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

No. 02-516

JENNIFER GRATZ and PATRICK HAMACHER,

Petitioners,

v.

LEE BOLLINGER, et al.,

Respondents.

On Writ Of Certiorari Before Judgment To The United States Court Of Appeals For The Sixth Circuit

BRIEF AMICUS CURIAE OF WARD CONNERLY IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does the University of Michigan's use of racial preferences in undergraduate and law school admissions violate the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d), or 42 U.S.C. § 1981?

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I IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Ward Connerly respectfully submits this brief amicus curiae in support of Petitioners. All parties consented to the filing of this brief and their letters of consent have been lodged with the Clerk of this Court.[1]

Connerly, as amicus curiae, intends to brief issues not expected to be adequately covered by the parties in their briefs on the merits. Specifically, Connerly is in a unique position to brief the issues in this case because he is a long-time member of the University of California Board of Regents, whose race-based admissions program at the medical school at the University's Davis campus was the subject of the Court's opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). In *Bakke*, Justice Powell cited the rationale of diversity as a compelling governmental interest in permitting the use of race as a "plus" factor in university admissions. *Id.* at 316-18. It was the diversity rationale solely articulated by Justice Powell on which the Sixth Circuit held that "diversity" was a compelling interest as a matter of law. *Grutter v. Bollinger*, 288 F.3d 732, 757 (6th Cir. 2002), *cert. granted*, 123 S. Ct. 617 (Dec. 2, 2002) (No. 02-241).

[1] Pursuant to Supreme Court Rule 37.6, Amici affirm that no counsel for any party in this case authored this brief in whole or in part. Counsel of record, Manuel S. Klausner and Patrick J. Manshardt, authored the present amicus curiae brief in its entirety. No person or entity, outside of amicus curiae, or his counsel of record, has made a monetary contribution to the preparation or submission of the present amicus curiae brief.

Connerly focused the attention of the nation on the University's race-based system of preferences in its admissions policy and in July 1995, following Connerly's lead, a majority of Regents voted to end the University's use of race as a means for admissions.

Connerly was also the Chairman of the Yes-on-209 campaign, a 1996 California ballot initiative which banned the use of race- and gender-based preferences in public education, public employment and public contracting. Connerly was also a signatory of the argument appearing in the ballot pamphlet on Proposition 209 and has participated as amicus curiae in *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 24 Cal. 4th 537, 545 (2000). Connerly was also a plaintiff in *Connerly v. State Personnel Bd.*, 92 Cal. App. 4th 16 (2001), which involved the application of Proposition 209 to a number of state administrative agencies.

II SUMMARY OF ARGUMENT

"Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality," and "racial discriminations are in most circumstances irrelevant and therefore prohibited . . . . " *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). With respect to the idea that some discrimination is benign, the Ninth Circuit has observed:

> The principle that ethnic discrimination is wrong is what makes discrimination against groups of which we are not members wrong even if the beneficiaries are members of groups whose fortunes we would like to advance.

Monterey Mechanical Co. v. Wilson, 125 F.3d 702, 707-08 (9th Cir. 1997).

"Whether in the public or private sectors, the quest for diversity has become a new American creed . . . [but] most Americans are still perplexed at its meaning." Ward Connerly, Observations Concerning the University of Michigan Cases (Jan. 3, 2003) (on file at the offices of the Individual Rights Foundation) ("Connerly Statement"). "On the one hand, if diversity means racial integration, then most Americans support it." *Id.* But "if it means a system of racial classifications and preferences that must be recalibrated periodically to reach a target 'goal,' then most Americans are opposed." Ward Connerly, *Q: Does Diversity in Higher Education Justify Racial Preferences?; A: No: Diversity of Viewpoint, Not Racial Set-Asides Based on Stereotypes, Should Guide Admissions*, Insight on the News, May, 14, 2001, at 40.

