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 Appeal for the Sixth Circuit

BRIEF OF *AMICI CURIAE* THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, MINORITY BUSINESS ENTERPRISE LEGAL DEFENSE AND EDUCATION FUND, INC., NATIONAL WOMEN'S LAW CENTER, NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, COALITION OF BAR ASSOCIATIONS OF COLOR, AND SIGMA PI PHI FRATERNITY IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

The Lawyers' Committee for Civil Rights Under Law is a tax exempt, nonprofit civil rights legal organization founded in 1963 by the leaders of the American bar at the request of President Kennedy, to provide legal representation to the victims of civil rights violations. Its members include former Attorneys General, former Presidents of the American Bar Association, law school deans and professors, and many of the nation's leading lawyers. Over the last forty years, the Lawyers' Committee and its independent local affiliates in Boston, Chicago, Denver, Los Angeles, Philadelphia, San Antonio, San Francisco, and Washington, D.C. have represented members of minority groups and women in hundreds of civil rights cases. Among the essential interests of the Lawyers' Committee is the proper construction and implementation of programs to remedy racial discrimination and its effects and to ensure that all members of our society share in its institutions, opportunities, and benefits.

The National Association for the Advancement of Colored People ("NAACP"), established in 1909, is the nation's oldest civil rights organization. It has state and local affiliates throughout the nation. The fundamental mission of the NAACP is the advancement and improvement of the political, educational, social and economic status of minority groups and the elimination of racial prejudice.

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[1] Pursuant to Rule 37.6, the *Amici* state that no counsel for any party in this case authored any portion of this brief, and no person other than the *Amici* and their counsel has made any monetary contribution to its preparation or submission. Letters of consent to its filing have been lodged and are on file with the Clerk of the Court under Rule 37.3.

The Minority Business Enterprise Legal Defense and Education Fund, Inc. ("MBELDEF") is a nonprofit corporation founded in 1980 by former Maryland Congressman Parren J. Mitchell. The primary purpose of MBELDEF is to promote legally defensible minority business opportunity programs that ensure the fair and equitable participation of minority businesses in the marketplace. As part of its mission, MBELDEF encourages affirmative action initiatives designed to assist minority entrepreneurs in the marketplace.

The National Women's Law Center ("NWLC") is a non-profit legal advocacy organization dedicated since 1972 to the advancement and protection of women's legal rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, NWLC has worked to secure equal opportunity in education for girls and women through full enforcement of the Constitution and laws prohibiting discrimination. It has a deep and abiding interest in assuring the continued vitality of affirmation action programs and policies that open the doors of opportunity for minorities and women.

The National Partnership for Women & Families, a non-profit, national advocacy organization founded in 1971 as the Women's Legal Defense Fund, promotes equal opportunity for women, quality health care, and policies that help women and men meet both work and family responsibilities. The National Partnership has devoted significant resources to combating sex and race discrimination in education and employment, and advancing women's opportunities in education, employment, and other aspects of American life.

The Coalition of Bar Associations of Color ("CBAC") consists of the National Bar Association, the

Hispanic National Bar Association, the National Asian Pacific American Bar Association, and the Native American Bar Association. CBAC advances the common interests of these bar associations through joint resolutions, actions, and meetings. Through these actions, CBAC reflects the unity of these bar associations in responding to issues concerning lawyers of color.

Sigma Pi Phi Fraternity is a non-profit organization of college- and university-educated professional men dedicated to the uplift of the African American community through local and national social action programs, concentrated heavily in the area of education, and focusing on mentoring and providing scholarships for economically disadvantaged minority youth. Founded in 1904, Sigma Pi Phi is the oldest predominantly African American Greek-letter fraternity, with 110 member boulés (local chapters) nationwide. Its mission is to gather together men of good training, intelligence and culture for the good of themselves and the community and "by concerted action bring about those things that seem best for all that cannot be accomplished by individual efforts." Sigma Pi Phi has adopted a policy position in support of preserving affirmation action in order to assure equal opportunity in American society.

SUMMARY OF ARGUMENT

The compelling state interest in enrolling a diverse student body that satisfies strict scrutiny review, articulated in the pivotal opinion of Justice Powell in *Regents of University of California v. Bakke*, 438 U.S. 265 (1978), should be adhered to as a matter of *stare decisis*, and for prudential and pragmatic reasons, including the preservation of consistency and confidence in the rule of law. *See Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

Institutions of higher education have relied upon this longstanding decision in shaping admissions policies to achieve academic diversity, and it should not be disturbed.

The University of Michigan Law School's, admissions policy satisfies strict scrutiny because it is narrowly tailored. The policy follows closely the Harvard Plan specifically approved in *Bakke*, which permits the consideration of race as one factor among a number of relevant factors. Proffered "percentage plans" are an inadequate alternative to the Law School's present policy, which, as a matter of law, is not an impermissible quota system.

Finally, the Court of Appeals was well within its province in reviewing *de novo* the "constitutional facts" associated with the determination of issues presented in this case. The nature of the rights and normative standards at issue are not the type generally entrusted exclusively to the trier of historic facts, and the objectives of "strict scrutiny" review make deference inapposite. Ultimately, the District Court's findings erroneously implicated the application of strict scrutiny and issues of "constitutional necessity."

