No. 02-241 and 02-516

IN THE

Supreme Court of the United States

BARBARA GRUTTER,
Petitioner,
v.
LEE BOLLINGER, *et al*,
Respondents,
and
JENNIFER GRATZ AND PATRICK HAMACHER
Petitioners,
v.
LEE BOLLINGER, *et al*.
Respondents

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

BRIEF OF *AMICUS CURIAE* MICHIGAN GOVERNOR JENNIFER M. GRANHOLM

KELLY G. KEENAN,
Legal Counsel
TERESA CAINE BINGMAN,
Deputy Legal Counsel
R. JOHN WERNET, JR.,
Special Legal Counsel
Executive Office of the Governor
Legal Division
P.O. Box 30013
Lansing, MI 48909
(517) 335-6847

JOHN D. PIRICH
Counsel of Record
MARK A. GOLDSMITH
HONIGMAN MILLER SCHWARTZ AND COHN LLP
222 N. Washington Sq.
Suite 400
Lansing, MI 48933
(517) 377-0172

Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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IDENTITY AND INTEREST OF *AMICUS* MICHIGAN GOVERNOR JENNIFER M. GRANHOLM

This *amicus curiae* brief is filed on behalf of Jennifer M. Granholm, Governor of the State of Michigan.[1] Pursuant to

[1] All parties have consented, pursuant to Rule 37(3)(a) of the Rules of the Supreme Court of the United States, to the filing of amicus briefs in

Mich. Const. 1963, art. V, § 1, Governor Granholm serves as the Chief Executive Officer of the State of Michigan. As Governor, she exercises general supervisory authority over all principal departments of state government. Mich. Const. 1963, art. V, § 8. The authority vested in the Governor under the latter provision includes the right to "initiate court proceedings in the name of the state to enforce compliance with any constitutional or legislative mandate, or to restrain violations of any constitutional or legislative power, duty or right by any officer, department or agency of the state or any of its political subdivisions."

The principal issue to be decided in these appeals is whether the admissions policies of the University of Michigan's Law School and its College of Literature, Science, and the Arts—policies that include consideration of race and ethnic origin as one of a broad array of factors used in making admission decisions—are constitutional. These policies seek to effectuate the University's well-considered judgment that having a racially and ethnically diverse student body is essential to the fulfillment of its educational mission. The University of Michigan is a political subdivision of the State of Michigan, established as an autonomous entity pursuant to Mich. Const. 1963, art. VIII, § 5. Because Michigan's Constitution and laws jealously guard against any interference with the educational autonomy specially conferred on Michigan's universities, this case is unquestionably of interest to the people of the State of

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support of either party. In accordance with Rule 37(6), Amicus certifies that this brief is a modified and expanded version of a similar brief filed below by then-Attorney General Granholm and her staff; the present version of the brief was authored entirely by Counsel of Record and the Governor's own Legal Counsel and his staff, all of whom are identified on the cover of the brief; and, finally, that no party other than *amicus curiae* has made any monetary contribution to the preparation or submission of this amicus brief.

Michigan and warrants participation by Michigan's Governor as *amicus curiae*.

Moreover, it cannot seriously be disputed that providing an education to their citizens is one of the most important functions performed by the states and their political subdivisions. An additional vital interest of the people of the State of Michigan is the critical importance of protecting state control over education from encroachment by the federal judiciary where that control would disrupt a constitutionally justifiable policy choice. It is this educational autonomy, conferred by both the First Amendment of the United States Constitution and art. VIII, § 5 of Michigan's own Constitution, that the Governor seeks to uphold by filing this amicus brief.

SUMMARY OF ARGUMENT

In the seminal case of *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), this Court concluded that a properly devised university admissions program involving the competitive consideration of race and ethnic origin would not violate the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 320, 328 (opinion of Powell, J., joined by Brennan, White, Marshall, and Blackmun, JJ.) Justice Powell's controlling opinion in *Bakke* examined each of the goals asserted by the university in defense of its use of race in its admissions process and concluded that only one—obtaining the educational benefits that flow from a diverse student body—was constitutionally permissible. *Id.* at 311-312.[2] In so ruling, Justice Powell

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[2] Justice Powell's opinion is controlling with regard to its statements that rely on the First Amendment's protection of academic freedom because it garnered the support of four justices of the Brennan plurality. They noted that California law had vested plenary legislative and administrative power in the University of California's Board of Regents and that nothing in the Equal Protection Clause justified limiting the scope

relied on the Court's long-honored doctrine of "academic freedom," grounded in the First Amendment, and recognized the right of educational institutions to engage in academic decision-making with limited judicial interference based on the unique and vital role they play in a democratic society. *Id.* at 312-313.

