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

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BRIEF OF THE LAW SCHOOL ADMISSION COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF THE LAW SCHOOL ADMISSION COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

This brief is submitted on behalf of the Law School Admission Council in support of respondents, with the written consent of the parties.[1]

INTEREST OF AMICUS CURIAE

The Law School Admission Council ("LSAC") is a non-profit corporation whose members are 201 law schools in the United States and Canada. Founded in 1947, LSAC's mission is to coordinate, facilitate, and enhance the law school admissions process, in part by gathering statistical information about law school applicants and by administering the

[1] Letters of consent have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than amicus or its counsel made a monetary contribution to this brief.

Law School Admission Test ("LSAT"). LSAC has a strong interest in ensuring that standardized test scores are given the proper weight in the admissions process, and a longstanding commitment to ensuring equal access to legal education for members of minority groups. LSAC participated as *amicus curiae* before the United States Supreme Court in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

SUMMARY OF ARGUMENT

The inescapable lesson of the statistical evidence compiled year after year by LSAC is that unless America's law schools are allowed to adopt race-conscious admissions policies, many of the nation's lawyers will be trained in an environment of racial homogeneity that bears almost no relation to the world in which they will work, and in which all of us live.

That lesson has not been lost on LSAC member law schools: the vast majority have long recognized and acted upon the need to take explicit measures to ensure racially diverse student bodies. The United States does not dispute the existence of the problem, and indeed carefully refrains from urging this Court to bar law schools from adopting admissions policies with the explicit goal of affecting the racial makeup of their student populations. Even the plaintiff in this case makes no effort to deny the dramatic decline in racial diversity in the nation's law schools that would follow if her position in this case prevails.

The simple, demonstrable statistical fact is that most selective law schools in this country will have almost no students of certain races unless they adopt admissions policies designed to alter that outcome. How best to achieve diversity in the face of this problem is a question of educational policy. For good reason, this Court generally defers to the judgments of the States and their expert educators on such questions. The entire premise of the United States' argument in this case, for instance, is that law schools like the Univer-

sity of Michigan Law School ("Michigan Law School") can achieve racial diversity through "efficacious" race-neutral means. But the first proposed alternative – that law schools could simply forgo reliance on grades and test scores – would have serious negative consequences for the quality of legal education that the United States fails to recognize. The second – that law schools adopt "percent plans" like those used by some state undergraduate institutions – would be even more irresponsible as a matter of educational policy in the law school context. "Percent plans" simply do not translate to the law school setting, where they would both fail to achieve diversity and succeed in undermining educational quality.

Far more modest than these proposed alternatives is the actual practice of Michigan Law School and the overwhelming majority of the nation's law schools: including race among the many factors considered in assembling a class rich in diversity, experience, and potential. This approach assigns to numeric measures the weight they most appropriately carry. High test scores and grades are not an entitlement to law-school admission. Such criteria assess acquired verbal reasoning skills and certain other cognitive skills, but – as the LSAC has long noted – they do not capture many other qualities important to success both in law school and in the legal profession. And they say nothing about the degree to which an applicant's personal attributes – including but certainly not limited to race – might affect the mix of backgrounds, experiences, and ideas from which all students can learn. LSAC believes that the best possible system of legal education requires *both* that law schools continue to include among their admissions criteria numeric measures of certain cognitive skills, *and* that all law schools be permitted to include race among the many other applicant attributes schools consider in assembling a class that will maximize the educational experience all students receive. Especially in the absence of any other educationally responsible approach to at-

taining racial and ethnic diversity, LSAC believes the Michigan Law School policy must be upheld as a constitutionally legitimate means of providing students the uncontested educational benefits of such diversity.

In support of that view, LSAC offers the Court the benefit of decades of experience and accumulated knowledge of the law school admissions process: what LSAC knows about the effect of selective admissions policies on the racial diversity of student populations, and what LSAC knows about both the value *and* the limitations of performance measures such as the LSAT and undergraduate grades.

ARGUMENT

I. EDUCATION IN A RACIALLY DIVERSE ENVIRONMENT IMPROVES THE QUALITY OF EDUCATION FOR ALL STUDENTS

Racial and ethnic diversity in higher education is valuable not for its own sake, but because it contributes significantly to the overall quality of education afforded to all students. This insight, central to Justice Powell's opinion in *Bakke*, is as unassailable today as it was 25 years ago:

> A great deal of learning occurs . . . through interactions among students of both sexes[,] of different races, religions, and backgrounds . . . who are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world.

