No. 02-241

IN THE

Supreme Court of the United States

BARBARA GRUTTER,
Petitioner,

v.

LEE BOLLINGER *et al.*,
Respondents.

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

BRIEF OF *AMICUS CURIAE* ASSOCIATION OF AMERICAN LAW SCHOOLS IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

CONSTITUTIONAL AND STATUTORY PROVISIONS

TABLE OF AUTHORITIES—Continued

OTHER MATERIALS

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF *AMICI CURIAE*

The Association of American Law Schools (AALS) is a non-profit association of 165 public and private law schools. Its purpose is "the improvement of the legal profession through legal education." The AALS serves as the learned society for law teachers and is legal education's principal representative to the federal government and to other national higher education organizations and learned societies.[1]

In light of its commitment to "equality of opportunity in legal education for all persons," AALS Bylaw § 6-4(a), the AALS requires that "[a] member school shall seek to have a faculty, staff, and student body which are diverse with respect to race, color, and sex." AALS Bylaw § 6-4(c). In November 1995, the AALS Executive Committee adopted a *Statement on Diversity, Equal Opportunity and Affirmative Action* reiterating the judgment of its member schools that increasing "the number of persons from underrepresented groups in law schools, in the legal profession and in the judiciary" is "economically necessary, morally imperative, and constitutionally legitimate." *Id.* Consistent with that judgment, most AALS member institutions use some form of race-conscious affirmative action in their admissions process. This case raises issues both under the equal protection clause, which binds the public law schools that belong to the AALS, and under federal statutes that apply to all members of the AALS, public and private. It casts doubt on the legality of the long-established admissions processes of many AALS members.

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[1] The parties' blanket letters of consent to the filing of all *amicus* briefs in this case have been filed with the Clerk of this Court. None of the parties authored this brief in whole or in part and no one other than *amicus* or counsel contributed money or services to the preparation and submission of this brief.

SUMMARY OF ARGUMENT

In *Sweatt v. Painter*, 339 U.S. 629, 634 (1950), this Court recognized that law schools are not an "academic vacuum." Rather, they prepare students to practice a profession that lies at the core of American self-governance. The twenty-five years since this Court's decision in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), have confirmed that carefully constructed affirmative action programs, like that of the University of Michigan Law School, are essential if law schools are to play their vital social role of producing lawyers, judges, and public servants for an increasingly multiracial and multiethnic society.

The legitimacy of the American legal system depends on meaningful minority participation at every level. Legal training is a formal prerequisite for many key positions—from prosecutor to legislative counsel to attorney-adviser within the executive branch to judge. And it provides an informal gateway to even more. It is not necessary to assume that all members of a racial or ethnic group share a point of view to conclude that if "a substantial and significant segment of society" is excluded from law schools, *Sweatt*, 339 U.S. at 634—and ultimately from governmental bodies composed entirely or largely of lawyers—the ensuing discussions will lack "qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable," *Peters v. Kiff*, 407 U.S. 493, 504 (1972), but nonetheless critical to the quality and public legitimacy of the deliberations.

A very small group of law schools produces a remarkable share of the Congress and federal judiciary, including a high proportion of black and Hispanic high public officials. Both during and after their law school years, white and minority lawyers, as well as the nation as a whole, benefit greatly from racially integrated legal education in these selective institutions.

Race-conscious admissions policies are necessary to achieve the paramount government objective of ensuring equal access to legal education, the legal profession, and the process of self-government. Contrary to what the United States and other *amici* supporting petitioner claim, there are currently no race-neutral ways of achieving racially integrated law schools that are narrowly tailored once law schools' complex mission is taken into account. The formally race-neutral alternatives to which opponents of affirmative action point are not race-neutral as a constitutional matter when a government actor decides to adopt one of these policies because of its racial consequences. *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256 (1979).

Moreover, none of the proposed alternatives is feasible for selective law schools. These schools draw their student bodies from a nationwide pool of undergraduate institutions, so plans that guarantee admission to students with a particular class rank cannot work. Nor could lotteries produce entering classes that simultaneously achieve racial diversity and representation of students with particularly valuable experiences or talents. While formally race-neutral but nonetheless race-conscious admissions processes might achieve a modicum of racial integration, they do so only by entirely subordinating a law school's other institutional interests.

Finally, principles of *stare decisis* weigh heavily in permitting law schools to continue using the kind of carefully constructed affirmative action plans that have formed a mainstay of admissions policies since the early 1970's, while they remain necessary to achieving racially integrated student bodies. This Court recognized in *Planned Parenthood v. Casey*, 505 U.S. 833, 856 (1992), that *stare decisis* is particularly important when over "two decades of economic and social developments" and individuals' "views of themselves and their places in society," rest on this Court's decisions. *Bakke* has had this effect. Both public *and* private law schools reasonably relied on this Court's guidance, and

have defined themselves, and have come to be understood by their students, their faculties, their alumni, and the public as institutions that can achieve both academic excellence and meaningful racial integration. While the effect of reliance on *Bakke* cannot be measured exactly, the costs of overruling *Bakke*, to both the legitimacy and the future functioning of the legal system, would be substantial.

ARGUMENT

I. A RACIALLY INTEGRATED SYSTEM OF LEGAL EDUCATION IS CRITICAL TO AMERICAN DEMOCRACY

Since the nineteenth century, observers have remarked on the central role that lawyers play in the United States. See Alexis de Tocqueville, Democracy in America, vol. I, chapter XVI (1st ed. 1835) (Vintage ed. 1945). One need not go as far as de Tocqueville in viewing courts as "the visible organs by which the legal profession is enabled to control the democracy," *id.* at 289, to recognize that lawyers and judges occupy a distinctly powerful and privileged position within the American political system.