In the case now before this Court, the University of Michigan has devised admissions policies that take race and ethnic origin into account as one among many factors it reviews in making admissions decisions. The University has done so based on its considered and eminently reasonable judgment that enrolling a racially diverse student body is essential to its mission of providing a quality education to its students, a judgment that has produced a diverse student body, with an outstanding record of academic achievement, to the great benefit of the people of this state. The Governor is aware that Respondents, as well as a number of distinguished *amici curiae*, will ably address the critical issue of whether, under the Equal Protection Clause, the enrollment of a diverse student body is a "compelling interest" that institutions of higher education may seek to promote by means of an admissions program that considers race as one factor to achieve that result. She further anticipates that Respondents and her fellow *amici* will likewise address extensively the reasons why the University's admissions policies are in fact "narrowly tailored" to meet this compelling interest. Accordingly, the Governor will not repeat those arguments in this brief but rather recommends and supports the able briefing of Respondents and her fellow *amici* to this Court.

This *amicus* brief instead focuses on the federal and state constitutional authority of the University to make such

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of the Regents' power to make academic choices. *Bakke*, 438 U.S. at 366, n. 42 (opinion of Brennan, J.)

academic decisions and urges the Court to pay appropriate deference to those choices. *Amicus* asserts that such deference is warranted both under well-established federal constitutional principles and under the provisions of Michigan's own Constitution.

ARGUMENT

THE UNIVERSITY OF MICHIGAN'S DETERMINATION THAT IT HAS A COMPELLING INTEREST IN ACHIEVING A DIVERSE STUDENT BODY IN ORDER TO ADVANCE ITS EDUCATIONAL MISSION FALLS WITHIN THE INSTITUTIONAL AUTONOMY AFFORDED TO UNIVERSITIES BY THE FIRST AMENDMENT AND BY ART. VIII, § 5 OF THE MICHIGAN CONSTITUTION AND SHOULD, THEREFORE, BE AFFORDED DEFERENCE BY THIS COURT.

"The process of education has naturally enough been the basis of hope for the perdurance of our democracy on the part of all our great leaders, from Thomas Jefferson onwards." *Wieman v. Updegraff*, 344 U.S. 183, 196 (1952) (concurring opinion of Frankfurter, J.) The Supreme Court has consistently sounded the theme that education is of crucial importance to our political system and "fulfills a most fundamental obligation of government to its constituency." *Ambach v. Norwick*, 441 U.S. 68, 76 (1979) (quoting *Foley v. Connelie*, 435 U.S. 291, 297 (1978)). One of the primary purposes of education is to prepare "individuals for participation as citizens." *Id.* (citing *Brown v. Board of Education*, 347 U.S. 483, 493 (1954)). Indeed, of all the functions served by state and local governments, "education is perhaps the most important." *Brown*, 347 U.S. at 493.

From this profound appreciation and respect for education in our democratic system has flowed a natural corollary of

judicial deference to educational decision-making crystallizing in the doctrine of "academic freedom." [3] The foundation for this doctrine was eloquently described by Justice Frankfurter in his concurring opinion in *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957), where he first enumerated the often-quoted "four essential freedoms" of a university:

> It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms" of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, *and who may be admitted to study.* [emphasis added]

In *Sweezy*, the Court was called upon to decide whether the State violated the due process rights of Paul Sweezy, a lecturer at the university, when it jailed him for contempt based upon his refusal, on First Amendment grounds, to cooperate with the State's investigation into subversive activities. Chief Justice Warren, writing for the Court, found that the State had unconstitutionally violated Sweezy's liberties; he specifically cautioned that the areas of political expression and academic freedom are areas in which "government should be extremely reticent to tread." *Id.* at 250. The Chief Justice went on to explain that "[t]he essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth." *Id.* In his concurring

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[3] For a thorough discussion on academic freedom, institutional autonomy, and the attainment of a diverse student body, *see* Darlene C. Goring, *Affirmative Action and the First Amendment: The Attainment of a Diverse Student Body is a Permissible Exercise of Institutional Autonomy*, 47 U. Kan. L. Rev. 491 (1999).

opinion, Justice Frankfurter emphasized that a free society depends on free universities, and that this requires "the exclusion of governmental intervention in the intellectual life of a university." *Id.* at 262.