Regents of the University of California v. Bakke, 438 U.S. 265, 312-13 n.48 (1978) (internal quotation marks omitted).

Thanks in part to decades of empirical research,[2] the educational value of diversity is now well understood and

[2] A wealth of research involving small group interactions, for instance, establishes that members of racially diverse groups are more

widely acknowledged. Even the district court that invalidated Michigan's policy did not dispute that racial and ethnic diversity enhances the quality of education, *see Grutter v. Bollinger*, 137 F. Supp. 2d 821, 849-50 (E.D. Mich. 2001) ("The court does not doubt that racial diversity in the law school population may provide . . . educational and societal benefits. . . . Clearly the benefits are important and laudable."), and neither petitioner nor the United States contests the educational benefits racial diversity provides all students, *see* Petr. Br. 34; SG Br. 13. In short, the legitimacy and value of efforts to achieve racial diversity in higher education are not in question here.

Petitioner's constitutional argument does, however, misconceive the reason law schools seek racially diverse student bodies. Law schools do not seek racial diversity because they "'presume that persons think in a manner associated with their race.'" Petr. Br. 38 (quoting *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 618 (1990) (O'Connor, J., dissenting)); *see also* SG Br. 20, 25 n.8. Quite the contrary.

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likely to reach creative solutions to problems than racially homogenous groups. *See, e.g.*, T. Cox, Jr., Cultural Diversity in Organizations: Theory, Research, and Practice (1993); P.L. Mcleod, *et al.*, *Ethnic Diversity and Creativity in Small Groups*, 27 Small Group Research 248 (1996). It is also well-established that racial and ethnic diversity promotes concern for the public good, and enhances sensitivity for and understanding of persons of diverse ethnic groups. *See, e.g.*, D. Powers & C. Ellison, *Interracial Contact and Black Racial Attitudes: The Contact Hypothesis and Selectivity Bias*, 74 Soc. Forces 205 (1995). In the educational context, these and other factors translate into significantly improved learning outcomes for students on diverse campuses. *See, e.g.*, Alexander Astin, *Diversity and Multiculturalism on the Campus: How Are Students Affected?*, 25 Change 44, 48 (1993) (campus diversity correlates with "widespread beneficial effects on a student's cognitive [] development"); Assoc. of Am. Universities, Diversity Works: The Emerging Picture of How Students Benefit 78 (1997) (racial diversity has "positive effects on retention, overall college satisfaction, college GPA, and intellectual and social self-confidence" of all students, but especially of majority students).

Law schools recognize that no two individuals are influenced in the precisely same way even by a shared experience, such as common membership in an identifiable racial or ethnic group. Each individual's experiences and perspectives, even within a given racial or ethnic group, will be unique. What racial diversity therefore fosters is not an exchange of *group* perspectives, but a greater multiplicity of *individual* perspectives. Including a variety of students, each with different backgrounds and perspectives, increases the likelihood that the aggregate range of experiences and perspectives within the student body will be broader – and the educational experience of all students correspondingly richer.

II. THIS COURT SHOULD NOT SECOND-GUESS THE UNIVERSITY'S EDUCATIONAL POLICY JUDGMENT ABOUT HOW BEST TO ACHIEVE A DIVERSE STUDENT BODY

Once it is established that the pursuit of racial and ethnic diversity in higher education is an important and legitimate goal – in that diversity enhances the quality of education for all students – the only question that remains is how to achieve such diversity. That is primarily a question of educational policy.

This Court has always been "reluctan[t] to trench on the prerogatives of state and local educational institutions." *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 (1985). That reluctance is grounded both in federalism concerns and in a healthy awareness of limited judicial competence in university administration. *See id.*; *see also San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42-43 (1973) (courts lack "specialized knowledge and expertise" in educational policy). Because federal courts are not "suited to evaluate the substance of the multitude of academic decisions" made by public educational institutions, those institutions are granted "the widest range of discretion" in carrying

out their educational missions. *Ewing*, 474 U.S. at 226 n.11 (internal quotation omitted).

University and law school decisions about how best to pursue student-body diversity reflect educational policy judgments entitled to substantial deference. Evaluation of the likely effectiveness of a proposed policy, for example, is aided by expert knowledge and a cumulative understanding of the workings of educational institutions – the province of educators, not the courts. *See id.* at 226. Perhaps most important, the success of any policy must be measured not only by whether it produces racial and ethnic diversity, *see* SG Br. 19, but also by whether it does so without sacrificing other, equally important educational goals – goals like academic selectivity and diversity along other dimensions. Striking the optimal balance between these different and sometimes competing objectives calls for the exercise of the most careful and informed educational judgment. Law schools are entitled to "the widest range of discretion," *Ewing*, 474 U.S. at 225 n.11, in making that complex and educationally critical decision.

