 1966, twelve years after *Brown*, a decree entered by the Court of Appeals for the Fifth Circuit finally brought integration to the schools in my southern home town. I, together, with two other young children, each day left my segregated community to attend a school on the other side of town. Although the schools were integrated, movie theaters, doctor's offices and the dressing rooms of many retail establishments remained segregated. I was ridiculed and taunted by white children who were opposed to my presence in the school. During most of my fourth grade year, my teacher referred to me as a "negress". In 1971, we moved to Chicago. After graduating from high school in the top 2 % of my class, I attended the largest state university in Illinois. I was the only African-American student in the entire department in my field of concentration. Students ignored my presence and very few would offer me any assistance. I later attended law school and graduated in 1983. I joined the law department of a local public agency, where I was one of four African-American attorneys in an office of over 150 attorneys. I presently work in a government law office of approximately 140 attorneys as a supervisor. There are

> only 4 other African-American attorneys in the office. My years of practice have been marked by negative events arising solely from my race. My competence has been challenged repeatedly. I have been mistaken for the court clerk, judge's secretary and an office secretary. I have learned to live with a sense of isolation in the practice.

Another of our members describes her experience growing up in the 1980's and practicing as a lawyer in Chicago:

> I grew up in the south suburbs of Chicago as one of four children. As medical doctors, my parents afforded us the best possible educational, athletic and community-oriented opportunities that they could. We grew up in a predominantly white affluent suburb. We received racial threats by telephone and mail while we were in high school and elementary school. My experiences in college, graduate school and law school only broadened my exposure to racism. Despite a presence of a diverse group of students, disparate treatment from the white students was the norm.
>
> My experience in the law practice is similar. When appearing before judges or other attorneys, I am regularly mistaken for a non-lawyer. My experience at my law firm is similar. I have come to accept that my work will be more closely scrutinized than white lawyers at the firm and I am constantly attempting to overcome the assumption of incompetence that many African-American attorneys face. If it were not for my husband, who is also an African-American attorney, it would be largely impossible to endure the sense of isolation that I often feel.

These experiences are provided as anecdotal evidence of the experience of black women lawyers. There are as many different stories as there are members of our organization, but one thing is clear. The experience of African-Americans is

"different in kind, not just degree" from that of other Americans. Twenty-five years after *Bakke* and almost fifty years after *Brown*, in every day, in every way, our members experience instances of racial discrimination too numerous to recount. The pervasive nature of the discrimination makes it institutional in nature. At a minimum, it is structural and continuing. To eliminate it, we need more African-Americans educated and able to fully participate in all aspects of society. Race-conscious admissions serves as a way to ensure that African-Americans continue to have the access to higher education.

IV. Remedying Past Racial Discrimination In Higher Education Is a Compelling State Interest.

Race-conscious admissions in higher education give meaning to this Court's holding in *Brown* that "separate educational facilities are inherently unequal." *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954). There is a long history of racially segregated (both *de facto* and *de jure*) institutions of higher education in America. Many of the historically black colleges and universities developed because blacks were excluded from the private and state institutions of higher education. Use of race as one factor, among many, in the admissions process, has helped to reduce the level of *de facto* segregation in predominantly white institutions of higher education. Therefore, we urge this Court to uphold the use of race as a factor to remedy this history of racial discrimination against blacks by state actors.

In 1955, only 4.9 % of college students ages 18-24 were black. This figure rose to 6.5 percent during the next five years, but by 1965 had slumped back to 4.9 %. Only in the wake of affirmative action measures in the late 1960s and early 1970s did the percentage of black college students begin to climb steadily (in 1970, 7.8 percent of college students were black; in 1980, 9.1 % and in 1990, 11.3%). University of Rhode Island, *Office of Affirmative Action, Equal Opportunity, and Diversity,*

www.uri.edu. Even these bleak percentages of black enrollment between 1955 and 1965 only came about because of the change from governmentally sanctioned racial discrimination to governmentally imposed desegregation.

A. The University of Michigan's Discriminatory History.

The University of Michigan was founded in 1817 and admitted its first African-American students in 1868. Joint Appendix, *Gratz v. Bollinger*, Nos. 01-1416, 01-1418, 01-1438 (6th Cir.) (hereinafter "6th Cir. J.A."), at 2265. However, the University supported segregation in campus housing and allowed the exclusion of students of color from fraternities, sororities and University organizations into the 1960's. 6th Cir. J.A. at 3757. A program designed to recruit and admit disadvantaged students to the University had the effect of increasing minority enrollment; however, minority students were still excluded from campus activities and social traditions. 6th Cir. J.A. at 2274-76, 3768.