ARGUMENT

I. THIS COURT SHOULD FOLLOW THE WISDOM OF *CASEY* AND REAFFIRM *BAKKE*

The *stare decisis* principles and policy considerations that caused this Court to stay its hand in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), apply with full force to *Bakke.*

A. This Court Has Long Applied The Doctrine Of *Stare Decisis* In Circumstances Such As This.

In *Casey*, the doctrine of *stare decisis* resulted in the Court reaffirming "the essential holding" of *Roe v. Wade*,

410 U.S. 113 (1973). *Casey*, 505 U.S. at 869 ("A decision to overrule *Roe*'s essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law. It is therefore imperative to adhere to the essence of *Roe*'s original decision . . ."). This Court affirmed *Roe*'s essential holding by looking to the "prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case." *Id.* at 854. These "prudential and pragmatic" considerations similarly inform the application of *stare decisis* in the instant case. This Court should reaffirm *Bakke*'s essential holding: "the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin," *Bakke*, 438 U.S. at 320.

"Although adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of *stare decisis* demands special justification." *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 231 (1995) (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)). *See, e.g., Dickerson v. United States*, 530 U.S. 428, 443 (2000); *United States v. Int'l Bus. Machs. Corp.*, 517 U.S. 843, 856 (1996). Adherence to *Bakke* comports with a long standing and "unbroken line of decisions" spanning more than fifty years and including *Sweatt v. Painter*, 339 U.S. 629, 634 (1950) and *Brown v. Board of Educ.*, 347 U.S. 483 (1954). *Cf. Adarand*, 515 U.S. at 232 (O'Connor, J.) (overruling *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), because it "colli[ded] with an accepted and established doctrine" of the Constitution).

As "the very concept of the rule of law underlying our own Constitution requires such continuity over time [,] a respect for precedent is, by definition, indispensable." *Casey*, 505 U.S. at 854. *See also Int'l Bus. Machs.*, 517 U.S. at 856 (*Stare decisis* "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." (quoting *Payne v. Tenn.*, 501 U.S. 808, 827 (1991)). *See, e.g., Runyon v. McCrary*, 427 U.S. 160, 174 n.12 (1976); *Johnson v. Transp. Agency*, 480 U.S. 616, 644 (1987) (Stevens, J., concurring). For this reason, there is no ordinary justification, let alone "special justification," for overruling *Bakke*. *See Dickerson*, 530 U.S. at 443. Indeed, the "prudential and pragmatic considerations" that informed this Court's decision in *Casey* also favor reaffirmation of the essential holding in *Bakke*. *Casey*, 505 U.S. at 854-55.

B. "Prudential And Pragmatic Considerations" Necessitate Reaffirming *Bakke*.

First, because "[n]o evolution of legal principle has left" *Bakke*'s "doctrinal footings weaker than they were in" 1978, this Court should reaffirm *Bakke*'s essential holding. *Casey*, 505 U.S. at 857. During the last twenty-five years, none of this Court's cases has declined to follow *Bakke*'s essential holding. Nor have any of these cases declined to follow Justice Powell's opinion that "the interest of diversity is compelling in the context of a university's admissions program," *Bakke*, 438 U.S., at 314. *See, e.g., Adarand*, 515 U.S. at 257; *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 477 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 284 (1986). None of these cases has "undermined [the] doctrinal underpinnings" of *Bakke*; accordingly there is no "special justification" for overruling *Bakke*. *Dickerson*, 530 U.S. at 443.

Second, because subsequent cases support *Bakke*'s holding and rely upon its analysis, *Bakke* should be reaffirmed. *See Casey,* 505 U.S. at 857. For example, in *Croson* and *Adarand*, this Court looked to and relied on *Bakke*'s analysis as to the appropriate standard of review. *See, e.g., Adarand*, 515 U.S. at 218 (adopting Justice Powell's strict scrutiny standard of review articulated in *Bakke*); *Croson*, 488 U.S. at 493-94 (same). Likewise, in *Alexander v. Sandoval*, 532 U.S. 275, 280-81 (2001), this Court looked to and relied on *Bakke*'s analysis as to the scope of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq*. And in her enumeration of legitimate state interests in *Wygant*, Justice O'Connor 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." 476 U.S. at 286. Thus, subsequent decisions have relied on *Bakke*'s analysis, bolstering support for its essential holding.

Third, it is not the case that *Bakke*'s "premises of fact have so far changed in the ensuing two decades as to render its central holding somehow irrelevant or unjustifiable in dealing with the issue addressed." *Casey*, 505 U.S. at 855. Quite to the contrary, "the attainment of a diverse student body," *Bakke*, 438 U.S. at 311-12, is still a major predicate for considering an applicant's race in the university admissions process. The number and variety of *amici* addressing the Court, in support of the Law School, on this issue illustrate this point eloquently and powerfully. Ultimately, our increasingly interconnected global society makes the attainment of diversity at least as important today as it was in 1978.

Fourth, reliance on *Bakke* relates to more than the immediacy of a Law School admissions program. As an initial matter, it reflects the pivotal role education plays in ensuring that this Nation has "'leaders trained through wide exposure' to the ideas and mores of students as diverse as [its] many peoples." *Id.* at 312 (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)). *See also Ambach v. Norwick*, 441 U.S. 68, 76 (1979) (Powell, J.) ("The importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests long has been recognized by our decisions."). *See also Brown*, 347 U.S. at 493 ("[Education] is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment."). Moreover, "tradition and experience lend support to the view that the contribution of diversity is substantial." *Bakke*, 438 U.S. at 313. Accordingly, universities -- their students, faculty, administrators and applicants -- "have ordered their thinking and living around" the predicate of diversity, as articulated by Justice Powell and supported by *Bakke*'s essential holding. *Casey*, 505 U.S. at 856. They have long ordered their educational mission around the assumption that they have the "freedom" to "make [their] own judgments as to education," *Bakke* 438 U.S. at 312, and in particular the quality of experience they offer students, *id.* at 321-22.