This same point was made by Justice Douglas a few years later in *Griswold v. Connecticut*, 381 U.S. 479, 482-483 (1965), where he explicitly premised protection for academic freedom on the First Amendment:

> In other words, the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read . . . and freedom of inquiry, freedom of thought, and freedom to teach . . . *indeed, the freedom of the entire university community* . . . . Without those peripheral rights the specific rights would be less secure. [citations omitted; emphasis added]

The doctrine of academic freedom became even more clearly grounded in the First Amendment in *Keyishian v. Board of Regents*, 385 U.S. 589 (1967). In *Keyishian*, the Court struck down a state statute that required faculty members to sign certificates stating that they were not Communists. In balancing the State's interest in assuring its teachers were not "subversives" against the faculty's right to academic freedom, the Court recognized that some areas of society should be free of excessive interference so as to assure they function effectively:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." The

> classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, (rather) than through any kind of authoritative selection."

385 U.S. at 603 (citations omitted).

Four years later, in *North Carolina State Board of Education v. Swann*, 402 U.S. 43 (1971), the Court explicitly recognized that the broad power of educational authorities to formulate educational policy extends even to a determination to achieve a degree of racial balance. Although the particular controversy before the Court concerned a school desegregation controversy and involved primary and secondary schools rather than colleges and universities, Chief Justice Burger, writing for the Court, spoke broadly concerning the authority and discretion of educational authorities. While recognizing that this authority is, of course, subject to constitutional guarantees, the Chief Justice stated that "school authorities have wide discretion in formulating school policy, and . . . as a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements." *Id.* at 45.

Against this backdrop, Justice Powell's opinion in *Bakke* is a natural and principled application of the recurring constitutional thread that had been woven since *Brown v. Board of Education*. In ruling that the University of California's goal of attaining a racially diverse student body was constitutionally permissible, Justice Powell carved out a narrow justification for consideration of race in admissions decisions: to ensure a diverse student body. He relied in part on the academic freedom doctrine, noting that this doctrine "long has been viewed as a special concern of the First Amendment." *Bakke*, 438 U.S. at 312 (opinion of Powell, J.) He further relied specifically on the "four essential freedoms"

of a university previously articulated by *Sweezy*, including the freedom "to determine for itself on academic grounds . . . who may be admitted to study" and concluded that "the freedom of a university to make its own judgments as to education includes the selection of its student body." *Id.*

In *Regents of the University of Michigan v. Ewing*, 474 U.S. 214 (1985), the Court made clear that academic freedom is a doctrine that applies not only to individuals but to educational institutions as well—and to the University of Michigan in particular. The plaintiff in *Ewing* had been dismissed from the University's accelerated medical school program based on a negative evaluation of his academic credentials; he claimed he had a protected property interest in continued enrollment that was violated by his dismissal. Citing *Bakke, Keyishian, and Sweezy*, the Court declared that, even assuming the existence of the asserted property interest, the Court was reluctant "to trench on the prerogatives of state and local educational institutions" and acknowledged a "responsibility to safeguard their academic freedom" as a special concern of the First Amendment. *Id.* at 226. The Court stressed that "[a]cademic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students but also . . . on autonomous decision-making by the academy itself." *Id.* at 226 n. 12 (citation omitted).[4] Justice Powell's concurring opinion was even

[4] The Court in *Ewing* cited *Board of Curators of the University of Missouri v. Horowitz*, 435 U.S. 78 (1978), a case in which the Court upheld the university's dismissal of a medical student based on an evaluation showing poor performance. Writing for the Court in *Horowitz*, Justice Rehnquist acknowledged that academic decisions requiring an expert evaluation of cumulative information are "not readily adapted to the procedural tools of judicial or administrative decision-making." *Id.* at 90. Explaining a possible underpinning of the Court's deference to universities, one scholar has noted that the doctrine of institutional

more explicit. He agreed fully with the Court's emphasis on the "respect and deference that courts should accord academic decisions made by the appropriate university authorities" and admonished that judicial review of academic decisions, including admission decisions, "is rarely appropriate." *Id.* at 230 (opinion of Powell, J.)