"In reality, diversity is little more than a Potemkin village of strict racial proportionality." *Id.* "Diversity has [now] become untethered from integration and has assumed a life of its own." *Id.* "For the racial advocacy groups and their allies, in higher education, diversity is now integration's rival." *Id.*

"The 'diversity rationale' relies upon and reinforces a rigid and fixed system of racial classification and categorization in a nation of ever-changing and expanding demographics and characteristics. It is time for America to get beyond 'race' and the 'one-drop' rule that underpin 'diversity building.' The Court should make a clean break from these governmental practices of using race to one in which race becomes irrelevant. True colorblindness should become the law, and 'race' should be rejected." Connerly Statement.

It is also true that as long as the government deems it important to treat black and Hispanic students differently, they will be marginalized and presumed to be inadequate.

Further, "[g]ranting any government agency the legal authority to practice racial discrimination in the ordinary course of its activities is dangerous to the well-being of our society and repudiates the 'culture of equality' that has evolved in America" over the last fifty years. Connerly Statement.

The "diversity rationale'" is also incoherent and illegitimate in that Universities are not genuinely concerned with "real diversity," (e.g., diversity of thought). Moreover, diversity is fraudulently used because no other rationale, for the use of race- and ethnic-based preferences in public education has been permitted by the Court.

Additionally, "diversity" does not even appear to be the real substantive policy advanced by the University's preferences in that it can not be separately identified from correcting underrepresentation – or put differently, simple racial balancing.

The Court's grant of certiorari in this case once again puts the nation at a crossroads with regard to the government's continued consideration of race in public life. Throughout our history, there have been many critical moments in which we as a nation have been called upon to answer the following questions: What does America stand for? Was the Declaration of Independence mere rhetoric or did it outline a framework to guide the moral and civic development of our young nation? Is the guarantee of equal treatment to "every person" contained in the Fourteenth Amendment of our Constitution something on which we can rely as we engage in daily transactions with

our government? Was it the purpose of the "civil rights" movement to end the morally abhorrent practice of discriminating **against** black people so that we could discriminate in **favor** of them? Or, was it the purpose of that tumultuous period in our nation's history to end the practice of discriminating against any American citizen on the basis of their race or skin color or the origin of their ancestors?

"Under the Constitution, every agency of government, national and local, legislative, executive, and judicial, must treat each of our people as an American, and not as some member of a particular group classified on the basis of race or some other constitutional irrelevancy." Connerly Statement (quoting U.S. Gov't's Amicus Brief in *Brown v. Board of Education*).

"The color of a man's skin – like his religious beliefs, or his political attachments, or the country from which he or his ancestors came to the United States – does not diminish or alter his legal status or constitutional rights. 'Our constitution is color-blind, and neither knows nor tolerates classes among citizens.'" Connerly Statement (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559-60 (1896) (Harlan, J., dissenting)).

III STATEMENT OF THE CASE

Connerly adopts the Statement of the Case set forth in the Petitions for Writ of Certiorari.

IV ARGUMENT

A. The History of the United States and the Supreme Court's Jurisprudence on Race Demonstrate that the Equal Protection Clause and Other Federal Laws Should Be Interpreted to Prohibit Race-Based Preferences and Discrimination.

As California Supreme Court Justice Janice Brown eloquently stated:

> The United States was founded on the principle that "all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are life, liberty and the pursuit of happiness." (Declaration of Independence.) Yet our history reflects a continuing struggle to enable every individual to fully realize this "self-evident" article of faith. (See *University of California Regents v. Bakke*, 438 U.S. 265, 387-395, 98 S. Ct. 2733, 57 L.Ed.2d 750 (conc. & dis. Opn. of Marshall, J). That struggle demarcates the historical and cultural context within which we decide the issue before us.

Hi-Voltage Wire Works, Inc. v. City of San Jose, 24 Cal. 4th 537 (2000).