Indeed, should this Court decide to reverse the Court of Appeals, not only will that decision devastate the Law School's efforts to enroll students of color, but it will also have the practical and pragmatic effect of harming

universities' efforts to achieve gender diversity.[2] Institutions of higher learning have not only relied on *Bakke* to achieve racial and ethnic diversity, but they also recognize that, like racial diversity, gender diversity enhances the educational experience and benefits the Nation as a whole. Faced with the persistent under-representation of women in many areas of study,[3] the Nation's universities have adopted a variety of programs aimed at admitting and retaining qualified women in these fields. For example, at the University of Michigan, the admissions process for its College of Engineering gives specific weight to an applicant's gender,[4] and other programs

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[2] *Amici* note that the District Court found credible the Law School's prediction that should it be forced to resort to race neutral admissions the enrollment of minorities would drop "sharply and dramatically". *See Grutter v. Bollinger*, 137 F. Supp. 2d 821, 842 (E.D. Mich. 2001) (quoting Expert Testimony of Stephen Raudenbush, who testified that under race-blind admissions minorities would have constituted four percent of the entering class in 2000, instead of 14.5%. *Id.* at 839.) *Amici* are confident Respondents and other *amici* will discuss fully the effects such a decision will have on students of color, and, thus call the Court's attention to the issue of gender diversity in an effort to place into context the broader import of *Bakke*'s essential holding.

[3] The most striking disparity is in engineering, where women receive only 18% of bachelor's degrees. Thomas D. Snyder & Charlene M. Hoffman, *Digest of Education Statistics, 2001,* Table 258, *at* http://nces.gov/pubs2002/2002130.pdf (March 1, 2002). In computer and information sciences, women receiving bachelor's degrees reached a high of 37% in 1984 but dropped to only 28% in 1999-2000 – showing that even where progress has been made for women in non-traditional fields of study, these gains are not immutable and can easily recede. *Id.* at Table 286, *at* http://nces.ed.gov/pubs2002/digest2001/tables/dt.286.asp.

[4] The "Selection Index Worksheet" for the College of Engineering allows 10 points for "Women in Engineering" (on file with the National Women's Law Center). *See* Joint Appendix filed in the Court of Appeals [hereinafter JA] at 239. In addition, the Selection Index for Michigan's College of Literature, Science and Arts includes points

(Footnote continued)

-- career workshops, a residence program offering tutoring and mentoring for female students, and the like -- help ensure the success of undergraduate and graduate women in science, engineering and mathematics. *See* http://wepan.org/ profiles_univ/UMichigan.html (2002). Similar programs are offered at many other universities. For example, the Women in Engineering Program & Advocates Network, a national, non-profit organization with members from nearly 200 engineering schools, lists on its website twenty-six colleges and universities offering programs designed to support women in engineering. *See* http://wepan.org/ profiles.html (2002). Educators have adopted these programs in recognition of the need for "[s]pecial efforts to identify and enroll women" in engineering and other fields because students "benefit significantly from education that takes place within a diverse setting. . . ." Association of American Universities, *Diversity Statement on the Importance of Diversity in University Admissions*, *at* http://www.aau. edu./issues/Diversity4.14.97.html (April 14, 1997).[5]

These programs will be placed at serious risk -- practically, if not legally -- if this Court strikes down consideration of race to achieve diversity in higher education. Under the Equal Protection Clause, gender

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for "Men in Nursing" – affirmative action for the underrepresented gender in that particular field. *Id.*

[5] Overbroad generalizations about the natural tendencies of men or women can have invidious consequences and are generally impermissible when they form the basis of state classifications along gender lines. *See, e.g., United States v. Virginia*, 518 U.S. 515, 533-534 (1996). But there are circumstances in which, "like race, gender matters" because a person's gender and resulting life experiences can affect his or her perspective. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 148 (O'Connor, J., concurring).

classifications are subject to intermediate scrutiny, rather than strict scrutiny. *See, e.g., Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982). However, this Court has cautioned that "[p]arties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action." *United States v. Virginia*, 518 U.S. at 531. If this Court strikes down the consideration of race in the Law School's admissions program to promote diversity, it is likely that many institutions either will not fully appreciate the distinctions between intermediate and strict scrutiny or, fearful of litigation, will eliminate gender-based programs in an abundance of caution.[6] In fact, even courts have sometimes confused the applicable standards.[7] Moreover, in practice,

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[6] Of course, this Court has already accepted that the intermediate scrutiny standard can be satisfied where an institution acts to remedy prior discrimination against women – and, indeed, that a remedial justification can satisfy a strict scrutiny standard as well. *See Adarand*, 515 U.S. at 237. The Court has ruled that sex-based classifications "may be used to compensate women for particular economic disabilities they have suffered to promote equal employment opportunity to advance full development of the talent and capacities of our Nation's people." *United States v. Virginia*, 518 U.S. at 533 (internal quotations omitted). To the extent that the types of affirmative action programs discussed here are adopted for remedial purposes, then, there can be no doubt that they are constitutionally permissible.