As this Court has repeatedly recognized, "officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government." *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973). Legal training is a formal prerequisite to many of these positions and a practical path to even more. Because of law schools' critical role in training the individuals who become our leaders, entry into law school cannot be shut to large segments of American society without striking a serious blow to the heart of democratic self-governance. The legitimacy of public institutions depends on public confidence that "government and each of its parts remain open on impartial terms to all who seek its assistance." *Romer v. Evans*, 517 U.S. 620, 633 (1996). In a multiracial and diverse

society like ours, that confidence cannot be maintained if access to legal education and the legal profession is not visibly open to talented and qualified individuals of every race. See, e.g., Michigan Supreme Court Task Force on Racial/Ethnic Issues in the Court at 67 (1989) (finding that low number of minority judges and government lawyers "affects the confidence in and effectiveness of" the Michigan judicial system).

A. Law Schools, Particularly Ones With Highly Selective Admissions Processes, Produce a Significant Proportion of High Public Officials

Lawyers and judges constitute barely one-half of one percent of the population of the United States between the ages of 25 and 84. Compare Statistical Abstract of the United States, 2001, tbls. 11 & 593. And yet, individuals with law degrees occupy a strikingly disproportionate share of the seats in all three branches of government at both the national and state levels: virtually every judgeship, roughly half of the governorships, more than half of the United States Senate, and more than a third of the United States House of Representatives.[2] Three of the last seven Presidents of the United States had law degrees. A research analyst at the National Conference of State Legislators reported in 2001 that eighteen percent of state lawmakers are attorneys. See Earl Kelly, Balt. Daily Record, Feb. 17, 2001, at 1.

Equally striking is the concentration of graduates of the most selective law schools in high office. *All* AALS member law schools are selective, in the sense that each will accept only applicants with "the level of intellectual maturity and accomplishment normally demonstrated by the award of an undergraduate degree," AALS Bylaw 6-2(b)—a standard that by itself disqualifies a majority of the nation's adult popu-

[2] These figures were compiled by examining the State and Congressional "Yellow Books" published by Leadership Directories, Inc.

lation. But most of our members are far more selective, and reject large numbers of entirely, sometimes exceptionally, well-qualified applicants. For example, a substantial majority of the member law schools that are part of state flagship universities reject more than half their applicants. More than a dozen public law schools—including many in states with large black or Hispanic populations—accept fewer than one-third of all applicants. Moreover, many of the most selective law schools are private institutions with national applicant pools that accept fewer than one in five applicants.

A very small group of schools produces a remarkable share of the Congress and federal judiciary. The most selective law schools include private schools such as the University of Chicago, Columbia, Harvard, Northwestern, Stanford, and Yale, and public schools such as Boalt Hall, UCLA, and the Universities of Arizona, Florida, Georgia, Michigan, Texas, and Virginia. Among them, these law schools *alone* account for 25 of the 100 senators and 38 of 436 members of the House of Representatives (including the nonvoting delegate from the District of Columbia). All nine members of this Court attended one of the most selective law schools, and seventy-four judges in active service on the United States Courts of Appeals (nearly half the judges now sitting) received an LL.B., a J.D., or an LL.M. degree from one of this relative handful of law schools, as did nearly two hundred of the more than six hundred federal district court judges.[3]

The same patterns hold true for black and Hispanic federal judges and members of Congress. The Federal Judicial Center's database contains 138 black men and women who have served as federal judges, beginning with William H.

[3] These figures exclude those judges who received an LL.M. from the University of Virginia's Graduate Program for Judges, which limits admissions to already sitting judges.

Hastie in 1949. See History of the Federal Judiciary <www.fjc.gov>. Unsurprisingly, Howard Law School is the alma mater of more of these judges—18—than any other law school in the United States. An excellent school in its own right,[4] Howard was also virtually the *only* law school in the United States that had a significant black enrollment prior to the late 1960's.[5] But the same handful of schools listed above trained 51 of the remaining black federal judges. After Howard, Harvard (12), and Yale (10), more black federal judges (6) received their law degrees from the University of Michigan than from any other institution.[6] The same data-base identifies 57 Hispanic judges who have sat on Article III courts other than the District of Puerto Rico. Twenty-seven of those judges received law degrees from the same small group of schools, with the University of Texas producing the largest number (9).

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[4] According to its website, Howard receives more than 1500 applications, and accepts roughly 350 students in order to enroll a class of 150. See <www.law.howard.edu/info/admissions/pg26catalog.htm>.

[5] In 1960, there were only 2678 black attorneys in the United States and the majority had graduated from Howard. See Theodore Cross and Robert Bruce Slater, Only The Onset of Affirmative Action Explains the Explosive Growth in Black Enrollments in Higher Education, 23 J. Blacks in Higher Educ. 110, 113 (Spring 1999) [hereafter Cross & Slater, Onset of Affirmative Action]. Cross and Slater note that, as late as 1965, there was only one black student in the graduating class at Harvard Law School, but that "after affirmative action took hold" in the late 1960's, the numbers of black graduates skyrocketed, reaching 52 in 1974, a level that has remained fairly constant for the last quarter-century. *Id.* at 114. Similarly, of the more than 1000 students attending the University of Michigan Law School in 1965, only one was black, but by the mid-1970's, after the school decided to use a "deliberately race-conscious admissions process," each graduating class contained at least 25 black students. See David L. Chambers, Richard O. Lempert, & Terry K. Adams, Doing Well and Doing Good, 42 Law Quadrangle Notes 61, 61 (Summer 1999).

[6] Six black judges attended Columbia Law School as well.

A law degree has also served as an important stepping stone to Congress for minority representatives. Of the 43 members of the Congressional Black Caucus in the 107th Congress, fifteen had law degrees, many of them from highly selective schools such as Boston College, Georgetown, Harvard, the Universities of Illinois, Michigan, and Virginia, and Yale. See <www.house.gov/ebjohnson/cbcprofiles.htm>.

The causal relationship between attendance at an extremely selective law school and later career success is, of course, complex. Admission to these schools is partly a recognition of existing talents and potential for future achievement. But both common sense and experience suggest that attending a selective law school actually contributes to a graduate's later success in a variety of ways.