III. LAW SCHOOLS CANNOT ACHIEVE MEANINGFUL RACIAL DIVERSITY WITHOUT TAKING RACE INTO CONSIDERATION AS ONE OF MANY ADMISSIONS FACTORS

A. Minority Law School Applicants Are Significantly Underrepresented In The Highest Ranges Of Numeric Admissions Criteria

No nationally accredited law school in the United States is open to all who apply and can afford the tuition. Because of what society rightly expects and demands of its lawyers, law schools rightly expect and demand much of their students. To help them predict which applicants will be able to meet their expectations, law schools have for decades relied on two measures: undergraduate grade point average ("UGPA") and performance on the LSAT.

Such measures are valuable tools for admissions decision-makers, but they also create a potential problem: because applicants of certain minority races are significantly underrepresented in the highest UGPA/LSAT ranges, law schools that hope to draw students from those ranges will have very few minority applicants from which to choose. This does not mean that minority applicants with lower scores are less "qualified" for admission; as we explain below, law schools do not make admissions decisions on the basis of numeric indicators alone. Instead they consider a broad range of attributes and factors that go into the formulation of an educationally optimal class. *See infra* at 18-21 & n.8. At the same time, however, most law schools seek students who excel in all areas, including the acquired verbal reasoning skills measured by the LSAT and the academic achievement reflected in undergraduate grades. Accordingly, law schools do place value on high grades and test scores. And minority applicants are much less likely than others in the general applicant pool to fall in the highest ranges of these numeric indicators.

The raw numbers are startling. For the fall 2002 entering class, there were a total of 4,461 law school applicants who had both LSAT scores of 165 or above and UGPA of 3.5 or above. Of that number, a total of just 29 were black. LSAC, National Decision Profiles, 2001-02. Only 114 were Hispanic. The numbers are consistent for preceding years: in 2001, just 24 black applicants had 3.5-plus UGPA and 165-plus LSAT, out of 3,724 total applicants in that range; in 2000, it was 26 out of 3,542; in 1999, 22 out of 3,475; in 1998, 24 out of 3,461. LSAC, National Statistical Report, 1996-97 through 2000-01 (lodged with the Clerk).[3] For the

[3] There are more Hispanics in this UGPA/LSAT range each year, but not significantly more. In 2001 there were only 78 Hispanics in this range, including all of those who self-identified as Chicano/Mexican American, Hispanic/Latino, or Puerto Rican. In 2000, there were 83; in 1999, 91; in 1998, 82; and in 1997, 59.

fall 1997 entering class, the year petitioner applied to Michigan Law School, there were 3,447 applicants nationwide in that range, a total of 17 of whom were black. *Id.* Some 2,999 applicants across the nation equaled or exceeded petitioner's 3.8 UGPA and 161 LSAT score, of whom 25 were black. *Id.*

The impact on law school admissions is obvious and inevitable. Of the thousands and thousands of applicants near the top of the LSAT and UGPA ranges – the pool from which the nation's more selective law schools primarily draw – there are only about 25 each year who are black. If admissions were based solely on the UGPA/LSAT index, then that number, dispersed evenly among the ten most selective schools, would leave fewer than three black students in each class – at institutions with class sizes ranging from 150 to 650. In reality, of course, the schools regarded as the most selective would likely attract most of those students, so that it would be mathematically impossible for many other selective law schools to enroll *even one* black student with numeric scores in the highest ranges. Accordingly, if a selective law school wants to admit a racially and ethnically diverse class, then it may be impossible for the school to limit itself to minority students whose grades and test scores are equal to those of other admitted applicants.

These statistics affect all of American legal education, not just the most highly selective law schools. Analysis of predicted admissions data for the 1990-91 and 2000-01 applicant pools under a hypothetical grades-and-scores-only approach demonstrates the broad effects of racial variances in the numeric criteria. For the 1990-91 applicant pool, as many as 90 percent of black applicants would not have been admitted to any nationally-accredited law school in the United States if grades and test scores were the sole admissions criteria. Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Conse-*

quences of Abandoning Race as a Factor in Law School Admission Decisions, 72 N.Y.U. L. Rev. 1, 22 (1997). For the 2000-01 applicant pool, the acceptance rate for black applicants would have fallen by nearly 40 percent. Linda F. Wightman, *The Consequences of Race-Blindness: Revisiting Prediction Models with Current Law School Data*, forthcoming in J. Legal Educ., at 11 (2003).