[7] *See Brunet v. City of Columbus*, 1 F.3d 390, 404 (6th Cir. 1993) (finding that strict scrutiny applied to an affirmative action plan based on a gender classification); *Conlin v. Blanchard*, 890 F.2d 811, 816 (6th Cir. 1989) (applying same scrutiny to race or sex based remedial measures); *Assoc. General Contractors of Am. v. City of Columbus*, 936 F. Supp. 1363, 1377 (S.D. Ohio 1996) ("[G]ender-based affirmative action plans are also subject to strict scrutiny when challenged under the Equal Protection Clause."), *vacated on other grounds*, 172 F.3d 411 (6th Cir. 1999); *Quirin v. City of Pittsburgh*, 801 F. Supp. 1486 (W.D. PA. 1992) (striking down gender-based affirmative action program based on precedents for race-based programs and finding that program was not

(Footnote continued)

race-based and gender-based affirmative action programs are often administered together, and it is unlikely that many such programs will survive for women if they are eliminated for students of color. Clearly, only a reaffirmation of *Bakke* by this Court can prevent the dismantling of a broad range of valuable programs put in place since *Bakke* was decided.

All these "prudential and pragmatic considerations" call for a reaffirmation of *Bakke*'s essential holding. *See Casey*, 505 U.S. at 854-55.

II. THE LAW SCHOOL'S RACE-CONSCIOUS ADMISSIONS PROGRAM IS NARROWLY TAILORED.

The Law School's measured and narrowly tailored use of race in admissions is permissible as a matter of law.[8]

A. The Law School's Admission Policy Considers Race As Only One Among Many Factors And Follows The Harvard Plan Referenced In *Bakke*.

The Law School's admissions policy is narrowly tailored, just as the Harvard College Admissions Program Justice Powell appended to his opinion in *Bakke*, 438 U.S. at 321-24. First, the policy considers race as only one of a host

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narrowly tailored, an element of strict scrutiny); *Am. Subcontractors Assoc. v. City of Atlanta*, 376 S.E.2d 662, 664 (Ga. 1989) (striking down a race- and gender-conscious affirmative action program under "a strict scrutiny standard, the appropriateness of which is conceded by the parties" without distinguishing between race and gender).

[8] Although *Amici* do not explore the compelling nature of the Law School's interests in these pages, we adopt by reference all arguments advanced in Brief of *Amici Curiae* Lawyers' Committee, *et al.*, in *Gratz v. Bollinger,* at 5-29.

of other factors such as "the enthusiasm of the recommenders, the quality of the undergraduate institution, the quality of the applicant's essay, residency, leadership and work experience, unique talents or interests, and the areas and difficulty of undergraduate course selection." *Grutter v. Bollinger*, 288 F.3d 732, 736 (6th Cir. 2002). Second, like the Harvard plan, the Law School's admissions policy focuses foremost on a candidate's academic qualifications -- a fact the Petitioner concedes. *See id.* at 748. Third, because Law School officials "read each application," automatically denying admissions to no student, *id.*, they improve on the Harvard plan, and comply with this Court's admonition to provide for individualized treatment in their decision-making policies. *See Bakke*, 438 U.S. at 319 n.53 ("So long as the university proceeds on an individualized, case-by-case basis, there is no warrant for judicial interference in the academic process."). Thus, every candidate competes for admission with a compilation of the factors he or she contributes to diversity, and one candidate's potential is weighed against every other candidate's. *See* JA at 1525. At Michigan, like Harvard, an African American candidate from Detroit might not be admitted while "a farm boy from Idaho" is. *Bakke*, 438 U.S. at 323.

Also, because race is considered in this limited way only, its effect, if at all, is diffuse. *See Grutter*, 288 F.3d at 767-68; *accord Gratz v. Bollinger*, 122 F.Supp.2d 811, 830 (E.D. Mich. 2000); *see also* Goodwin Liu, *The Causation Fallacy:* Bakke *and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045 (2002). As Justice Powell stated in *Bakke*:

> The applicant who loses out on the last available seat to another candidate receiving a "plus" on the basis of ethnic background will not have been foreclosed from all

> consideration for that seat simply because he was not the right color or had the wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant. His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment.

438 U.S. at 318.

This Court has held, in other contexts, that similar consideration of race is not impermissible. *See, e.g., Bush v. Vera*, 517 U.S. 952, 958 (1996) (O'Connor, J.) ("Strict scrutiny does not apply merely because redistricting is performed with consciousness of race.") (citation omitted). This Court's recent cases hold that the Constitution is implicated where a state actor subverts traditional concerns to race as the predominate factor. *See e.g., Miller v. Johnson*, 515 U.S. 900, 916 (1995).

Modeled so closely to the Harvard plan cited in *Bakke*, the Law School's policy is narrowly tailored to meet its interest in diversity.

B. Percentage Plans Are Insufficient To Achieve The Law School's Interest In Diversity, And The Government's Proffers Provide No Basis On Which To Challenge The Law School's Policy.

The Government's *amicus* brief largely hinges on the untested proposition that there are "race neutral" "percentage plans" available to the Law School, which, if employed, would be equally efficacious as its present policy and

constitutionally permissible. *See* Brief for the United States as *Amicus Curiae* at 22 (citing *Croson*, 488 U.S. at 510). These proffers are merely untested suppositions.

As an initial matter, percentage plans were not implemented in Texas, California, or Florida prior to the date the record closed in this case. The reports the Government proffers in support of these plans were, therefore, not available at trial, where it is likely that an objection on the basis of *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), would have been made.[9] Absent such scrutiny, the Government's proffers are untested in the evidence, are little more than *ipse dixit*, and should not now be considered against the Law School.[10]

This point is all the more clear as percentage plans have been the subject of much criticism -- particularly with respect to whether they are contrary to the Nation's policies

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[9] A court faced with such reports is expected to ask, *inter alia*, (1) who wrote the reports; (2) was that person qualified?; (3) was that person "biased?", *see* FED. R. EVID. 701 and 702; (4) were the studies "of a type reasonably relied upon by experts in the particular field," and were the methodologies employed valid?, *see* FED. R. EVID. 703; (5) are these studies "relevant" to the constitutional issues in dispute?, *see* FED. R. EVID. 401; (6) and are their conclusions "probative" of the constitutional facts in issue in this case?, *see* FED. R. EVID. 403.