Hi-Voltage held that the City of San Jose's "targeted" outreach to minority- and women-owned business violated the California Constitution's outright ban on race- and gender-based preferences. In *Hi-Voltage*, Justice Brown noted that "the Courts have been instrumental in effecting positive change in the quest for equality, [but] their involvement in articulating a coherent vision of the civil rights guaranteed by our Constitution has not been without its low points." *Hi-Voltage*, 24 Cal. 4th at 545

(citing *Dred Scott v. Stanford*, 60 U.S. (19 How.) 393, 405 (1856), where the Court denied citizen status to blacks as its nadir in this area). In legitimizing the "pernicious concept" that blacks "had no rights that the white man was bound to respect" (*Dred Scott*, 60 U.S. at 449-52), the "Court set the stage not only for the cataclysm of the Civil War but for the contentiousness that continues to this day over government's proper role with respect to race." *Hi-Voltage*, 24 Cal. 4th at 546.

After the Civil War, "Congress overturned the *Dred Scott* decision when it adopted the Fourteenth Amendment." *Id.* But nevertheless, the Court "validated government-initiated racial restrictions and gave its imprimatur to legally enforced segregation," and it approved "separate but equal" accommodations. *Id.* (citing *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896)).

In his dissent in *Plessy*, Justice Harlan set forth his view of a color-blind constitution:

> Our constitution is color-blind, and neither knows nor tolerates classes among citizens. . . . The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law.

Plessy, 163 U.S. at 559-60 (Harlan, J., dissenting).

"It is [still] less than half a century ago that this governmental use of race as an instrument of discrimination was finally repudiated." *Ho v. San Francisco Unified School Dist.*, 147 F.3d 854, 863 (9th Cir. 1998). In *Brown v. Board of Education*, 437 U.S. 483 (1954), a unanimous Court adopted Justice Harlan's color-blind view and

repudiated *Plessy* by concluding that "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal [and] deprive[ ] [those affected] of the equal protection of the laws guaranteed by the Fourteenth Amendment." *Hi-Voltage*, 24 Cal. 4th at 546 (quoting *Brown*, 347 U.S. at 495). After *Brown*, courts "did not hesitate to apply its animating principles in other contexts." *Hi-Voltage*, 24 Cal. 4th at 547 (citing Van Alstyne, *Rites of Passage: Race, the Supreme Court and the Constitution*, 46 U. Chi. L. Rev. 775, 783, n.24 (1979)). Professor Van Alstyne summarized the common thread in the cases in the years between 1955 and 1976 following *Brown* by stating "virtually every other race-related decision by the Supreme Court appeared to convey" Justice Harlan's conviction "that the Civil War amendments altogether 'removed the race line from our governmental systems.'" *Hi-Voltage*, 24 Cal. 4th at 547.

"Professor Alexander Bickel referred to these cases as 'the great decisions of the Supreme Court' whose lesson . . . [has] been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society.'" *Hi-Voltage*, 24 Cal. 4th at 548 (quoting Bickel, The Morality of Consent, 133 (1975)).

The recalcitrance of local officials to courts' orders to end racial discrimination prompted Congress to enact the Civil Rights Act of 1964. *Hi-Voltage*, 24 Cal. 4th at 549.

United States Senator Hubert Humphrey of Minnesota, one of the principal supporters of the Civil Rights Act of 1964 declared with respect to Title VII of the Act:

> "Contrary to the allegations of some opponents of this title, there is nothing in it that will give any power to the Commission or to any court to require hiring, firing, or promotion of employees in order to meet a racial "quota" or to achieve a certain racial balance. That bugaboo has been brought up a dozen times; but it is nonexistent. In fact, the very opposite is true. Title VII prohibits discrimination. . . . In Title VII we seek to prevent discriminatory hiring practices. We seek to give people an opportunity to be hired on the basis of merit . . . . "

Price v. Civil Service Comm'n, 26 Cal. 3d 257, 289, 295 (1980) (Mosk, J., dissenting) (emphasis in original omitted).