The real-world consequences of these statistics were illustrated by the experience of law schools in Texas and California in the years immediately after affirmative action was prohibited in those states. In 1997, the first year Boalt Hall was legally barred from considering race, it enrolled *no* African-Americans – not one – and only seven Latino applicants. *See* Rachel F. Moran, *Diversity and Its Discontents: The End of Affirmative Action at Boalt Hall*, 88 Cal. L. Rev. 2241, 2247 (2000). At UCLA, African-American and Latino first-year enrollment totaled 64 in 1996, dropped to 49 in 1997, and stood at 21 in 2000. *See* Wightman, *Consequences of Race-Blindness*, *supra*, at 2-3 & n.8. In Texas, the results were similar. In the years just after University of Texas Law School was barred from taking race into account along with test scores and grades, African-American enrollment fell from 7 percent to 1.7 percent. *See* Clark Cunningham, Glenn Loury & John Skrentny, *Using Social Science to Design Affirmative Action Programs*, 90 Geo. L. J. 835, 855 (2002) (African-American enrollment was 7 percent in 1996 and 1.7 percent in 1999).[4]

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[4] The more optimistic numbers cited by the Solicitor General, *see* SG Br. 14-17, are not inconsistent with this data. The statistics he cites are the product of policies instituted at the *undergraduate* level for the express purpose of restoring minority representation. Even assuming such plans could survive scrutiny if this Court were to adopt petitioner's position, these policies have not been adopted, and could not be adopted, for law school admissions. *See infra* at 14-16. No law school anywhere has adopted such a policy, and the Solicitor General has submitted no evi-

The statistical evidence establishes the basis for some form of affirmative action. No law school would adopt an admissions policy consciously designed to enhance racial and ethnic diversity if there were no need to do so. But the disproportionately low number of minority applicants in the highest UGPA/LSAT ranges means that while law schools can afford to be selective with respect to applicants in those ranges generally, they will have very few minority applicants from which to choose – and some law schools may have none. For many law schools, the only way to achieve racial diversity is to adopt some policy consciously designed to enhance the representation of minorities among the students they admit.

B. Discarding Test Scores And Grades Is Not An Educationally Responsible Answer To The Problem Of Minority Underrepresentation In The Highest UGPA/LSAT Ranges

Unlike petitioner, the United States does not argue that States should be barred from addressing the problem created by low minority representation in the high UGPA/LSAT ranges. Instead the United States takes issue with the particular policy devised by Michigan to achieve that end, arguing that it is invalid because there are other, supposedly "race-neutral alternatives" that would be "efficacious" in achieving the desired racial diversity. SG Br. 21. But none of the alternatives would be "efficacious" in any meaningful sense.

1. One alternative proposed is for the nation's law schools to "eas[e] admissions requirements for all students," by "discard[ing] facially neutral criteria that, in practice, tend to skew admissions in a manner that detracts from educa-

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dence whatsoever that such plans would work to improve minority representation in the law school setting.

tional diversity," SG Br. 13-14 – criteria such as UGPA and LSAT scores.

The LSAC believes that discarding grades and test scores as tools for evaluating certain important skill sets in the admissions process would be a profoundly unwise course for American legal education. It goes without saying that when it comes to the study of law, an applicant's cognitive ability is a significant indicator of success. It is not the only indicator; nor is it the only quality for which law schools appropriately screen when selecting a class. But the educational mission of law schools depends in critical part on the ability to identify and admit applicants whose cognitive skills will enable them to benefit from – and contribute meaningfully to – the legal learning process.

Undergraduate grades and LSAT scores are the principal means by which law schools can screen and select for these skills. *See* Linda F. Wightman, *The Role of Standardized Admission Tests in the Debate About Merit, Academic Standards, and Affirmative Action*, 6 Psychol. Pub. Pol'y & L. 90, 94-95 (2000). LSAT scores, which reflect acquired, high-level reading and verbal reasoning skills, are an effective predictor of students' performance in law school. *See* LSAC, *Beyond FYA: Analysis of the Utility of LSAT Scores and UGPA for Predicting Academic Success in Law School*, Research Report 99-05 (2000); Lisa C. Anthony, *et al.*, *Predictive Validity of the LSAT: A National Summary of the 1995-1996 Correlation Studies*, LSAC Technical Report 97-01, LSAC Research Report Series (Aug. 1999). LSAT scores are also used in conjunction with undergraduate grades, to help law school administrators better understand and evaluate the records of students at colleges with which they are not especially familiar. *See* William P. LaPiana, *A History of the Law School Admission Council and the LSAT*, Keynote Address, LSAC Annual Meeting (1998), at 5-10.