First, the connections students begin to forge in law school, both with their talented and ambitious classmates and with alumni, as well as the school's standing and prestige in the community, can provide a powerful career boost. See, e.g., *United States v. Virginia*, 518 U.S. 515, 520, 551-52 (1996); *Sweatt v. Painter*, 339 U.S. 629, 634 (1950).

But law school is not simply a credentialing or networking device: it is an educational process. Three years of law school change students in important, and sometimes hard to measure ways. As this Court explained in *Sweatt*, law school is a "proving ground for legal learning and practice," in which students are exposed to "the interplay of ideas and the exchange of views with which the law is concerned." *Id.* The quality and characteristics of the faculty and classmates with whom a student interacts will undoubtedly influence the way a student approaches the practice of law. The evidence compiled by William G. Bowen and Derek Bok in their massive study, The Shape of the River (1998), suggests that there is substantial "value added" from attendance at a highly selective educational institution. See *id.* at 128, 211, 264. Bowen and Bok conclude that for a variety of reasons black

students, like all students, generally benefit from attending the most selective institution to which they are admitted. *Id.* at 144.

Moreover, while grade-point averages and test scores may play a significant role in the admissions process, they do not infallibly predict law school performance, let alone career contributions. For example, at Columbia Law School, two years in a row, the top student in the graduating class had been admitted from the wait list. In another year, the editor-in-chief of the *Columbia Law Review* was admitted from the wait list. In yet a third year, a student admitted to Columbia from the wait list the day before classes began was later selected by a Justice of this Court as a law clerk. See Jack Greenberg, Affirmative Action in Higher Education: Confronting the Condition and Theory, 43 B.C.L. Rev. 521, 533 (2002). In a similar vein, a study at the University of Michigan found that a formula combining LSAT scores and undergraduate grades explained between 38 and 43 percent of the variance in students' law school grades. But the same study found that there was no statistically significant relationship between that formula and either graduates' earnings or their career satisfaction. And it revealed a mildly *negative* correlation with *pro bono* public service: individuals with lower LSAT scores and college grades tended to contribute more time to unremunerated legal service. See David L. Chambers, Richard O. Lempert, & Terry K. Adams, Doing Well and Doing Good, 42 Law Quadrangle Notes 61, 70-71 (Summer 1999).

This is not to say that LSAT scores and undergraduate or law school performance have no predictive power with respect to future career success and contribution to society. They do. But it does indicate that among the highly qualified applicants who are chosen for admission to selective law schools, numerical indicators fail to capture many relevant qualities and skills. Making law school admissions decisions more dependent on a few narrow numerical criteria may do

little to improve law schools' primary mission, which is not to reward recent college graduates for doing well, but to produce lawyers who serve their clients and the public.

B. A Racially Integrated Student Body is Essential for Law Schools to Perform Their Role as Training Grounds for the Next Generation of Judges, Public Servants, and Leaders

Respondents and other *amici* have pointed to the overwhelming evidence regarding the pedagogical benefits of diversity within the classroom and academic communities more generally. Certainly, the experience of AALS member schools confirms that law school classrooms are more intellectually challenging and better prepare students for the practice of law when many points of view are expressed by students with a variety of perspectives and life experiences.

Nothing about the arguments in favor of racial inclusiveness in legal education depends on a simplistic perception that members of the same racial group—regardless of other differences among them—"think alike [or] share the same political interests," *Shaw v. Reno*, 509 U.S. 630, 647 (1993). This Court's decisions about the most democratic aspect of the legal system—the jury—recognize that the value of inclusiveness rests in part on subtle and unmeasurable contributions that diversity can make to the quality of deliberations and in part on the legitimacy it accords the results of the adjudicatory process. In *Ballard v. United States*, 329 U.S. 187 (1946), for example, this Court rejected *both* the proposition that women "act or tend to act as a class" in deciding legal issues, *id.* at 193, *and* the proposition that their absence from the jury room would therefore have no effect. As with sex, a single-race community "is different from a community composed of both; the subtle interplay of influence one on the

other is among the imponderables." *Id.* In *Peters v. Kiff*, 407 U.S. 493(1972), Justice Marshall explained the vice in the systematic exclusion of blacks from juries this way:

> When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.

Id. at 503-04. See also *J.E.B. v. Alabama*, 511 U.S. 127, 133-34, 140 (1994); *id.* at 148-49 (O'Connor, J., concurring) (noting that "like race, gender matters," that "one need not be a sexist to share the intuition that in certain cases a person's gender and resulting life experience will be relevant to his or her view of the case," and that "[i]ndividuals are not expected to ignore as jurors what they know as men—or women").

The same is true of law schools. Of course, if a law school intentionally excluded minority students, its policies would violate the Constitution and federal law. But even if their absence from law school classrooms is entirely inadvertent, its effect on the character of legal education may be the same: an unknown and perhaps unknowable range of experiences and perspectives will be lost. The setting in which a future lawyer, legislator, judge, or other public servant confronts doctrinal and policy questions may reverberate through the rest of his or her professional career.

Justice Marshall's own career illustrates this point. As Justice O'Connor observed:

> Although all of us come to the Court with our own personal histories and experiences, Justice Marshall brought a special perspective. . . . At oral arguments and conference meetings, in opinions and dissents, Justice

> Marshall imparted not only his legal acumen but also his life experiences, constantly pushing and prodding us to respond not only to the persuasiveness of legal argument but also to the power of moral truth.