[10] The Governor of Florida has submitted a more detailed description of that state's so called "One Florida" admissions program. *See* Brief of the State of Florida and the Honorable John Ellis "Jeb" Bush, Governor as *Amicus Curiae*. That program, of course, also has not been subjected to evidentiary testing or constitutional review. In any event, its independent constitutionality is the *sine qua non* of Governor Bush's contention that it is constitutional. That fact is not to be assumed, nor can it be subject to "judicial notice."

of integration and diversity. As a recent Staff Report issued by the U.S. Civil Rights Commission concludes, the plans implemented in Texas, California, and Florida cannot attain the goal of equal educational opportunity.[11]

Built upon a foundation of racial separation, the plans fail for several reasons. First, and most troubling, their success is predicated on the continued operation of racially isolated secondary schools -- a proposition antithetical to *Brown v. Board.*[12] Second, the Texas plan covers no graduate schools and, as a result, the number of African American graduate students there has dropped severely. *See* Comm'n Report at 3. Data from Florida also shows a downward trend. For example, the number of first-time minority students decreasing at the University of Florida College of Law. *Id.* at 4. Third, percentage plans operate on the premise that all secondary schools provide an equal education. The regrettable truth is that they do not, and

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[11] *See* U.S. Comm'n on Civil Rights, *Beyond Percentage Plans: The Challenge of Equal Opportunity in Higher Education* (2002) [hereinafter Comm'n Report]. In Texas, for example, while the number of minorities applying to the University of Texas-Austin has increased since 1996, the percentage of those admitted has decreased. *Id.*

[12] *See* Michelle Adams, *Isn't It Ironic? The Central Paradox at the Heart of "Percentage Plans"*, 62 OHIO ST. L.J. 1729, 1733-34 (2001) ("[I]t is more accurate to describe percentage plans as a reflection of current day educational apartheid."). *See also* U.S. Comm'n on Civil Rights, *Toward an Understanding of Percentage Plans in Higher Education: Are They Effective Substitutes for Affirmative Action?* (2000) ("The [Florida] Plan is an unprovoked stealth acknowledgment - and acceptance - that the existing school and housing segregation will never change and that longstanding efforts to remedy the race discrimination that was legal in Florida have been abandoned."); Jack Greenberg, *Affirmative Action in Higher Education: Confronting the Condition and Theory*, 43 B.C. L. REV. 521, 546, 547 (2002).

institutions of higher learning have an interest in admitting only qualified students -- a fact the Law School emphasizes.[13] Fourth, any numerical success the percentage plans offer at first blush is limited to university-system-wide calculations that disregard qualitative considerations about the individual colleges and universities.[14] In fact, the number of students of color attending these states' prestigious flagship institutions has diminished under the percentage plans.[15] Fifth, these plans are based purely on numerical quotas, contrary to *Bakke*'s call for individualized assessment. Ultimately, these plans are "a mechanism intended to achieve racial diversity upon a foundation of inequality," Adams, *supra* note 12 at 1734, and their substitutions for the race-conscious policies upheld by the

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[13] *See, e.g.*, Expert Rep. William G. Bowen in *Gratz v. Bollinger*, No. 97-75321 (E.D. Mich.) at 12 (percentage plans would have effect of "admit[ting] some students from weaker high schools while turning down better-prepared applicants who happen not to finish in the top tenth of their class in academically stronger schools."); Greenberg, *supra* note 12 at 546 (reporting a decline in mean SAT scores at the University of Texas at Austin from 1240 in 1996 to below 1220 in 2001).

[14] *Compare* Brief of the State of Florida and Governor Bush as *Amicus Curiae* at 16 (including community colleges in that state's "One Florida" initiative), *with* Comm'n Report at 4 (explaining that in the two years subsequent to that state's ban on race-conscious admissions, "blacks were underrepresented among first-time students, within ... the most selective University of Florida and Florida State University.").

[15] *See* Mitchell Landsberg, et al., *Affirmative Action Alternatives Uneven*, Pittsburgh Post Gazette, Jan. 19, 2003 at A-11 (reporting that "at the prestigious University of Texas-Austin, black enrollment has declined by 17%, Hispanic enrollment by 5%," and that "minority enrollment dropped off and has yet to rebound at [California's] most competitive campuses, UCLA and UC Berkeley.").

Bakke Court would bring us full circle to days of racial animosity.

C. The Law School's Admissions Policy Is Not An Impermissible Quota Within The Meaning Of *Bakke* And Its Progeny.

Justice Powell eschewed resolutions of whether an admissions program that considers race as one factor is permissible on the basis of the semantic label of "quota." *See Bakke*, 438 U.S. at 288-89. Rather, he looked to whether non-minority applicants were foreclosed from competing for a certain number of seats that were reserved exclusively for minority applicants, who were themselves permitted to compete for all openings. This he found to be an impermissible racial classification. *See id.* at 289. In contrast, he found no infirmity in an admissions program in which "race or ethnic background may be deemed a 'plus' in a particular applicant's file, yet it *does not insulate the individual from comparison with all other candidates* for the available seats." *Id.* at 317 (emphasis added). "[A]n admissions program operated in this way is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight." *Id.*