Indeed, the LSAT was designed in part to serve precisely that function. In the years before World War II, law schools had developed "a very complex system for the evaluation of college grades and . . . had built up a lot of tables predicting what a certain average at a particular college meant." *Id.* at 5 (internal quotation marks omitted). After the war, with returning veterans attending college in record numbers, law schools were faced with a flood of transcripts from new colleges for which they had little or no data. The LSAT, introduced in 1947, gave law schools both a tool for evaluating unfamiliar college transcripts and a reliable, universal standard by which all students could be compared. *Id.*

In that respect, the LSAT worked – and works today – to *increase* access to legal education. In the past, high LSAT scores opened the doors of elite law schools to applicants from minority religious groups and white ethnic groups who might otherwise have been overlooked, often because they attended less prestigious colleges from which a high grade-point average was of uncertain significance, and sometimes as a result of cultural biases. *See id.* at 9-10. Even now, the LSAT helps law schools identify promising students at undergraduate institutions with which they do not have extensive experience. "[I]f one believes in the relative validity of the test results, then their widespread use in admissions can be seen as a net gain for fairness." *Id.* at 7.

Despite the LSAT's success in expanding access to legal education, we have already seen how the test could have, to some extent, the opposite effect for certain racial minorities, if given inappropriate weight in the admissions process. But addressing that problem by "discarding" test scores and grades altogether would seriously undermine the important educational interest in accurately measuring the verbal reasoning and other cognitive skills necessary for success in law

school.[5] Selecting students in part on the basis of these skills is fundamental to the academic mission and standards of the nation's law schools.

2. The United States offers one other alternative for achieving racial diversity in law schools: law schools could adopt policies like the Texas "ten percent plan." SG Br. 14-15.

Such policies make no sense for law school admissions. The United States tacitly concedes as much – nowhere in all its discussion of such plans does it even *refer* to their operation in the law school context, much less explain how they would work. In fact they would not. At the undergraduate level, the idea is that the state college or university attains diversity by offering admission to the top *x* percent of the class (on the basis of grade point average alone) at all state high schools. If such a plan promotes diversity at all, it is only because it depends on *de facto* racial segregation in state high schools. But the nation's colleges and universities are not racially segregated the way high schools in Texas evidently are. Even if it were wise to adopt a diversity policy that depends for its success on continued racial segregation, it is impossible to see how such a plan would work to enhance diversity where there is no pool of racially segregated institutions from which to draw.

Law schools would need answers to fundamental questions before they could even think about abandoning their selective admissions policies in favor of arbitrary percent-

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[5] Discarding the test because of its disparate racial outcomes cannot be justified on the ground that such disparity reflects a racial bias inherent in the test. To the contrary, repeated studies by LSAC researchers have confirmed that the test accurately predicts minority law school performance. *See, e.g.*, Lisa C. Anthony & Mei Liu, *Analysis of Differential Prediction of Law School Performance by Racial/Ethnic Subgroups Based on the 1996-1998 Entering Law School Classes*, LSAC Technical Report 00-02 (Jan. 2003).

plan programs. For instance, from what pool of colleges and universities would a law school like Michigan's draw to obtain a class of 320 students? Would it be all colleges and universities nationwide? If so, the Law School would have to offer admission to only a miniscule fraction of the very top graduates – maybe no more than the number one graduate of every college and university in the nation. But do enough of them want to go to law school? And is the pool of number one college and university graduates nationwide racially diverse? Perhaps the plan could be limited to just colleges and universities in Michigan, or maybe the Big Ten schools. But is there sufficient segregation among those schools such that admitting some percentage of the top graduates would enhance diversity? Perhaps Michigan could focus such a plan on accepting only the top graduates of historically black colleges. But in what sense would that be "race-neutral"? The failure of percent plan proponents even to acknowledge, much less address, basic questions such as these speaks volumes about the viability of such plans in the law school context.[6]

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[6] It is unclear why undergraduate "percent plans" are "race-neutral." It is true that percent plans do not make express reference to race. But they are intended to have a disproportionately favorable impact on the admissions prospects of minority applicants, and if they succeed, it is because they have precisely the intended race-based effect. The most candid affirmative-action critics – including notably the spokesman for petitioner's counsel Center for Individual Rights – insist that "percent plans" are no more race-neutral than policies like Michigan Law School's. *See, e.g.*, Curt A. Levey, "Texas's 10 Percent Solution Isn't One," *The Washington Post*, Nov. 12, 2002, p. A24 ("[Texas's 10 percent] plan furthers racial diversity on campus because it effectively applies a lower admissions standard to applicants from predominantly minority schools – in effect using a race-based double standard to engineer a specific racial mix. Such an intent is unlawful under the U.S. Constitution and federal law."); Roger Clegg, "Texas's Unconstitutional Experiment," *The Washington Post*, Nov. 7, 2002, P. A24 (arguing that Texas's 10 percent plan "is unconstitutional because it . . . rewrites admissions criteria to achieve a particular racial mix").