However, the plain language and legislative history of the Civil Rights Act was betrayed by subsequent judicial interpretations:

> In obvious reference to the charge that the word "discrimination" in Title VII would be interpreted by federal agencies to mean the absence of racial balance, the interpretive memorandum stated:
>
> > "[Section 703] prohibits discrimination in employment because of race, color, religion, sex, or national origin. It has been suggested that the concept of discrimination is vague. In fact it is clear and simple and has no hidden meanings. To discriminate is to make a distinction, to make a difference or favor, and those distinctions or differences in treatment or favor which are prohibited by [Section 703] are those which are

> based on any of the five forbidden criteria: race, color, religion, sex, and national origin."

United Steelworkers of America v. Weber, 433 U.S. 193, 239 (1979) (Rehnquist, J., dissenting) (quoting 110 Cong. Rec. 7213 (1964)). Into the Civil Rights Act, the Court now "introduce[d] into Title VII a tolerance for the very evil that the law was intended to eradicate, without even offering a clue what the limits on that tolerance may be." *Weber*, 433 U.S. at 254-55 (Rehnquist, J., dissenting).

"In the wake of *Weber*, Title VII went through a sea change in less than a decade . . . from providing individualized restitutionary relief for specific injury to approving race-conscious practices by court order." *Hi-Voltage*, 24 Cal. 4th at 553. "Having once validated consideration of race, the United States Supreme Court struggled to articulate a principled, consistent standard for doing so given its earlier construction of Title VII." *Hi-Voltage*, 24 Cal. 4th at 553.

In more recent years, the Court has now limited the use of race in public employment and contracting to those situations where there has been "convincing evidence that remedial action is warranted." *Adarand Constructors Corp. v. Pena*, 515 U.S. 200, 236-37 (1995); see also *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 501-02 (1989) ("where gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination.")

This is no less of an important constitutional moment for the Court's race jurisprudence. "Since 1954 Americans have been creating a culture of equality, a culture that has little tolerance of bigotry and discrimination, a culture in

which even a veiled suggestion that segregation was once acceptable can be sufficient to get one removed from a seat of enormous political power." Connerly Statement. The culture of equality is one "in which people of different races are marrying across lines of race at an ever-increasing pace, and a culture in which the very lines of race are becoming blurred." Connerly Statement.

"It is through the interpretation and application of *Bakke* that the University of Michigan's College of Literature, Arts and Sciences and School of Law ("University") and government actors elsewhere are attempting to overthrow the culture of equality." *Id.* "Instead of equal treatment for every person, the University seeks to apply different standards to every person in the interest of achieving the amorphous goal of 'diversity.' "

"Racial discriminations imposed by law, or having the sanction or support of government, inevitably tend to undermine the foundations of a society dedicated to freedom, justice, and equality. The proposition that all men are created equal is not mere rhetoric. It implies a rule of law – an indispensable condition to a civilized society – under which all men stand equal and alike in the rights and opportunities secured to them by their government." *Id.*

When the federal government filed its amicus curiae brief in *Brown v. Board of Education,* the government faced squarely the question of what it means to be an American citizen and why racial discrimination is so abhorrent:

> Racial discriminations imposed by law, or having the sanction or support of government, inevitably tend to undermine the foundations of a society

> dedicated to freedom, justice, and equality. The proposition that all men are created equal is not mere rhetoric. It implies a rule of law – an indispensable condition to a civilized society – under which all men stand equal and alike in the rights and opportunities secured to them by their government. Under the Constitution, every agency of government, national and local, legislative, executive, and judicial, must treat each of our people as an *American*, and not as some member of a particular group classified on the basis of race or some other constitutional irrelevancy. The color of a man's skin – like his religious beliefs, or his political attachments, or the country from which he or his ancestors came to the United States – does not diminish or alter his legal status or constitutional rights. "Our constitution is color-blind, and neither knows nor tolerates classes among citizens." [citing *Plessy*, 163 U.S. at 559-60 (Harlan, J., dissenting)]

The question presented in this case will be heard nearly sixty years after the Court heard *Brown v. Board of Education*. Connerly submits that *if the nine members of the Court today were hearing THIS case sixty years ago, each and every Justice would at that time have fully endorsed and applied Justice Harlan's view of a color-blind constitution that was adopted in Brown*. The Court's intervening digressions in achieving a color-blind constitution since *Brown*, quite like those digressions that preceded *Brown*, should not stand in the way of a color-blind constitution being our immediate and final destination.