From 1949 to 1952, the Michigan Civil Rights Congress and other groups called for an end to discriminatory clauses in the constitutions and by-laws of all campus organizations. 6th Cir. J.A. at 2266. However, University President Harlan Hatcher flatly rejected the proposal, and effectively allowed all University organizations to continue their discriminatory practices. In 1966, the Department of Defense investigated the University's compliance with Title VI of the 1964 Civil Rights Act. 6th Cir. J.A. at 2270-71. The Department urged campus administrators to increase recruitment of black students, faculty and staff. *Id*. In 1970, intense dissatisfaction with the University's failure to address campus racism and the University's failure to increase minority enrollment culminated in a series of student strikes. The students urged the University to increase its African-American enrollment and increase financial aid to minorities. 6th Cir. J.A. at 2278-80. The proposal was supported by Governor William Milliken, while the University administrators rejected it. After a strike by

students, the African-American presence at the University increased to 6.8% in 1972. 6th Cir. J.A. at 2287.

In 1975, requests by minority students to increase the support services on campus and to address the negative racial climate on campus were rejected by President Robben Fleming. 6th Cir. J.A. at 2298-99. With no minority recruitment and admissions effort in place, well-publicized discrimination on campus and no corresponding University redress, enrollment and retention rates of minorities declined between 1976 and 1985. 6th Cir. J.A. at 3885. During that time period, the University's African-American student population dropped by 34 percent. *Id.*

During the 1980's, the "Michigan Mandate" was announced as a plan aimed at addressing racial discontent at the University and to increase the number of students and faculty of color. 6th Cir. J.A. at 1378-79. The Mandate acknowledged the "prejudice, bigotry, discrimination and even racism" on the Michigan campus. 6th Cir. J.A. at 1390.

The University of Michigan's history of egregious discriminatory practices towards minorities is well-documented. Intervenors in both cases below submitted evidence of the University's policies of racial discrimination and segregation that must be considered in the Court's determination of whether a race-conscious admissions policy is a compelling state interest in these cases. The University's admissions policies permit the "limited use" of race as one factor, among many others to include African-Americans. This "limited use" of race as a factor in a university's admissions program is one way to remedy the effects of racial discrimination, and thereby, reduce the economic disparity that exists between black and white citizens in this country. It also serves as a mechanism to increase the numbers of African-Americans that are given an opportunity to attend universities whose ancestors were traditionally excluded and/or discriminated against in the admissions process.

According to this Court, "a public employer. . . must ensure that, before it embarks on an affirmative-action program, it has convincing evidence that remedial action is warranted. That is, it must have sufficient evidence to justify the conclusion that there has been prior discrimination. Evidentiary support for the conclusion that remedial action is warranted becomes crucial when the remedial program is challenged in court by nonminority employees." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986). The University of Michigan's prior discrimination satisfies this standard and should provide sufficient evidentiary support for a race-conscious affirmative action program that has the effect of remedying past discrimination.

B. The School Desegregation Cases Establish the Constitutionality of Race-Conscious Remedial Measures.

The constitutionality of race-conscious remedial measures is well established. Several school desegregation cases have recognized that, even absent a judicial or legislative finding or a constitutional violation, a school board constitutionally could consider the race of students in making school assignment decisions. *See, e.g., Swann v. Charlotte-Mecklenburg Board of Educ.,* 402 U.S. 1, 16 (1971); *McDaniel v. Barresi,* 402 U.S. 39, 41(1971); *Bakke,* 438 U.S. at 399. But the Court has gone further, stating that:

> [A] flat prohibition against assignment of students for the purpose of creating a racial balance must inevitably conflict with the duty of school authorities to disestablish dual school systems. As we have held in *Swann [v. Charlotte-Mecklenburg]*, the Constitution does not compel any particular degree of racial balance or mixing, but when past and continuing constitutional violations are found, some ratios are likely to be useful as starting points in shaping a remedy. An absolute prohibition against use of such a device–even as a starting point–contravenes the implicit command of *Green v. County*

> *School Board*, 391 U.S. 430 (1968), that all reasonable methods be available to formulate an effective remedy.