Second, not only are percent plans unworkable in law schools, they would seriously compromise the educational values served by selectivity in admissions. Part of the problem is that percent plans exalt undergraduate grades while discarding test scores for applicants sufficiently close to the top of their classes. Test scores, as discussed above, are a critical piece of the evaluation process. The fact that a college student is in the top 10 percent of her class, SG Br. 14-15 (Texas plan), or top 20 percent, *id.* at 15-17 (Florida plan), or even top 4 percent, *id.* at 17 (California plan), may say much about her preparation for legal study – or it may not. If the college is small and noncompetitive, or is not academically demanding, or has a reputation for inflating grades, then a high grade-point average alone signifies very little. The LSAT was designed in part to fill this gap, *see supra* at 12-13, and depriving law schools of its use would impose significant educational costs.

But there is more to the problem than just the elimination of test scores. Most law schools take very seriously the process of selecting, from among the thousands of applications they receive, the students they think will contribute the most to the interactive educational environment characteristic of American law schools. *See infra* at 18-21 & n.8. In this process law schools consider a wide range of attributes beyond just grades and test scores. Any admissions plan that focuses rigidly on undergraduate grades would cut off that critically important subjective evaluation process, forcing the school to live with whatever applicants fall within the arbitrarily defined grade category. That is not a sensible program for quality legal education.

In sum, the alternatives for achieving racial diversity offered here would allow a law school to pursue racial diversity only by significantly reducing or eliminating reliance on admissions criteria the nation's law schools have long

deemed important to their educational mission.[7] Yet the point of law school diversity policies is to *maximize* the quality of education offered to all students. *See supra* at 4-6. A diversity policy that operates to *undermine* educational quality is self-defeating as a matter of logic and unsound as a matter of educational policy. Even absent the usual deference this Court gives to the academic policy judgment of States and their experienced educators, there is simply no plausible basis for concluding that there are educationally responsible means, other than the type of admissions policy at issue here, for attaining the benefits of racial and ethnic diversity in legal education.

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[7] By contrast, suggestions that law schools "seek to promote experiential, geographical, political or economic diversity in the student body," SG Br. 14, are sensible educational ideas. In fact, most law schools, including Michigan, already *do* pursue such forms of diversity. But pursuing other forms of diversity does not significantly promote *racial* diversity, which is why the many law schools that rely on non-racial diversity criteria also consider race in admissions. It bears special emphasis that the most commonly suggested proxy for pursuing racial diversity – affirmative action on the basis of socioeconomic status – has no relation at all to achieving racial diversity. Because racial variances in numeric criteria are consistent across all socioeconomic levels, *see* Wightman, *The Threat to Diversity in Legal Education*, *supra*, 72 N.Y.U. L. Rev. at 42 (Table 10), an admissions policy that considers socioeconomic status is of little or no assistance to minority candidates. Further, the vast majority of people who are economically disadvantaged are white, meaning that "poverty-based affirmative action" primarily benefits white applicants, "by simple force of the numbers." Deborah C. Malamud, *Assessing Class-Based Affirmative Action*, 47 J. Legal Educ. 452, 465 (1997); *see* Gary Orfield, *Campus Resegregation and Its Alternatives*, in Chilling Admissions, at 7-16 (Gary Orfield & Edward Miller eds. 1988).

C. Race-Sensitive Admissions Policies Such As Michigan's Achieve Racial Diversity Without Compromising The Ability Of The School To Assemble An Educationally Optimal Class

Faced with the need to take some measures to ensure diversity, law schools like Michigan have correctly rejected proposals that they abandon altogether the selective and comprehensive admissions process that allows them to assemble classes that maximize the educational experience for all students. Instead, they pursue a much more modest course: they simply include race among the many other non-numeric factors they consider in deciding which applicants will create a class that best advances the school's overall educational goals. In doing so, law schools merely recognize that membership in an identifiable racial or ethnic minority group is at least as salient as other experiential and background attributes – attributes that schools properly regard as valuable because they broaden the perspectives students bring to the interactive classroom environment. *See supra* at 5-6. This approach to admissions strikes the appropriate balance between reliance on numeric measures of verbal reasoning skills and assessment of other attributes equally important in the admissions process.