Thus, the key to determining the lawfulness of an admissions policy rests on the distinct question of whether it permits competition among all applicants on the basis of their contribution to the interest in diversity, not merely a focus on numbers. Indeed, if a diverse student body is to include diversity by race, of necessity, there will be some focus on the numbers of persons of various racial groups represented. *See Bakke*, 438 U.S. at 323 ("a truly heterogen[e]ous environment ... cannot be provided without

some attention to numbers."). It is the lack of ability of all persons to compete that has been the defining element of an impermissible consideration of race. *See, e.g., Croson*, 488 U.S. at 493 ("The Richmond Plan denies certain citizens the opportunity to compete for a fixed percentage of public contracts based solely upon their race."); *Metro Broadcasting Inc., v. FCC*, 497 U.S. 547, 630 (1990) (O'Connor, J., dissenting) ("For the would-be purchaser or person who seeks to compete for the station, that opportunity depends entirely upon race or ethnicity."); *Johnson*, 480 U.S. at 638 ("[T]he Agency Plan requires women to compete with all other qualified applicants. *No* persons are automatically excluded from consideration; *all* are able to have their qualifications weighed against those of other applicants") (emphasis in original).

The District Court failed to make the critical inquiry whether all applicants have the opportunity to compete with each other for admission to the Law School. *See Grutter v. Bollinger*, 137 F. Supp. 2d 821 (E.D. Mich. 2001). Rather, it examined only the percentages of minority students enrolled. The court repeatedly noted that the Law School has no fixed numeric enrollment goal. *See, e.g., id.* at 840 (finding "critical mass" to be "a concept" with no "precise quantification"); *id.* at 832-33 (admissions director "stated there is no number or percentage, or range of numbers or percentages"); *id.* at 834 (noting the Law School Dean, "was unable to quantify 'critical mass' in terms of numbers or percentages, or ranges of numbers or percentages," saying only that it meant "meaningful numbers," for purposes of class dialogue). Yet the court concluded that the Law School had a policy of admitting between 10-12% minority students and held that "there is no principled difference between a fixed number of seats and an essentially fixed minimum percentage figure." *Id.* at 851. Based only on this conclusion, the District Court then declared that "students of

all races are not competing against one another for each seat, with race being simply one factor among many which may 'tip the balance' in particular cases," and that "[t]he practical effect of the law school's policy is indistinguishable from a straight quota system…). *Id.* The District Court's leap from its focus on numbers to a conclusion that there was a lack of competition was unsupported.

Contrary to this leap, the District Court reviewed the record evidence that demonstrated that "[a]ll applications are read in their entirety, and all of the information elicited by the application is factored into the admissions decision." *Id.* at 829. The court gave no further consideration to the manner in which the policy provided for a comparison of each applicant to all other applicants. The Court of Appeals, however, did examine these aspects of the policy, and found "[i]mportantly, [that] the Law School's consideration of race and ethnicity does not operate to insulate any prospective student from competition with any other applicants." *Grutter*, 288 F.3d at 746. Ultimately, the Law School's policy requires all candidates to compete for all available seats. The Court of Appeals was therefore correct to reverse the district court on the issue of an impermissible "quota."

III. *DE NOVO* REVIEW OF CONSTITUTIONAL FACTS IS APPROPRIATE IN THIS CASE.

The Court of Appeals was within its purview in reviewing *de novo* the District Court's findings of constitutional fact.

A. Appellate Courts Employing Strict Scrutiny Should Review Findings Of Constitutional Fact *De Novo.*

For over half a century, this Court has recognized the imperative to give *de novo* review to a class of findings

sometimes referred to as "constitutional facts."[16] These are findings in which "a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts." *Fiske v. Kansas*, 274 U.S. 380, 385-86 (1927), *quoted in Bose Corp. v. Consumers Union of U.S., Inc.* 466 U.S. 485, 517 (1984) (Rehnquist, J., dissenting) ("The Court correctly points out that independent appellate review of facts underlying constitutional claims has been sanctioned by previous decisions of this Court[.]"). This Court has also described this class of findings as essentially consisting of mixed questions of law and fact in which the "relevant legal principle can be given meaning only through its application to the particular circumstances of a case." *Miller v. Fenton*, 474 U.S. 104, 114 (1985), *quoted in Ornelas v. United States*, 517 U.S. 690, 697 (1996).[17]

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[16] It appears that the term "constitutional fact" first appeared in John Dickinson, Crowell v. Benson: *Judicial Review of Administrative Determinations of Questions of "Constitutional Fact,"* 80 U. PA. L. REV. 1055 (1932). *See* Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 231 n.17 (1985). "Constitutional fact" has been used primarily in cases involving alleged infringements of the First Amendment. *See, e.g., Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 508 n.27 (1984) (*de novo* review of whether a false defamatory statement was made with "actual malice"); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 54 (1971) ("The simple fact is that First Amendment questions of 'constitutional fact' compel this Court's *de novo* review.").

[17] *See* Steven A. Childress, *Constitutional Fact and Process: A First Amendment Model of Censorial Discretion*, 70 TUL. L. REV. 1229, 1240 (1996) ("To the extent that these cases merely restate the oft-cited rule that legal conclusions or mixed law-fact questions fall outside complete factfinding protections, such as the clearly erroneous standard of Federal Rule 52(a), they are not revolutionary or particularly necessary as a separate exception."); 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, Federal Practice and Procedure § 2579, at 537-38 (2d ed. 1995) ("It is often difficult to decide whether a particular matter is a fact finding

(Footnote continued)

The doctrine of constitutional fact review has reached its fullest development in cases involving free speech, coerced confessions, and search and seizure law, all of which have established consistent principles for application of the doctrine.[18] As explained below, these principles allow appellate *de novo* review of the constitutional facts necessary to determine whether state action satisfies strict scrutiny. Indeed, *de novo* review is an essential component of the appellate courts' role in establishing and applying constitutional law. *See Bose*, 466 U.S. at 501 ("[T]he rule of independent review assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact[.]").