North Carolina Bd. of Educ. v. Swann, 402 U.S. 43, 46 (1971).

This Court asserted in *McDaniel* that "[s]chool boards that operated dual school systems are 'clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.'" 402 U.S. at 41, *quoting Green v. County School Board*, 391 U.S. 430, 437-38 (1968). "In this remedial process, steps will almost invariably require that students be assigned 'differently because of their race.'" *McDaniel,* 402 U.S. at 41. "Any other approach would freeze the status quo that is the very target of all desegregation processes." *Id*.

The University of Michigan's race-conscious admissions policy is merely an effort to integrate or desegregate an institution of higher learning that allowed state-sanctioned discrimination against African-Americans in its recent past. As a result, this Court should support the continued desegregation of the University by allowing race to be utilized as one factor, among many others, in its admissions process.

V. Race-Neutral Plans Are Inherently Race-Conscious and Disadvantage African-Americans.

The beginnings of black presence in higher education in any significant numbers can be traced to Executive Order 1146 issued by President Lyndon Johnson in 1965. That Order forbade discrimination on any basis that included race by those contracting with the federal government. By 1990, 11% of college students were black, a figure which largely mirrored the percentage of blacks in this country. Our continued presence in higher education in meaningful numbers is threatened by potential elimination of race-conscious admissions plans approved by the Court in *Bakke.*

Almost 25 years ago the Court in *Bakke*, 438 U.S. at 320, held that "the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin." In *Bakke,* this Court approved the use of race as a "plus" factor in admissions if the plan was narrowly tailored to further that interest. 438 U.S. at 315-20. The Court determined that the attainment of a diverse student body is a constitutionally permissible goal protected under the First Amendment to the Constitution. 438 U.S. at 311-12. The University of Michigan has defended its admissions policies by producing evidence which establishes clear compliance with the requirements of *Bakke.*

The Petitioner and other *amici* argue that the University's policies fail to pass the required strict scrutiny test because they are not narrowly tailored given the existence of purportedly race-neutral alternatives. As examples of "race-neutral" alternatives, the United States directs the Court to the experiences of state universities in Texas, Florida and California.[6] In these states, race conscious admissions policies were eliminated and replaced with purportedly race neutral plans that focus on the admission of a certain top percentage of high school students from every high school in the state. The viability of a purported diversity initiative whose success depends on residential segregation to produce meaningful results is troubling. The Florida, California and Texas plans are no more "race-neutral" in effect than any "race-neutral" plan would be in a country with a history of racial segregation. "Percentage plans function effectively to diversify higher education only if secondary education remains firmly racially segregated. Percentage plans are a reflection of current day educational apartheid, highlighting the fact that much of our secondary education system is both racially segregated and

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[6] *See*, *e.g.*, Brief of the United States in *Gratz* at § C1; Brief of the State of Florida and Governor Jeb Bush at 6-10.

profoundly unequal." Michelle Adams, *Isn't It Ironic? The Central Paradox at the Heart of "Percentage Plans",* 2001 Ohio State Law Journal 1.

Under the Texas plan, high school students in the top 10 % of their class are entitled to attend the University of Texas or Texas A & M--the state's two flagship campuses--or any other state university. While the number of minority students *applying* to public universities in Texas increased, the percentage of those *admitted* declined. Mary Frances Berry, *How Percentage Plans Keep Minority Students Out of College,* The Journal of Higher Education (August 4, 2000). With regard to black enrollment at the University of Texas Law School, after 1997, black enrollment in the first year class fell from an average of 34 to an average of 10. *Black Law Student Enrollments: A Virtual Eviction in Texas and California,* Journal of Blacks in Higher Education, at page 8 (Summer 1997). In Florida, many minority students attend substandard public schools that do not offer the courses needed for entry to the state's university system. Furthermore, the Florida plan does not require the state's flagship schools to admit the top twenty per cent from every high school, potentially creating a two-tier system of "separate but equal educational facilities." In fact, the State of Florida admits in its brief as *amicus curiae* that the percentage of African-Americans enrolled at the University of Florida, one of its flagship institutions, decreased after the implementation of its "race-neutral" plan. *See* Brief of the State of Florida and Governor Jeb Bush at 9. Enrollment of African-Americans in the 1999-2000 academic year, the last year before the plan was implemented, was 9.95%. It fell to 7.15% in 2001-02 after the plan was implemented. *Id*.