The doctrine of institutional academic freedom, or "institutional autonomy," embodied in these decisions has been followed in numerous cases decided by the lower federal courts. *See, e.g., Lovelace v. Southeastern Massachusetts University*, 793 F.2d 419, 426 (1st Cir. 1986) (upholding a university's decision not to renew faculty member's contract for his alleged failure to inflate grades and to lower academic standards and emphasizing that a university has a recognized right to govern its institution according to the "four essential freedoms" that supersedes an individual faculty member's right to academic freedom); *Doherty v. Southern College of Optometry*, 862 F.2d 570, 576 (6th Cir. 1988) (affirming the dismissal of a breach of

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academic freedom may have its roots in common law academic abstention:

> The constitutional right of institutional academic freedom appears to be a collateral descendent of the common law notion of academic abstention. This heritage is made explicit in [*Ewing*], where the Court . . . suggests that these views recommend themselves as protection for academic freedom. And the "four freedoms" of *Sweezy* reflect the kinds of university decisions courts have refused to review under common law principles. Institutional academic freedom can be viewed as academic abstention raised to constitutional status . . . .

J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment"*, 99 Yale L. J. 251, 326-27 (1989) (footnotes omitted). Byrne goes on to characterize cases like *Horowitz* as counseling courts to appreciate "that universities proceed on assumptions different from society as a whole and that an insistence by courts on conforming to legal standards or procedures will likely destroy something uniquely valuable in higher education." *Id.* at 326.

contract claim in a disability discrimination case because it arose "in an academic context where judicial intervention in any form should be undertaken only with great reluctance"); *Martin v. Helstad*, 578 F. Supp, 1473, 1482 (W.D. Wis. 1983) ("[a]cademic institutions are accorded great deference in their freedom to determine who may be admitted to study at the institution").

Hopwood v. State of Texas, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996), does not undermine the force of these decisions. In *Hopwood*, the Fifth Circuit ruled that the University of Texas Law School could not use race as a factor in its law school admissions to further its goal of achieving diversity in its student body. The Fifth Circuit explicitly rejected the university's reliance on Justice Powell's opinion in *Bakke*, stating "[it] is not binding precedent on this issue." *Id.* at 944. *Hopwood's* reasoning, however, is flawed and internally inconsistent; this Court should not rely on it for several reasons.

First, and perhaps most significantly, Judge Smith's opinion [5] in *Hopwood* offers so little considered analysis of the university's First Amendment institutional autonomy defense as to have virtually ignored it. In a short footnote, the panel acknowledged that the university's First Amendment right to assemble the student body of its choice was "somewhat troubling." However, the panel simply dismissed that claim, making no attempt to refute it on any legal basis except to distinguish *Sweezy* as involving individual, rather

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[5] Judges Smith and DeMoss joined in the lead opinion; Judge Wiener filed a special concurring opinion in which he disagreed with the panel's conclusion that diversity can never be a compelling governmental interest in a public graduate school. 78 F.3d 932, 962 (opinion of Wiener, J., concurring). He would have assumed without deciding that diversity *is* a compelling state interest and would have proceeded to then address the issue of whether implementation of the university's policy was narrowly tailored to meet its diversity interest.

than institutional, academic rights. 78 F.3d at 943, n. 25. Moreover, in doing so, the panel made no mention of *Ewing* and its explicit statement regarding institutional rights.

Second, the panel inexplicably began its analysis with a statement that, subsequent to *Bakke*, "Supreme Court decisions regarding education state that non-remedial state interests will never justify racial classifications." Yet nowhere in its opinion are any such cases identified or analyzed. Indeed, only cases such as *Adarand Contractors, Inc. v. Pena*, 515 U.S. 200 (1995) and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) are discussed. The panel characterizes these cases as having implicitly "overruled" *Bakke*, despite the panel's own quotation of Justice O'Connor's concurrence in *Wygant v. Jackson Board of Education*, 476 U.S. 267, 286 (1986), in which she noted that a "state interest in the promotion of racial diversity has been found sufficiently 'compelling,' *at least in the context of higher education*, to support the use of racial considerations in furthering that interest." 78 F.3d at 945, n. 27 (emphasis added). Cases such as *Croson* and *Adarand*, which deal with highway construction and government contracting, clearly do not implicate the kind of First Amendment constitutional protections appropriate in the educational context[6] and, accordingly, are of little value to this Court in resolving the issues before it.