Sandra Day O'Connor, Thurgood Marshall: The Influence of a Raconteur, 44 Stan. L. Rev. 1217, 1217-18 (1992). The fact that Justice Marshall was a black man who grew up in the segregated South was not, of course, the only factor that contributed to his special perspective. Nor is it in any sense necessary for a law student, a lawyer, or a judge to be black or Hispanic for him to understand the importance of the principles for which Justice Marshall stood. Many milestones in the legal struggle for racial justice were the product of the actions and decisions of white judges. See, e.g., Jack Bass, Unlikely Heroes (1981). But it would deny reality to say that Justice Marshall's race was irrelevant, either to his perspective, or to his influence on the development of the law, or to his impact on public perceptions of justice. And the fact that race undoubtedly played *some* role in President Johnson's decision to nominate Justice Marshall to the Supreme Court,[7] takes nothing away from his qualifications for the Court, based on his intellect, character, and record as a judge and Supreme Court advocate. Similarly, the fact that race may play *some* role in law school admissions decisions takes nothing away from the impressive qualifications of black and Hispanic law students.

In *Powers v. Ohio*, 499 U.S. 400, 415 (1991), this Court recognized that jury selection is "a visible, and inevitable, measure of the judicial system's own commitment to the commands of the Constitution." So, too, is the composition

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[7] See Doris Kearns, Lyndon Johnson and the American Dream 306-07 (1976) (interview with Johnson); Neil D. McFeeley, Appointment of Judges: The Johnson Presidency 80-81 & 111 (1987); Barbara A. Perry, A "Representative" Supreme Court?: The Impact of Race, Religion, and Gender on Appointments 100 (1991).

of the bench, bar, and law school student bodies from which those judges and lawyers come. The legitimacy of the legal process depends on public confidence that positions of power are not reserved for whites alone.

The public understands the critical relationship between admission to selective public educational institutions and political and economic power and advancement. The reaction in Texas to the court of appeals' decision in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996), is instructive. The so-called Texas ten-percent plan was crafted by black and Hispanic legislators who were determined to prevent minority enrollments in the state's flagship educational institutions from dropping, particularly in light of the state's changing demography. See, e.g., Brian T. Fitzpatrick, Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten-Percent Plan, 53 Baylor L. Rev. 289, 323-27 (2001) (describing the origins and legislative history of the plan).[8] Members of traditionally excluded groups are acutely sensitive to the importance of their hard-fought and recently won access to flagship state institutions. Their perception of the legitimacy of those schools, and of the governments that both shape and are shaped by the individuals who attend them, depends on their faith that access will remain open to them. Public support for great universities and their law schools is critical to achieving their missions of carrying out research as well as serving as avenues of upward mobility for talented students. That support depends on public confidence that the schools are open to talented individuals of all races. The idea that such confidence can better be maintained by confining universities to admissions criteria that produce nearly lily-white student

[8] The next section of this brief addresses whether there is a constitutionally meaningful distinction between programs like the Texas ten-percent plan and more traditional race-conscious affirmative action and whether such programs can work for law schools admissions.

bodies in states with significant black and Hispanic populations than by permitting candid reliance on carefully crafted affirmative action programs is naive and pernicious.

II. WITHOUT RACE-CONSCIOUS AFFIRMATIVE ACTION, LAW SCHOOLS WOULD BE FACED WITH AN UNACCEPTABLE CHOICE BETWEEN HAVING VIRTUALLY NO MINORITY PRESENCE AND SACRIFICING OTHER WEIGHTY EDUCATIONAL INTERESTS

The United States recognizes that "[e]nsuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective." Brief for the United States as Amicus Curiae Supporting Petitioner at 16. The problem with respondents' admissions process, it suggests, has to do with the *means* Michigan has chosen to "to ensure that minorities have access to and are represented in institutions of higher learning," *id.* at 24, namely taking race into account in the admissions process.

But the principal nominally race-neutral mechanisms proposed by petitioner and their *amici* for pursuing the paramount government objective of providing meaningful access to the legal profession are not in fact race-neutral, cannot work with respect to law school admissions, and would require sacrificing a set of other critically important interests. In short, there are no narrowly tailored race-neutral alternatives to a carefully crafted race-conscious affirmative action program.

A. The Alternative Methods of Achieving a Representative Student Body Proposed by the United States Are Not Race-Neutral as a Matter of Constitutional Law

The United States points to two alternatives to race-conscious affirmative action that it claims are more narrowly

tailored. First, it suggests that schools may "identify and discard facially neutral criteria that, in practice, tend to skew admissions in a manner than detracts from educational diversity," thereby "easing admissions requirements for all students." Brief for the United States at 17. Second, it points to recent initiatives in the public universities of California, Florida and Texas that admit all students within the top range (four percent, twenty percent, and ten percent, respectively) of their high school classes, claiming that these programs have achieved roughly the same level of integration as race-conscious plans. See Brief of the United States at 17-22.

It is not at all clear that either option is race-neutral in the constitutionally relevant sense simply because it does not *expressly* classify applicants by race. This Court has long scrutinized race-neutral state action adopted for the purpose of distributing benefits on the basis of race under the same demanding standard that applies to express racial classifications. See *Guinn v. United States*, 238 U.S. 347, 364-65 (1915). Surely, if a state *adopted* a particular race-neutral admissions criterion for the purpose of skewing admissions to *decrease* minority admissions, that change would be subject to (and almost certainly fail) strict scrutiny. If, for example, a state were aware that minority students tend to have lower class ranks than white students and adopted a ten percent plan "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon" minority applicants, *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 279 (1979), that plan would be unconstitutional.

Thus, if the "consistency" principle of *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 224 (1995) (citing *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989) (plurality opinion)), applies to acts that are race-conscious in purpose as well those that are race-conscious in form, then admissions procedures like those employed by California, Florida and Texas might also be subject to strict scrutiny. But cf. Kathleen M. Sullivan, After Affirmative Action, 59 Ohio St.

L.J. 1039, 1047-50 (1998) (suggesting that plans like Texas's and plans like Michigan's should be treated consistently and that neither should trigger strict scrutiny).