1. It has been the consistent position of LSAC that "[t]here is no entitlement to a seat in law school, regardless of one's test scores and undergraduate grades." Philip D. Shelton, *Top Ten Misconceptions About the LSAT*, Law Services Report (Jan./Feb. 1999), at 9. That conclusion follows from a recognition that the goal of law school admissions is not simply to reward academic promise or achievement, whether measured by LSAT scores, UGPA, or any other indicator. Legal education is not an awards program. It is instead a process, with a two-fold mission: to enhance students' legal reasoning skills and mastery of legal principles, and to prepare them for meaningful participation and leader-

ship in the profession and in society. *See Ambach v. Norwick*, 441 U.S. 68, 76 (1979) (recognizing pivotal role of institutions of higher educations in "the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests"); *Sweatt v. Painter*, 339 U.S. 629, 634 (1950). The goal of law school admissions is to compose a class that best promotes those objectives for all students.

Grades and LSAT scores are important factors in this process. *See supra* at 8, 12-14. But they are not the only important factors. As LSAC repeatedly has cautioned, "[t]est scores and grade-point averages should play only a limited role in the admissions process," LSAC, *The Art and Science of Law School Admission Decision Making* 3 (2002), and should be "examined in relation to the total range of information available about a prospective law student," LSAC, *Cautionary Policies Concerning LSAT Scores and Related Services* (1996).[8]

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[8] The proper role of test scores and grade-point averages is best appreciated by considering all of the other factors LSAC deems important to the admissions decision. Those factors are reviewed in *The Art and Science of Law School Admission Decision Making*, *supra*, at 9-10, and include:

1) Academic Factors – advanced work or degrees, undergraduate major, difficulty of college course work, grade trends, quality of high school and prior academic experience, other test scores; 2) Demographic and Diversity Factors – age, gender, race/ethnicity, geographic residence, socioeconomic status, family size, religion, multicultural experiences, growing up in a low-income community, family history of higher education (i.e., first generation to attend college), dominant language and other languages, parents' and grandparents' education level, number of hours worked and other responsibilities during school; 3) Work Experience – position/type, level of responsibility achieved, full-time/part-time, number of years worked, type of industry or business, law-related experience or knowledge, military service; 4) Leadership and Extracurricular Factors – undergraduate or graduate leadership activities, community leadership/accomplishments, volunteer activities, academic leadership and or-

The LSAT, for instance, was never intended to serve as a measure of "merit." *See* LaPiana, *History of LSAT*, *supra*, at 8 (LSAT not designed as "fool-proof gauge of something called merit"); *see also id.* ("founders of the test were adamant that [the LSAT] could not and must not be the only criterion for admission"). Though an important measure of cognitive abilities, the LSAT "measures only a limited set of skills." Shelton, *Misconceptions*, *supra*, at 8. It does not, for instance, assess writing ability, effectiveness of advocacy, negotiating ability, leadership potential, or a number of other skills and attributes integrally related to success in law school and the legal profession. Nor does the LSAT evaluate important personal characteristics – such as motivation, perseverance, personal integrity, courage, social skills, and passion – that play a crucial role in determining success in law school and in a legal career. *See* Kevin McMullin, *Building a Better Legal Population: Schools Shouldn't Rely So Heavily on Test Scores in Admissions*, Tex. Law., Nov. 23, 1998, at 22; Jerry L. Anderson, *Ranking Isn't Everything: U.S. News Law School Study Overlooks Important Indicators of Success*, 83 A.B.A. J. 112 (1997).

Most significantly, neither LSAT scores nor grades provide any indication of how an applicant will affect the mix of backgrounds, experiences, outlooks, and ideas reflected within the class of students. As discussed, most of the nation's law schools base their entire approach to legal educa-

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ganizations, athletic activities, travel/foreign living, service activities; 5) Accomplishments – special skills and talents, music/drama/writing /artistic, overcoming/persevering in face of adversity, significant personal accomplishments of any kind, overcoming substantial discrimination, helping in overcoming discrimination against others, serving underserved communities or peoples; 6) Evidence Supporting Character and Fitness (i.e., Personal Qualities) – integrity, maturity, honesty, compassion, judgment, motivation, perseverance/tenacity, unique perspectives; and 7) Skills and Abilities – communication skills, planning ability, analytical skills, advocacy skills, problem-solving skills.

tion on the premise that heterogeneity in the student body improves both cognitive learning and preparation for leadership in the profession and society. Not only racial and ethnic heterogeneity, but also heterogeneity along a number of dimensions – gender, age, socioeconomic status, personal history, geography, special skills or talents – contributes significantly to the learning process on a law school campus.