The Court has an opportunity to say that achieving racial "diversity" is not sufficient grounds to discriminate. More importantly, it has a "unique opportunity to advance the cause of color-blindness by removing its imprimatur

from the classification system that forms the pillars for the race-obsessed world in which institutions such as the University of Michigan reside." *Id.*

B. As Long as the Government Deems it Important to Treat Black and Hispanic Students Differently, They Will Be Marginalized and Presumed to Be Inadequate.

Not only does the "oft-obscured reality of racial preferences offend[ ] the values of most Americans of all races . . . [it] also fosters pernicious assumptions that black (and Hispanic) people are and will remain long incapable of competing on a level playing field with whites and Asians." Stuart Taylor Jr., *Do African-Americans Really Want Racial Preferences?* Nat'l J., Dec. 20, 2002. At bottom, the undeniable message that the defenders of the "diversity rationale" send is "that black and high school graduates, and black and Hispanic college graduates applying to professional schools are so academically weak that eliminating the double standard would lead to pervasive resegregation." *Id.* Although the intentions of universities and professional schools may be benign, is there nonetheless a resulting stigma of inferiority on every black and Hispanic student, even those who don't need preferences? This is clearly a message that perpetuates, as opposed to eliminates, the most intractable source of racial inequality in America today, which is the small number of preferred minorities who sufficiently excel academically in order to apply and be admitted to the nation's universities and professional schools without the use of preferences. *Id.* "As long as the government deems it important to treat black and Hispanic students differently, they will be

marginalized and presumed to be inadequate." Connerly Statement.

Further, "[d]ouble standards, preferential treatment, . . . and various kinds of entitlements all constitute a pattern of exceptionalism that keeps blacks (and other minorities) down by tolerating weakness at every juncture where strength is expected of others." SHELBY STEELE, A DREAM DEFERRED: THE SECOND BETRAYAL OF BLACK FREEDOM IN AMERICA 34 (1998). In Connerly's view, nowhere is that "toleration of weakness" more clearly codified than in the admissions policies practiced at the University of Michigan.

"The most dehumanizing and defeating thing that can be done to black Americans . . . is to lower a standard in the name of their race." *Id.* at 113. But there is a remarkably simple antidote: Place the same high expectations on the minority applicant which are placed on every other applicant. By so doing, the University would demonstrate its "faith in that student's equal humanity, intelligence, and skill." *Id.* Further, "when [the student] meets that expectation, his equality becomes unassailable." *Id.*

"Diversity" is essentially a code word for black and Hispanic inadequacy and racial balancing to correct resulting underrepresentation. "As long as our government believes that it can only achieve racial 'diversity' by giving special consideration to those who would not otherwise be 'represented' because of their race, color or ethnic background, we will suffer what the president [Bush] rightly calls the 'soft bigotry of lower expectations.'" As long as the diversity rationale is given governmental legitimacy, every black and Hispanic student in college will suffer the

presumption of inadequacy that is implicit in that rationale. *Id.*

C. The Court Should Make a Clean Break from the Past and Reject the Use of Race by Government in Favor of Making True Color-Blindness the Law.