That is not to say that the California, Florida or Texas programs are unconstitutional. On the contrary, those states' weighty interest in maintaining diverse student bodies may well justify them. But that is a far cry from the claim that these programs are race neutral or constitutionally superior to carefully crafted race-conscious affirmative action plans.

B. The Alternative Methods of Achieving a Representative Student Body Proposed by the United States Will Not Work to Integrate Selective Law Schools

The United States' invocation of race-neutral undergraduate admissions plans as a model for law school admissions is deeply flawed. When these plans work,[9] they work primarily because of racial segregation in secondary schools. The top tier of students in schools with an almost entirely black or Hispanic student body will, as a matter of simple arithmetic, include significant numbers of minority students. But, in general, law schools and other graduate programs draw their students from undergraduate colleges that are racially integrated. Moreover, there are so many colleges relative to spots in selective law school classes that it would be

[9] The first comprehensive study of the effects of the Texas ten percent plan suggests that its success has been limited. Relatively few minority students who gained admission to the University of Texas under the ten percent plan would have been rejected prior to *Hopwood*, but black and Hispanic applicants below the top quintile of their high school class are now faring decidedly worse. And the representation of blacks and Hispanics in the entering class has declined during a period in which their proportion of graduating high school seniors has increased significantly. *See Marta Tienda et al*., Closing the Gap?: Admissions & Enrollments at the Texas Public Flagships Before and After Affirmative Action (Jan. 21, 2003) <http://www.texas-top10.princeton.edu/>.

impossible for a law school to adopt *any* kind of class rank-based admissions process. Consider, for example, Stanford Law School. The current study body of roughly 600 students comes from 135 undergraduate institutions. See <www.law.stanford.edu/admissions/admiss.shtml>. While most students ranked in the upper five percent of their undergraduate class, it would clearly be impossible for Stanford to admit *everyone* who met that criterion, given that there are several thousand institutions of higher education. Moreover, differences in the academic strength of different colleges and universities, and of different courses of study, mean that being in the top five percent of students at different schools, in different majors, carries vastly different meanings. A student who majors in classics or physics and finishes in the top quarter of her class at a highly selective research university may be a far more attractive applicant than one who finishes at the top of his class at a non-selective college majoring in golf-course management (an available concentration at more than a dozen colleges or universities, see <http://site.pga.com/FAQ/membership/managment_program.html>).

Tellingly, the United States all but admits the inapplicability of its argument to law school and other graduate school admissions. Its only reference to graduate school concerns a set of programs that do not guarantee admission to students graduating in the top percentage of their undergraduate programs. The United States cites a Florida report showing an increase in "[s]ystem-wide minority enrollment in graduate programs" after the adoption of a race-neutral admissions policy. Brief of United States at 17-22. However, the cited report does not say whether the enrollment of *underrepresented* minorities—blacks and Hispanics—increased or decreased.

C. Race-Neutral Means For Achieving a Representative Student Body Can Actually Be *Less* Narrowly Tailored Than a Carefully Constructed Affirmative Action Plan, Once the Overall Mission of Law Schools Is Taken Into Account

To be sure, it would be simple for law schools to achieve racially integrated student bodies through race-neutral means if achieving racial integration were a law school's *only* goal. Law schools could, for example, hold a lottery among all applicants capable of actually graduating, regardless of the strength of their undergraduate program, their LSAT scores, their prior work and life experience, and other factors that admissions officers currently deem relevant to selecting a highly qualified student body.[10] But law schools all seek to overrepresent certain types of students in their entering classes. Law schools may prefer students who have advanced academic degrees or work experience after college. See<www.law.columbia.edu/admissions/adm2.html>. They may wish to include students who bring unusual qualities or skills or experiences in their entering class beyond those students' proportion of the applicant pool. A lottery would prevent schools from shaping their classes at all.

Radical egalitarians might prefer such a system. But unless the Constitution mandates that approach, the inquiry into narrow tailoring cannot simply ask "are there formally race-

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[10] The district court took respondents to task for failing to consider "using a lottery system for all qualified applicants." *Grutter v. Bollinger*, 137 F. Supp.2d 821, 853 (E.D. Mich. 2001), *rev'd*, 288 F.3d 732 (6th Cir. 2002). Of course, for a lottery to produce the desired level of racial integration, "qualified applicants" would have to be defined in such a way that the qualified applicant pool contained a sufficient proportion of minority applicants. It is difficult to see how taking this into account in defining the pool would make the admissions process any less race-conscious than the plus-factor approach condemned by the district court.

neutral means of achieving racial integration?" Of course there are. The real question is whether there are race-neutral alternatives that achieve integration without unduly sacrificing other key aspects of schools' educational mission. Neither petitioner nor her *amici* even address that question, much less provide an affirmative answer.

The only evidence cited by the United States on the question of the performance of students admitted under its favored formally race-neutral plans has little bearing on the key issue. In its brief in the companion case of *Gratz v. Bollinger*, the United States points out that "students enrolled through [the University of Texas] percentage plan, including minority students, consistently outperform other students at the University of Texas with comparable standardized test scores." See Brief of United States as Amicus Curiae in Support of Petitioner in *Gratz* at 17. This fact is wholly unsurprising and irrelevant. The data cited by the United States compare top ten percent and non top ten percent graduates of Texas high schools and control for standardized test scores. Thus, the data show that as between two candidates with the same standardized test scores, the one with better high school grades will generally outperform the one with weaker high school grades. *See* Table 6, Implementation and Results of the Texas Automatic Admissions Law (HB 588) at The University of Texas at Austin, at 10 <www.utexas.edu/ student/ research/reports/admissions/HB588-Report5.pdf>. In other words, standardized test scores in conjunction with high school grades are a better predictor of college grades than standardized test scores alone—a fact that has been widely known for years. To ascertain whether the ten percent plan has adversely affected the overall quality of the student body one would have to ask whether students admitted because of the plan outperform the students they have displaced. The

data cited by the United States do not speak to that question at all.[11]

To be clear, undergraduate admissions programs like that of California, Florida, and Texas may be entirely legal. States can legitimately choose to make university education a reward for relatively good high school performance, even at the cost of deliberately rejecting students who, on average, might achieve better academic records. But this is not a case about the California, Florida, or Texas *undergraduate* admissions systems. This case involves the admissions procedures at one of the nation's most highly selective public *law schools*.