The statistics regarding minority enrollment in California are not much better. In 1995, after the California board of regents voted to end all affirmative action programs in its admissions, at the University of California-LosAngeles ("UCLA"), enrollment dropped from 470 to 265. William C. Kidder,

Affirmative Action in Higher Education: Recent Developments in Litigation, Admissions and Diversity Research, 12 Berkeley La Raza L.J. 173, 210 (2001). The last time there were so few African-American students at UCLA was 1968. *Id*. at 209. In 1997, law school admissions at University of California law schools dropped 76.6%. Theodore Cross and Robert Bruce Slater, *How Bans on Race-Sensitive Admissions Severely Cut Black Enrollments at Flagship State Universities*, The Journal of Blacks in Higher Education (February 6, 2003). For example, in fall 1999, there were only two black students and one Native American student enrolled in the UCLA Law School. Jennifer Lin, *Civil Rights Commission Denounces Percentage Programs*, In Motion Magazine, at 7 (June 2, 2000). In fall 2002, 13 black students enrolled at the law school at UCLA; this is less than one third the total black first year enrollments in 1994. Today, first-year enrollments at the Boalt Hall Law School University of California at Berkeley, are still less than one half the level of black enrollments that existed less than a decade ago when race conscious admissions were in place at the University. Cross and Bruce, *supra*, at 7.

In 2000, a federal district court ruled that the University of Georgia's admissions program was unconstitutional. The Eleventh Circuit Court of Appeals upheld this decision and, as a result, in 2001 the University of Georgia was forced to utilize a strict "race-neutral" admissions policy. In the first year under the plan, the number of black freshmen at the University of Georgia represented a 20% decline from the number of black freshmen who enrolled at the university in the fall of 2000. *See* Cross and Bruce, *supra*.

Similarly, if institutions rely solely on standardized tests such as the SAT or LSAT, these scores do not have a "race neutral" effect. The College Board's data demonstrate that these tests continue to display differences based on race. Theodore Cross, *Why the Hopwood Ruling Would Remove Most African-Americans from the Nation's Most Selective*

Universities, Journal of Blacks in Higher Educ. (Spring 1996), at 68. Minorities on average score lower than whites on the LSAT and on other standardized tests. *Id*. Thus, in practice standardized tests do not have a race neutral effect. *See id.* at 67; Elizabeth Chambliss, *Miles to Go 2000, Progress of Minorities in the Legal Profession,* American Bar Association, Commission of Racial and Ethnic Diversity in the Profession (2000). Moreover, researchers have established that scores on standardized tests are no predictor of law school or professional success. Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming The Innovative Ideal,*, 84 Cal. L. Rev. 953 (1996) ("[Standardized tests] do not reliably identify who will succeed in college or later in life, nor do they consistently predict those who are most likely to perform well in the jobs they occupy"). In practice, standardized tests are more a predictor of race and wealth rather than academic competence. Indeed, data collected indicate in that "many test [scores] correlate quite closely with parental income". *Id.* at 988.

Reliance on "legacy" admissions as a purported "race-neutral" admissions factor is also misplaced. With the exception of historically black colleges, blacks were systematically discriminated against and refused admissions to colleges and universities throughout the fifty states. Hence, most colleges and universities can identify the date the first African-American was admitted. Those dates generally are within the 20th century, and certainly only within the last 25 years have African-Americans been admitted in any meaningful numbers. With that historical context, it is easy to see that reliance on the legacy of a parent or a grandparent or a great-grandparent being an alumnus for purposes of admission is simply a race-based policy by another name. Virtually all alumni of predominantly white state institutions were white until the last 25 years or so, therefore, only white students will benefit from this classification. Legacy admissions are simply another proxy for race—the white race—which continues the

discrimination of the past and disadvantages blacks with no compelling state interest. Simply put, it is not "race neutral."