1. *The Predicates of De Novo Review of Constitutional Facts.*

This Court has identified a number of factors that bear on whether to engage in *de novo* review of a constitutional fact. First, the Court will examine the nature of the right at issue. The *Bose* Court explained that *de novo* review "reflects a deeply held conviction that judges ... must exercise such review in order to preserve the precious liberties established and ordained by the Constitution." 466 U.S. at 510-11. The importance of answering the

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or a legal conclusion. An appellate court will regard a finding or conclusion *for what it is,* regardless of the label the trial court may have put on it." (footnotes omitted; emphasis added)).

[18] *See, e.g., United States v. Arvizu*, 534 U.S. 266, 275 (2002); *Thompson v. Keohane*, 516 U.S. 99, 112-13 (1995); *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 567-68 (1995); *Miller*, 474 U.S. at 115; *Jacobellis v. Ohio*, 378 U.S. 184, 189-90 (1964); *Watts v. Indiana*, 338 U.S. 49, 51 (1949); *Pennekamp v. Florida*, 328 U.S. 331, 335 (1946).

constitutional question correctly and consistently, therefore, overwhelms any efficiency-based arguments that might otherwise counsel deference. *See Jacobellis v. Ohio*, 378 U.S. 184, 187-88 (1964) (noting that granting deference to lower court "is appealing", but that "[s]uch an abnegation of judicial supervision in this field would be inconsistent with our duty to uphold the constitutional guarantees.").

Second, the Court will examine the nature of the constitutional question and the relative decisional expertise of the potential judicial actors. *See Miller*, 474 U.S. at 114. Questions requiring the development of historical facts -- what happened, who is telling the truth -- are entrusted to triers of fact. *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985). This deference given to bench trial findings is codified in Federal Rule of Civil Procedure 52(a), which mandates that "findings of fact not be set aside unless clearly erroneous." Fed. R. Civ. P. 52(a). *See also Pullman-Standard v. Swint*, 456 U.S. 273, 277 (1982). It acknowledges the "superiority of the trial judge's position to make determinations of credibility," and it also recognizes that a "trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise." *Anderson*, 470 U.S. at 574. Accordingly, this Court has generally deferred to trial court findings of historical facts and "state of mind" issues, even when engaging in *de novo* review of constitutional facts. *See Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 688, 689 n.35 (1989); *Miller*, 474 U.S. at 112, 117.

In contrast, questions calling for the exposition and application of constitutional standards are entrusted to appellate courts exercising *de novo* review "of the whole record." *New York Times, Inc. v. Sullivan*, 376 U.S. 254, 285 (1964) (citation omitted) ("This Court's duty is not limited to the elaboration of constitutional principles; we must also in

proper cases review the evidence to make certain that those principles have been constitutionally applied.").[19] Thus, the *Miller* Court stressed that when a "relevant legal principle can be given meaning only through its application to the particular circumstances of a case, the Court has been reluctant to give the trier of fact's conclusions presumptive force and, in so doing, strip a federal appellate court of its primary function as an expositor of law." 474 U.S. at 114. *See also Bose*, 466 U.S. at 501-02. In short, constitutional standards are commonly "fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed." *Ornelas*, 517 U.S. at 696 (citation omitted). Retaining the exposition and application functions in the appellate courts through *de novo* review is necessary "to maintain control of, and to clarify, the legal principles," and "to unify precedent." *Id.* at 697; *see also Cooper Indus. Inc., v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001).

Finally, the Court will look at whether appellate courts have traditionally given *de novo* review to the type of finding at issue. For example, in determining that *de novo* review applied to the constitutional fact of whether a defendant was "in custody" under *Miranda*, the *Thompson* Court reviewed the judicial history of giving non-deferential review to related constitutional facts such as the "voluntariness of a confession," the "effectiveness of counsel's assistance," the "potential conflict of interest

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[19] *See* WRIGHT & MILLER, *supra* note 17 at 565 n.1 ("When dealing with questions of a constitutional magnitude, the court of appeals is not at liberty to accept the fact trier's findings merely because it considers them not "clearly erroneous"; the court of appeals must make its own examination of the material from which the decision is made." (citation omitted)).

arising out of an attorney's representation of multiple defendants," and whether there was "waiver of [the] Sixth Amendment right to assistance of counsel." 516 U.S. at 111-12. Similarly, the Court in *Bose* conducted an exhaustive review of prior First Amendment speech cases in which constitutional facts received *de novo* review. 466 U.S. at 504-08.

This review thus ensured respect for "*stare decisis* concerns" in the Court's application of *de novo* review. *See Miller*, 474 U.S. at 115.

2. *Appellate Courts Applying Strict Scrutiny Should Engage in De Novo Review.*

The principles described above all point to *de novo* review when appellate courts employ strict scrutiny. Certainly the nature of the rights at issue, and the elimination of our Nation's historical racial divide, are of the highest constitutional order -- consecrated by the Civil War and invigorated by this Court in decisions such as *Brown v. Board.* Thus the rights at issue in this case are on a par with the First Amendment rights vindicated by *de novo* review in *Bose* and *Harte-Hanks* and the Fourth and Fifth Amendment criminal procedure rights protected by *de novo* review in *Ornelas* and *Miller*.