Moreover, any rule this Court fashions under the Equal Protection Clause will apply, through Title VI, to nearly every *private* law school as well. See *Bakke*, 438 U.S. at 287. Under the view of narrow tailoring put forth by the petitioner and her *amici*, these institutions face a Hobson's choice. If they wish to secure the advantages of an integrated student body, they must adopt formally race-neutral admissions procedures, such as a lottery, that may substantially dilute the quality of their entire student body—minority and non-minority alike. They must choose between maintaining the reputations for excellence in which they have invested over the course of decades and maintaining their commitment to providing educational opportunities to members of all racial groups.

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[11] In fact, the University of Texas report cited by the United States suggests elsewhere that the ten percent plan may adversely affect overall academic performance. It finds that in every year from 1996 through 2001, non top ten percent students with SAT scores over 1300 earned, on average, better freshman grades than top ten percent students with SAT scores under 1000. Thus, if the University of Texas were interested in selecting the best-performing undergraduates, it would choose some applicants with high SAT scores who were not in the top ten percent of their respective high school classes over some applicants with low SAT scores with better high school class ranks.

Fortunately, neither the Constitution nor Title VI puts institutions of higher education to this choice. The narrow tailoring inquiry properly focuses on whether there are practical alternatives, not whether there are hypothetical alternatives. For example, using race in deciding which police officers to assign to a predominantly black neighborhood with a history of distrust of white police officers might well be narrowly tailored to the compelling interest of avoiding violence. Cf. *Baker v. City of Detroit*, 483 F. Supp. 930, 997-1000 (E.D. Mich. 1979) (upholding a race-conscious affirmative action plan under such circumstances), *aff'd*, 704 F.2d 878 (6th Cir. 1983). In the real world, such a plan would be more narrowly tailored than a formally race-neutral decision to assign the entire police force or the state militia to patrol the relevant neighborhood. Built into the requirement that a race-conscious government decision be the "least restrictive means" of achieving a compelling interest is the commonsense notion that an alternative that achieves the compelling interest by unreasonably sacrificing other important interests is not a real alternative. In the case at bar, petitioner and her *amici* have not produced a single datum to suggest that race-neutral means of achieving the benefits of a racially integrated student body are practical. On the contrary, the means they propose are not race neutral in the constitutionally relevant sense, and as applied to law schools, they could only achieve racial integration by doing serious damage to the important educational mission of institutions like the University of Michigan.

III. LAW SCHOOLS' JUSTIFIED RELIANCE ON THIS COURT'S ASSURANCE THAT RACE MAY BE DEEMED A "PLUS FACTOR" IN ADMISSIONS WARRANTS REAFFIRMING THAT PRINCIPLE

This Court has long recognized that the goal of protecting reliance interests substantially underwrites the principle that

precedents should not be lightly overruled. Although "*[s]tare decisis* is not an inexorable command," *Payne v. Tennessee*, 501 U.S. 808, 828 (1991), it nonetheless remains an important judicial policy, especially when significant investments have been made in reliance on judicial precedents.

"[T]he classic case for weighing reliance heavily in favor of following [precedent] occurs in the commercial context," *Planned Parenthood v. Casey*, 505 U.S. 833, 855 (1992), and law schools are significant commercial actors. For example, each of the 165 law schools comprising the AALS collects thousands of tuition dollars annually from each of its hundreds (and in some cases thousands) of students.[12] Most of them actually spend even larger sums on instructional and scholarly activities (through budgets supplemented by state and/or private contributions). Since *Bakke*, AALS member schools have collectively invested literally billions of dollars in their respective reputations for excellence. A requirement that these schools use only formally race-neutral means of admissions would, as we explained earlier, either drastically reduce the numbers of black and other minority students enrolled in law school or threaten the schools' investment.

Moreover, the financial reckoning understates the damage that a decision flatly prohibiting race-conscious admissions decisions would do. For though these institutions have invested money in reliance on this Court's precedents, they have done more. As this Court recognized in *Casey*, the

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[12] For the 2002-03 academic year, tuition and fees at the University of Michigan Law School were estimated at $24,992 for Michigan residents and $30,992 for non-residents. <www.law.umich.edu/prospectivestudents/admissions/financial.htm.> The latter number is in the same range as tuition at other highly selective law schools. See, e.g., <www.law.harvard.edu/Admissions/JD_Admissions/HLSfaqs.html> (Harvard Law School's current tuition is $29,500); <www.law.columbia.edu/admissions/tuit1.html. (Columbia Law School's current tuition is $32,700), <lawschool.stanford.edu/admissions/ admiss.shtml> (Stanford Law School's tuition is $30,880).

constitutional measure of reliance is not exhausted by the sum of individual occasions on which a legal right is exercised: in that case it also included the fact that "for two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the" Court's abortion decisions. *Casey*, 505 U.S. at 856.

Bakke has produced a similar effect. For the quarter century since this Court's decision, American law schools have defined themselves and their place in American economic and social life against the backdrop of a legal rule that permitted them to pursue both academic excellence and the critical benefits that flow from a racially integrated student body. Such reliance is, of course, ultimately attributable to natural persons whose interests the Constitution protects: the students, faculty, administrators, and alumni who comprise a law school community. Given this reliance, petitioners and their *amici* have offered no argument that would warrant pulling the rug out from under America's institutions of higher education.