In sum, a "sound admission program" is more than an exercise in assessing an applicant's cognitive skills and "predicting first-year performance." LSAC, *Art and Science of Law School Admission*, *supra*, at 4. Its "goal is much broader – assembling a class of individuals who contribute to each other's learning experiences, and who possess talents and skills that will contribute to the profession, frequently talents and skills not measured on the LSAT or captured in undergraduate grades." *Id.* Assessing which applicants best meet those criteria is a quintessential and profoundly academic judgment, properly entrusted to university officials. *See Ewing*, *supra*, 474 U.S. at 226-26; *Bakke*, 438 U.S. at 312 (Powell, J.) (university should be granted deference in determining who will be admitted to study). A policy that includes the appropriate consideration of grades and test scores but also gives weight to other factors, including racial and ethnic diversity, provides law school administrators with the information and latitude they need to compose a class that maximizes the quality of education for all students.

2. It is precisely the flexibility afforded admissions officials that distinguishes most race-sensitive law school admissions policies from the "quota" system condemned in *Bakke*. *See* 438 U.S. at 315-19 (Powell, J.) (distinguishing between admissions policies treating race as a "plus" factor and polices establishing racial "quotas"). Under the program at issue in *Bakke*, minority applications were forwarded to a separate committee, ranked internally but not against the general applicant pool, and then slotted into a specified

number of seats set aside for minority candidates. *Id.* at 274-75. As a result, admissions decision-makers had no opportunity to compare minority to non-minority candidates. There was no way to consider, for instance, whether the attributes of a given non-minority candidate – cognitive skills, special talents, unique background – might better enhance the school's overall educational environment than those of a given minority candidate. It was this flaw – the "insulat[ion]" of a racial group from "competition with all other applicants" – that defined "quota" for Justice Powell in *Bakke*, *id.* at 315, and now marks the constitutional line between permissible and impermissible consideration of race.

The educational virtue of policies like Michigan's is the same thing that sets them apart from a quota system. The law school faculty and staff who make admissions decisions evaluate all aspects of all applicants, separately and as compared to each other, in order to assemble a class that provides the best education to all students. Non-minority candidates, just like minority candidates, are screened for subjective factors: would they make the student body more heterogeneous along a non-racial dimension? bring some exceptional talent or personal experience to the class? be a leader or otherwise contribute to the law school community in a way not readily captured by numerical criteria? The system, that is, operates in a way "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant," and that is enough to make it permissible under *Bakke*. *Id.* at 317.

Research sponsored by LSAC into law school admissions processes confirms that such systems in practice do not operate like the quota system in *Bakke*. Wightman, *Consequences of Race-Blindness*, *supra*, at 32 ("as practiced in law school admissions, taking race into account is not the same as having a quota system"). The admissions data displayed in petitioner's own chart demonstrate how a law school can

seek meaningful racial diversity, measured even by targets, ranges, and critical masses, without elevating race above all other factors, as the *Bakke* program did. *See* Petr. Br. 7. Minority applicants at Michigan, for instance, were rejected in favor of other minority candidates with lower LSAT/UGPA combinations, making clear that factors other than race and numerical criteria guide admissions decisions. More striking is the fact that some minority applicants are rejected in favor of *non-minority* applicants with lower LSAT/UGPA combinations. *Id.* That result would not be possible were Michigan Law School focused exclusively on race, or unwilling to consider the subjective attributes of non-minority as well as minority candidates.[9]

* * * *

The operation of Michigan's system is not unusual. Nor can it be impermissible. There are but two other alternatives: selective law schools without meaningful enrollment of minority students, or the elimination of measures such as test scores and grades from the law school admissions process. If States may permissibly take steps to avoid the first result – to "ensure . . . that minorities are represented in institutions of higher learning," as the United States puts it, SG Br. 19 – then it should be left to the States and their expert legal educators to decide whether the second result is acceptable, or whether there is a better way to achieve diversity while at the same time ensuring the best possible quality legal education in America.

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[9] Moreover, even with affirmative action policies, black applicants as a group still experience one of the lowest overall acceptance rates of any race or ethnic group, *see* Wightman, *Consequences of Race-Blindness*, *supra*, at 7, further confirming that such policies work at best only to increase access to law school seats, not to provide minorities with disproportionate access.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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February 18, 2003