Moreover, the nature of the constitutional fact questions involved in affirmative action jurisprudence demonstrates that appellate judges cannot delegate through deference their decisional responsibilities to triers of fact. The constitutional fact questions presented in this case include whether the Law School's admissions policy satisfies a compelling state interest; and whether the policy is narrowly tailored to further that interest. *See Bakke*, 438 U.S. at 305. These questions cannot be answered simply by

determining "what happened" or "who is lying"; rather, they require a series of predictive or normative judgments and distinctions that are, at their core, constitutional in nature. *See Adarand*, 515 U.S. at 237-38. In the course of resolving these questions, appellate courts will give "substantive content" to the structure of strict scrutiny review and will "unify precedent," at least within the scope of their jurisdiction. *Ornelas*, 517 U.S. at 696-97.

Likewise, the objectives of strict scrutiny review make clear that deference to the trial court is inappropriate. For example, in *Croson*, this Court emphasized that the "purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool." 488 U.S. at 493.

This Court's past practice has been to apply *de novo* review to racial distinctions. For example, in a "watershed" equal protection challenge to the alleged exclusion of African Americans from grand jury service, this Court refused to allow the factual nature of the issue to limit its authority: "That the question is one of fact does not relieve us of the duty to determine whether in truth a federal right has been denied." *Norris v. Alabama*, 294 U.S. 587, 589-90 (1935).

More recently, this Court has recognized that courts of appeals properly can conduct an independent review of constitutional fact questions regarding compelling state interests and narrow tailoring. *See Adarand*, 515 U.S. at 237-38 (directing the appellate court on remand to determine whether the interests served by a subcontractor compensation clause program were "compelling" and whether the program was narrowly tailored); *on remand Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1164 (10th Cir. 2000) ("*We*

decide the question [of] whether the interests served by the use of [a race-conscious program] are properly described as compelling." (emphasis added; internal quotations omitted)).

In sum, the nature of the rights at issue, the nature of the questions presented, and *stare decisis* all allow the conclusion that Court of Appeals could review *de novo* the constitutional facts arising in this case.

B. The Court Of Appeals Acted Within Its Purview In Applying *De Novo* Review.

1. *On the Issue of Whether the Law School Uses an Impermissible Quota*

The Court of Appeals properly applied a *de novo* standard of review to the District Court's finding that the Law School's admissions policy is "indistinguishable from a quota system," *Grutter*, 137 F. Supp. 2d at 851. This question is one of constitutional fact because it implicates "applications of standards of law," that are constitutional. *Baumgartner v. United States*, 322 U.S. 665, 671 (1944).

In making its fact finding, the District Court explained that "such a system is not narrowly tailored under any interpretation of the Equal Protection Clause." *Grutter*, 137 F. Supp. 2d at 851. The District Court's finding was a "legally determinative consideration" derived from constitutional interpretation and was more than fact finding, rooted solely in the record as developed by the parties. *See Pullman-Standard*, 456 U.S. at 286 n.16 (distinguishing between an "ultimate fact" and an "essentially factual" issue, "subject to the clearly - erroneous review."). It is these precise types of findings that "more clearly impl[y] the application of standards of law" and necessitate *de novo* appellate review. *Baumgartner*, 322 U.S. at 671; s*ee also, Bose Corp.*, 466 U.S. at 508 n.27 ("This Court 'has an

obligation to test challenged judgments against the guarantees of the First and Fourteenth Amendments,' and in doing so 'this Court cannot avoid making an *independent* constitutional judgment on the facts of the case.'") (quote omitted, emphasis added). The District Court considered the constitutional mandate of narrow tailoring and applied this interpretation to the factual record. Accordingly, the Court of Appeals acted well within its purview in applying *de novo* review in this instance.

2. *On the Implied Issue of "Constitutional Necessity".*

In *Bakke*, five Justices agreed that race could be considered to remedy past and continuing racial discrimination. *Bakke*, 438 U.S. at 300-05, 307-08 (Powell, J.); *id.*, at 362(Brennan, White, Marshall and Blackmun, JJ.). The underlying basis for this agreement was articulated by Justice Blackmun:

> I yield to no one in my earnest hope that the time will come when an "affirmative action" program is unnecessary and is, in truth, only a relic of the past. I would hope that we could reach this stage within a decade at the most. But the story of *Brown v. Board of Education*, ... decided almost a quarter of a century ago, suggests that that hope is a slim one. At some time, however, beyond any period of what some would claim is only transitional inequality, the United States must and will reach a stage of maturity where action along this line is no longer necessary. Then persons will be regarded as persons, and discrimination of the type we address today will be an ugly feature of history that is instructive but that is behind us.

Bakke, 438 U.S. at 403.

What Petitioners inferentially argues -- or, at least must necessarily argue -- is that (1) this Court's finding of "constitutional fact" in *Bakke*, that this Nation has not yet reached a stage of maturity such that race-consciousness is no longer necessary, was either erroneous as a matter of fact in 1978, or (2) in any event, is erroneous today. Such an argument is mistaken as to the first contention, and Petitioner has failed her burden of proof as to the second. The *Bakke* Court baseline finding was correct in 1978 when it approved the affirmative use of "race plus" factors in voluntary admissions programs in higher education under both prongs of "strict scrutiny." Regrettably, the *Bakke* Court's baseline finding remains true today. *Cf. Adarand*, 515 U.S. at 237 (O'Connor, J.):

> The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it.

In any event, Petitioner and her *amici* have failed to prove that it is not. The Court of Appeals properly found, with a "definite and firm conviction" that the District Court erred in making any finding -- express, inherent, implied or explicit -- to the contrary. *Cf. Easley v. Cromartie,* 532 U.S. 234, 242 (2001).

CONCLUSION

For the foregoing reasons, *Amici Curiae* respectfully submit that the judgment of the United States Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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