A. Higher Education as We Know It Today Was Built in Reliance Upon *Bakke*

Although some American colleges and universities trace their roots to the colonial period, the current American system of higher education is of much more recent vintage. The G.I. Bill, Servicemen's Readjustment Act of 1944, Pub. L. No. 78-346, 58 Stat. 284, 288-89 (1944), put a college education within the financial reach of many more Americans than could previously afford it, and admissions policy changes by the leading American universities transformed these institutions from bastions of privilege into the leading players in the formation and certification of a national meritocracy they now are. As even a staunch critic of university admissions policy over the last six decades concedes, academically selective admissions was originally designed to "depose the

existing, undemocratic American elite and replace it with a new one made up of brainy, elaborately trained, public-spirited people drawn from every section and every background." Nicholas Lemann, The Big Test: The Secret History of the American Meritocracy 5 (1999).

One need not accept the view that those admitted to selective institutions are in any moral sense especially deserving of the wealth and privilege that often come from attending them to recognize that, in a world of competitive global markets, universities serve the national interest by training the most highly qualified students to work in increasingly complex fields such as business, engineering, law, medicine, and science. Selective universities thus pursue both their own interest as institutions devoted to the advancement of human knowledge and the public interest when they choose their students based upon their best educated guess about applicants' likely performance, in school and beyond.

But, as we explained in Part I of this brief, the public interest is also served by racial integration of the elite professions that control the levers of power in American society. Were it not for race-conscious affirmative action, however, selective universities and professional schools would not be able to pursue both these goals [13] Blacks (to pick the most salient

[13] Ironically, law school admissions became far more competitive at roughly the same time that significant numbers of minority students sought to attend. In 1960, for example, Harvard Law School—then probably the most selective school in the nation—admitted nearly half of all students who applied. See Joel Seligman, The High Citadel: The Influence of Harvard Law School 7-8 (1978). Today, by contrast, Harvard admits fewer than 15% of its applicants. As late as 1965, at the very tail end of the period of less competitive admissions, Harvard Law School often enrolled only one black student per year. *See* Cross & Slater, Onset of Affirmative Action, *supra*, at 114. When Heman Sweatt applied to the University of Texas Law School, the school had only just adopted a competitive admissions process at all. See Oral History of Dean W. Page

example) continue to score substantially lower than whites on the standardized tests that colleges, law schools, and universities adopted as part of the new process for sorting applicants. Last year, for example, there were only 75 black applicants (and 54 Mexican-American applicants) to law school whose LSAT score (165 or above) would have placed them above the 25th percentile of the entering class at the nation's most selective schools; by contrast, there were 5990 white students who scored 165 or above. See Law Schools Admissions Council Memorandum No. 03-15 (January 2003). See also Theodore Cross & Robert Bruce Slater, Why the End of Affirmative Action Would Exclude All But a Very Few Blacks from America's Leading Universities and Graduate Schools, 17 J. Blacks in Higher Educ. 8, 13 (Autumn 1997). No single cause for this persistent test-score gap has been identified, although it is easy to identify factors that likely work in combination. With respect to under-graduate admissions, these include lower "quality of schooling, unequal treatment by teachers, weak or complete absence of educational support at home, parents' educational attainment, low household income, peer pressure, 'stereotype vulnerability,' inadequate preparation for the SAT in the curriculum, segregated living and schooling conditions, and inadequate support from guidance counselors." Greenberg, *supra*, at 532-33 (2002).[14] Many of these factors undoubtedly have an impact on law school admissions as well.

Keeton <www.law.du.edu/russell/lh/sweatt/docs/koh.htm>. Today, the University of Texas Law School accepts fewer than one-quarter of its applicants.

[14] The gap is *not* due to different levels of aptitude, as measured by IQ scores, in the respective gene pools of blacks and whites, notwithstanding the much-publicized claim to that effect in Richard Herrnstein & Charles Murray, The Bell Curve: Intelligence and Class Structure in American Life (1995). *See* Richard E. Nisbett, Race, Genetics, and IQ, *in* The Black White Test Score Gap 86, 89 (Christopher Jencks & Meredith Phillips eds., 1998) (finding "almost no support for genetic explanations of the IQ

In order to achieve both excellence and racial integration, colleges, law schools, and universities have, for decades, admitted minority applicants with, on average, weaker (albeit still impressive) numerical indicators than non-minority applicants. Since this Court's decision in *Bakke*, integration has been achieved by treating race as merely one factor in the overall profile of each applicant.

Accordingly, in the post-*Bakke* world, two key features characterize the limited use of race in admissions to institutions of higher education. First, race is never the determinative factor. Put in terms of this Court's recent decisions addressing the permissible use of race in the redistricting process, race is not the "predominant factor" explaining a law school's decision to admit a particular applicant. See *Easley v. Cromartie*, 532 U.S. 234, 241 (2001); *Miller v. Johnson*, 515 U.S. 900, 916 (1995). That is, race does not "subordinat[e] traditional [admissions] principles," *id.*, such as indicators of intellectual aptitude, demonstrated commitment to public service, leadership experience, nonquantifiable evidence that an applicant's future promise is not adequately signaled by her past performance, and the like. See also Pamela S. Karlan, Easing the Spring: Strict Scrutiny and Affirmative Action After the Redistricting Cases, 43 Wm. & Mary L. Rev. 1569, 1594-98 (2002).The black and Hispanic applicants selective law schools admit are all capable of benefitting from and contributing to the educational life of the school and of having successful professional careers.

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difference between blacks and whites.") Any genetic explanation would be particularly difficult to square with, among other things, two arresting pieces of evidence. First, the gap has no correlation with percentage of African versus European ancestry. *See id.* at 89-91. Second, studies of children fathered by American G.I.'s in Germany find no meaningful IQ difference between children of white fathers and children of black fathers, *see id.* at 91, further confirming that social rather than genetic factors explain the test-score gap.