In cases such as *Sweezy, Griswold, Keyishian, Bakke*, and *Ewing*, this Court has charted a clear and consistent course of according deference to the academic freedom and autonomy

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[6] Judge Wiener's concurring opinion in *Hopwood* identifies this very flaw in the panel's opinion, concluding that "[t]his unique context [constructing an entering class at a public graduate or professional school], first identified by Justice Powell, differs from the employment context, differs from the minority business set aside context, and differs from the redistricting context; it comprises only the public higher education context . . . ." 78 F.3d at 965, n. 21.

of universities. In these and other decisions, the Court has consistently respected and deferred to the specialized judgments made by our educational institutions including judgments concerning the composition of their student bodies. It has repeatedly expressed its view that universities, not courts, are best entrusted with the crucial job of assuring that our Nation's "marketplace of ideas" continues to thrive. The Court should continue to follow that clear course in evaluating the University of Michigan's admissions policy in the instant case. The "essentiality of freedom" in American universities is as self-evident, and as critical, today as it was in 1957 when *Sweezy* was decided. The First Amendment protects the University of Michigan's admissions decision-making process against undue judicial interference and, accordingly, this Court should grant considerable deference to the University's determination that, in fulfilling its educational mission, it has a compelling interest in achieving a diverse student body.

These notions of academic freedom and institutional autonomy are of particular importance in Michigan. Like California,[7] Michigan has devised its system of higher education based on the firm principle that university autonomy best serves the goal of educating its citizens.[8] To that end, Michigan's Constitution confers a unique autonomous status on its public universities and their governing boards. Specifically, art. VIII, § 5 of Michigan's

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[7] *See, e.g., Bakke,* 438 U.S. at 366, n. 42 (opinion of Brennan, J.)

[8] In fact, in 1850 Michigan became the first state to enact a constitutional provision mandating the separate governance of its state university, the University of Michigan. Mich. Const. 1850, art. XIII, § 8. *See* Byrne, *supra* note 4, at 327-328.

Constitution vests plenary authority over educational matters in the University of Michigan's Board of Regents, providing that:

> The regents of the University of Michigan and their successors in office shall constitute a body corporate known as the Regents of the University of Michigan . . . . [The] board shall have general supervision of its institution and the control and direction of all expenditures from the institution's funds . . . .

This constitutional mandate of institutional autonomy was no mere accident; to the contrary, it was grounded in experience. Under Michigan's 1835 Constitution, the Legislature controlled and managed the University of Michigan, our State's first public university. *See* Mich. Const. 1935, art. X, § 5. This approach failed, however, and prompted extensive debate about the future of the University during the Constitutional Convention of 1850. *See Federated Publications, Inc. v. Michigan State University Board of Trustees*, 460 Mich. 75, 85, 594 N.W.2d 491, 496 (1999) (citing *Sterling v. Regents of the University of Michigan*, 110 Mich. 369, 374-8, 68 N.W. 253, 255-6 (1896)). What emerged from this debate was a consensus that the Legislature should be divested of its power and that control of the university should instead be placed in an autonomous elected board. [9] Michigan's Supreme Court has described the

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[9] As explained by Professor Byrne:

> When Michigan constitutionalized institutional autonomy in 1850, it did so against a history of frustrating failures to establish respectable state universities in America . . . . The legislature was perceived to manage the university for practical, political ends, rather than for long-term scholarly and educational objectives. The solution adopted—the election for eight year terms of officials responsible only for university governance—was an ingenious innovation, accommodating conflicting values and fostering a university known and admired throughout the world.

Byrne, *supra* note 4, at 328-329.

status of the University's governing board under this new system as "the highest form of juristic person known to the law, a constitutional corporation of independent authority, which, within the scope of its functions, is co-ordinate with and equal to that of the legislature." *Board of Regents of the University of Michigan v. Auditor General*, 167 Mich. 444, 450, 132 N.W. 1037, 1040 (1911). Under this new system, led by its independent board of regents, the University thrived. *Sterling*, 110 Mich. at 377, 68 N.W. at 255. The regent system has been in place ever since and the University of Michigan has continued to maintain its position as one of our country's finest educational institutions.