As set forth above, reliance on "race-neutral plans" which largely depend on the existence of residential segregation to ensure success is a poor substitute for an admissions plan which allows educators to conduct an individualized assessment of an applicant. It is estimated that imposing purportedly race neutral standards in admissions would decrease the number of blacks in colleges to 2%. William G. Bowen & Derek Bok, *The Shape of the River: Long Term Consequences of Considering Race in College and University Admissions*, at 280 (1998). This would be lower than levels seen at the time of this Court's decision in *Brown* when black enrollment in largely segregated colleges was approximately 5%.

VI. Beneficiaries of Affirmative Action Are Not Stigmatized.

Ward Connerly as *amicus curiae*, at 13-14, argues that there is a stigma of inferiority placed on African-Americans when race is one of the factors, among others, used in the higher educations admissions process. He argues that this Court should be mindful of this stigma on African-Americans when it is weighing the constitutionality of an admissions process which considers race as a factor in including historically underrepresented groups. We acknowledge that the stigma of inferiority is something that African-Americans must bear in this country. However, we disagree that the source of the stigma is a policy designed to provide opportunities to African-Americans who have been historically disadvantaged.

We attribute the source of the stigma of inferiority with which African-Americans often suffer to this nation's history of slavery and the Constitution's treatment of former slaves as property and otherwise inferior human beings. Additionally, we attribute the source of the stigma to the legal system's codes and case law that branded blacks as inferior. As Justice

Marshall stated in *Bakke*, the inferiority suffered by blacks was created by a legal system which denied opportunity to blacks. 438 U.S. at 400 (Marshall, J., dissenting) ("It is not merely the history of slavery alone but also that a whole people were marked as inferior by the law. And that mark has endured."). As black women lawyers, we have not been stigmatized by having the opportunity to attend predominantly white colleges, universities and law schools.

We note that Petitioners and *amici* that support them do not assert that the black students admitted are unable or unqualified successfully to complete the academic curriculum and graduate. Similarly, we note that the Petitioners and *amici* do not assert that black lawyers are less competent or less accomplished than their white peers. That being said, it appears the stigma argument is a distraction to divert this Court's attention from the highly qualified nature of the black students who are admitted and the accomplishments of black lawyers who graduated from these institutions. For examples, statistically African-American lawyers have significantly higher levels of participation in civic activities and leadership than their white counterparts, thereby making their survival important in cultivating leadership for our community. Richard O. Lempert, *et al*., "*From the Trenches to the Towers": Law School Affirmative Action: An Empirical Study of Michigan's Graduates in Practice: The River Runs Through Law School*, 25 Law & Soc. Inquiry 395, 455-56 (2000).

Unfortunately, in recent years, our presence in the legal profession has declined. In 1999, the total number of minority law graduates dropped for the first time since 1985. Minority representation in the legal profession is about 10%; the only profession lower is dentists–4.8%. Combined African-American and Hispanic attorneys make up only 7% of the

profession.[7] There are fewer African-American federal appellate court judges today than there were under President Jimmy Carter. Three quarters of the federal circuit courts have either no African-American or no Hispanic jurist. *Id*. Less than 3% of partners in large law firms are racial minorities. The attrition rates of African-American associates and partners from large law firms is staggering. Accordingly, while we do not perceive or suffer any stigma of inferiority from having the opportunity to attend certain predominantly white institutions of higher education, we do feel a sense of urgency that we not retreat from efforts made to increase our presence in the legal profession.

The University of Michigan's use of race was narrowly tailored, as is constitutionally required, because no race-neutral means yet exist to serve the compelling interest in diversity of the student body in institutions of higher education. Certain *amici* have raised the question, when will this use of race to achieve diversity end? They suggest that there is no logical ending. However, they are wrong. The logical ending is when race no longer matters in America. We will know that we have reached that point when a child born black has the same opportunity in America as a child born white in America. We will have reached that day when research reflects that there is no economic disparity in America based upon race for individuals similarly situated. We will have reached that day when a black person with a stereotypically African-American name and an identical resume to that of a white person with a stereotypically white name as an equal opportunity to get a job interview in America. Until the research reflects that the historic legacy of slavery and its continued discriminatory effect has disappeared, we must use race conscious means to

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[7] Lawyers for One America, Bar None: Report to the President of the United States on the Status of People of Color, www.lfoa.org/barnone_collaboration .html.

keep the doors of opportunity open to African-Americans in America.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Sixth Circuit in *Grutter* should be affirmed and the district court's judgment in *Gratz* should be reversed.

Respectfully submitted.

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