Second, taking race into account does not undermine the commitment of colleges, universities and law schools to selecting excellent student bodies. Thus, for example, where a minority applicant's individual folder contains substantial evidence of the sorts of factors likely to depress test scores—such as lower family socioeconomic status or poorer educational opportunities—admissions officers may conclude that notwithstanding somewhat lower test scores than typical of admitted non-minority students, the minority applicant's numerical indicators understate his or her ability to perform in a competitive educational setting and beyond. The premise of somewhat race-conscious admissions is not that minority candidates aren't as good as non-minority candidates but should be admitted anyway. Instead, admissions policies of the sort in place at the University of Michigan Law School accept that, because of a variety of social and cultural factors, some minority applicants will, on average, have weaker test scores than non-minority applicants, despite having the talent to take advantage of the educational opportunities available to those admitted. This judgment is vindicated by the most comprehensive analysis of the effects of affirmative action in higher education, *see* Bowen & Bok, *supra*, as well as by the University of Michigan's own study that showed that its minority graduates pass the bar, have economically successful and personally satisfying careers and perform public and *pro bono* services at rates comparable to white graduates who entered the school with higher LSAT scores and undergraduate grade-point averages. See Chambers, *supra*.

B. Colleges, Law Schools and Universities Justifiably Relied Upon the Holding of *Bakke*

Under *Marks v. United States*, 430 U.S. 188, 193 (1977), when this Court issues a judgment but no majority opinion, the policy of *stare decisis* applies to the narrowest ground on which five Justices agree or, absent such agreement, to the narrowest grounds on which a judge whose vote was

necessary to the decision ruled. See *Stenberg v. Carhart*, 530 U.S. 914, 952 (2000) (Rehnquist, C.J., dissenting); *O'Dell v. Netherland*, 521 U.S. 151, 160 (1997) (O'Connor, J., concurring). Applying *Marks*, it is clear that Justice Powell's separate opinion in *Bakke* set out the law with respect to the permissibility of race-conscious admissions in higher education for the past twenty-five years. In *Bakke*, Justice Powell cast the fifth and decisive vote for the proposition that the U.C. Davis Medical School's admissions policy was unlawful as well as the fifth and decisive vote for the proposition that U.C. Davis should nonetheless not be enjoined from considering race at all in admissions. His opinion alone provided a justification for both of those key factors in the disposition of the case.

Accordingly, this is not a case in which the lower courts have been unable to glean a consistent "narrowest ground" from this Court's divided decision. See *Nichols v. United States*, 511 U.S. 738, 745 (1994); *Seminole Tribe v. Florida*, 517 U.S. 44, 66 (1996). On the contrary, the federal appeals courts have overwhelmingly understood Justice Powell's opinion in *Bakke* as the controlling law.[15] The few recent rulings finding otherwise [16] are aberrant. To the extent that

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[15] See, e.g., *Wessman v. Gittens*, 160 F.3d 790, 796 (1st Cir. 1998); *Brewer v. West Irondequoit Cent. School Dist.*, 212 F.3d 738, 747 (2d Cir. 2000); *Taxman v. Board of Education*, 91 F.3d 1547, 1562 n.12 (3rd Cir. 1996), *cert. dism'd*, 522 U.S. 1010 (1997); *Talbert v. City of Richmond*, 648 F.2d 925, 928-29 (4th Cir. 1981), *cert. denied*, 454 U.S. 1145 (1982); *Williams v. New Orleans*, 729 F.2d 1554, 1567-68 (5th Cir. 1984); *Hill v. Ross*, 183 F.3d 586, 588 (7th Cir. 1999); *Setser v. Novack Inv. Co.*, 657 F.2d 962, 965 & n.2 (8th Cir.), *cert. denied*, 454 U.S. 1064 (1981); *Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1*, 285 F.3d 1236, 1250 (9th Cir. 2002); *Buchwald v. Univ. of N.M. School of Medicine*, 159 F.3d 487, 499 (10th Cir. 1998).

[16] See, e.g., *Johnson v. Board of Regents*, 263 F.3d 1234, 1245 (11th Cir. 2001); *Hopwood v. Texas*, 78 F.3d 932, 944 (5th 1996); *Grutter v. Bollinger*, 137 F. Supp.2d 821, 846-49 (2001).

they treat *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) and *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), as overruling *Bakke*, they ignore this Court's injunction that it, and it alone, has the authority to say that its precedents have been overruled. See *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). To the extent that they say *Bakke* never was the law, they disregard *Marks.* If ever there were a case in which a divided Court nonetheless produced a clear holding, it is *Bakke*, where it was crystal-clear that five Justices disapproved of rigid quotas and (a different) five Justices permitted race to be used as a plus factor in the selection of a diverse student body.

Moreover, even were there some confusion about the status of Justice Powell's *Bakke* opinion, that confusion would be irrelevant to the issue here, because respondents do not rest their case simply on Justice Powell's opinion announcing the judgment of the Court in *Bakke*. Respondents relied on the *holding* of *Bakke*. Five Justices in *Bakke* clearly believed that an admissions program such as the Harvard Plan was a constitutionally acceptable means of securing the advantages of a racially diverse student body, and the disposition of the case, reversing "so much of the California court's judgment as enjoin[ed the Medical School of the University of California at Davis] from any consideration of the race of any applicant," 438 U.S. at 320, equally clearly reflected their view. That five-Justice holding of the Court in *Bakke* is entitled to the full respect this Court customarily affords to its prior precedents—except, of course, to the extent that subsequent majority decisions expressly or *sub silentio* overrule it. For the reasons set forth by respondents, no intervening decision of this Court comes remotely close to having already overruled the holding in *Bakke*.

This Court has never stated that actors cannot rely on its plurality decisions. And for good reason: institutions, officials, and private individuals must order their affairs in light

of the law as best they understand it. Under *Marks*, a ruling with no opinion of the Court nevertheless establishes the law, and primary actors must obey the law. When, as here, they do so in a way that orders their very functioning, that factor strongly counsels adherence to the prior decision, regardless of whether that prior decision was expressed in a majority or plurality opinion.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to affirm the judgment of the Court of Appeals.

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