Just recently, in *Federated Publications*, the Michigan Supreme Court forcefully reaffirmed the principle that Michigan's Constitution guarantees the University full autonomy over educational matters. There, the Court held that Michigan's Legislature lacked the power to require the University to comply with Michigan's Open Meetings Act when conducting a search for a new University President finding that such a requirement would infringe upon the University's constitutional autonomy in managing its own affairs. *Federated Publications*, 460 Mich. at 78, 594 N.W.2d at 493. In so ruling, the Court reiterated that "[l]egislative regulation that clearly infringes on the university's educational or financial autonomy must . . . yield to the university's constitutional power." *Id.* at 87, 594 N.W.2d at 497. The Court observed that Michigan's Constitution "grants the [university] governing boards authority over the absolute management of the University" and that the Court has "'jealously guarded' these powers from legislative interference." *Id.* at 87, 594 N.W.2d at 497 (citing *State Board of Agriculture v. Auditor General*, 226 Mich. 417, 424, 197 N.W. 160, 161 (1924) and *Board of Control of Eastern Michigan University v. Labor Mediation Board*, 384 Mich. 561, 565, 184 N.W.2d 921, 922 (1971)). Although universities may be subject to certain general state laws such

as the public employees relations act, even those laws "cannot extend into the university's sphere of educational authority . . . ." *Id.* at 87-88, 594 N.W.2d at 497. The constitutional constraints on legislative authority over the University, the Court noted, extend even to the appropriations process: "although the Legislature may attach conditions to an appropriation, the conditions cannot invade university autonomy." *Id.* at 88, 594 N.W.2d at 497. In short, "[w]ithin the confines of the operation . . . of the University, it is supreme." *Id.* at 87, 594 N.W.2d at 497 (quoting *Regents of the Univ. of Michigan v. Employment Relations Comm.*, 389 Mich. 96, 108, 204 N.W.2d 218, 224 (1973) and *Branum v. Bd. of Regents of the Univ. of Michigan*, 5 Mich. App. 134, 138-9, 145 N.W.2d 860, 862 (1966)).

The unique autonomy of the University under Michigan's Constitution is also a compelling reason why the so-called "percent plans," advocated by some as an alternative mechanism for achieving diversity in university admissions programs, are not viable in Michigan. These plans, variations of which have been attempted in Texas, Florida, and California, generally involve a guarantee that a fixed percentage of the graduating class of each high school in the state will be admitted to the state's university system. Critics of such plans have raised numerous concerns. *See, e.g.*, Catherine L. Horn and Stella M. Flores, *Percent Plans in College Admission: A Comparative Analysis of Three States' Experiences*, The Civil Rights Project, Harvard University (February 2003).[10] While such criticisms are largely beyond the scope of this brief, there is at least one that is of particular concern in Michigan.

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[10] The full text of this study is available via the internet at: http://www.civilrightsproject.harvard.edu/research/affirmativeaction/tristate.pdf

Percent plans typically rely to a significant extent on a statewide university system in order to assure that, if there is not sufficient space in a particular institution for all of the eligible "percent" applicants, the applicant will be able to enroll in another institution in the same statewide system. The constitutional autonomy of the University of Michigan precludes this approach. The University of Michigan, under our Constitution, is independent and does not function as a part of an integrated statewide system. Thus, if the number of guaranteed "percent" applicants exceed the available spaces, there is nowhere else the University is able to guarantee admission. Changing this situation would require a substantial alteration of the State's existing and constitutionally mandated higher education structure. For this reason, the "percent plan" approach simply does not represent a viable mechanism for assuring diversity in admissions at the University of Michigan.

CONCLUSION

Both the First Amendment of the United States Constitution and art. VIII, § 5 of Michigan's Constitution confer upon the University of Michigan the right, as a separate autonomous entity, to make academic choices with only limited judicial scrutiny. Decisions regarding the composition of a university's student body are quintessentially within the sphere of that constitutionally protected autonomy. The importance of preserving that essential freedom cannot be overstated. Because the University's determination that it has a compelling interest in achieving a diverse student body in order to provide the best educational experience for its students falls squarely within the protection afforded by the doctrine of institutional autonomy under both the First Amendment and the Michigan Constitution, this determination should be afforded deference

by this Court. For these reasons, Governor Granholm urges this Court to uphold the constitutionality of the University of Michigan's admissions policies designed to achieve a diverse student body.

Respectfully submitted,

KELLY G. KEENAN,
Legal Counsel
TERESA CAINE BINGMAN,
Deputy Legal Counsel
R. JOHN WERNET, JR.,
Special Legal Counsel
Executive Office of the
Governor
Legal Division
P.O. Box 30013
Lansing, MI 48909
(517) 335-6847

JOHN D. PIRICH
Counsel of Record
MARK A. GOLDSMITH
HONIGMAN MILLER SCHWARTZ
AND COHN LLP
222 N. Washington Sq.
Suite 400
Lansing, MI 48933
(517) 377-0172

Counsel for Amicus Curiae

February 14, 2003