It is no longer necessary to use race in American public life. "Unlike prior instances when the Court has had to confront the issue of 'race,' America is fulfilling the promise of equal opportunity without regard to race or ancestry at an unprecedented level in our history." Connerly Statement. "Like never before, Americans formerly denied the fullness of what this nation has to offer are now icons in any number of activities or endeavors." *Id.* "Black people [and other minorities] now have the opportunity to excel on the [golf course,] tennis court as well as the basketball court; in the corporate board room as well as in the cotton fields; and not only as secretaries, but as Secretary of State." *Id.*

"Fourteen years before *Bakke*, Congress attempted to settled the question of whether equal treatment under the law would be guaranteed to every 'person' when it enacted the Civil Rights Act of 1964." *Id.* "That law, following on the heels of the tumultuous movement that preceded it, led by Martin Luther King, Jr., set the stage for the American people to create a culture of equality in America, a culture that we celebrate annually to honor Dr. King and his legacy of 'color-blindness.'" *Id.*

"When the United States Supreme Court ratified the above principle in *Brown v. Board of Education*, it poured the foundation for us to build a culture of equality in our

land. The Congress constructed the walls a decade later, when it enacted the Civil Rights Act of 1964." *Id.* "But, it remained for us – the American people – to complete the structure by placing our faith in the principle of equal treatment and dedicating ourselves to making that principle the centerpiece of our lives." *Id.* "Thus, we have, indeed, built a culture of equality, a culture that grants no tolerance to anyone who would countenance a different kind of America." *Id.*

"So much has happened to make real the dream of a color-blind America that the time has come for the government to discontinue the odious practice of classifying its citizens on the basis of how many drops of blood course through their veins to be suitably classified as 'black' or 'African American' or whatever the government wants to use to define its citizens." *Id.* "The problem of race in America will not be expunged from American life as long as the government classifies its citizens on the basis of an increasingly arbitrary system of classification." *Id.* "The very premise of 'diversity' presupposes and relies upon a government-sanctioned classification system." *Id.*

This "clean break" would nonetheless not be a radical break in that much of the United States has already jettisoned the use of race in public life. In California, Proposition 209 (Art. I, sec. 31 of the California Constitution) has altogether banned the use of race- and gender-based preferences in public employment, public contracting and public education. In the State of Washington, I-200 had similarly accomplished what first started in California. At the University of California and the University of Florida, the state university systems have done away with race and ethnic preferences in favor of admitting the top portion of graduating seniors from each high

school. Diversity as a rationale for race and ethnic preferences in public universities has also been done away with in both the Fifth and Eleventh Circuits as being incompatible with the Fourteenth Amendment's Equal Protection Clause. See *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996); *Johnson v. Board of Regents of the Univ. of Georgia*, 263 F.3d 1234 (11th Cir. 2001). The Court should move the rest of the nation in the same direction by banishing the use of race in admission to public colleges and universities.

D. Permitting the Government to Practice Racial Discrimination in the Name of "Diversity" Is Dangerous to the Well-Being of Our Society and Repudiates the "Culture of Equality" that Has Evolved in America.

The reason for the strict scrutiny analysis of race-based preferences under the Fourteenth Amendment is "because there is simply no way of determining what classification is 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Croson*, 488 U.S. at 493.

As stated above, the Civil Rights Act of 1964 had been amended by judicial interpretation to permit preferential treatment for certain groups on the basis of race, sex, and ethnicity. This is how the University would have the Court add unwarranted and perverse gloss to the otherwise clear language of the Equal Protection Clause by holding that "diversity" is a compelling justification for the use of race- and ethnic-based preferences at the University. But as a matter of simple logic, one cannot grant preferences on the basis of these criteria without discriminating against

someone else. Race and ethnic preferences based on diversity and equal treatment for every person are two incompatible principles.

With respect to university admissions, life is a zero-sum game at many "preeminent" (Opposition to Petition at 3) institutions of higher education. As an example, at the University of California's Berkeley, Los Angeles, San Diego and Santa Barbara campuses, the Regents receive between 38,000 and 41,000 applications each year to attend each of those campuses. But there are only about 3,500 slots at each campus. By granting some students access to an institution of not unlimited capacity based on race, administrators are routinely denying that access to other individuals based on race.

Almost 20 years ago, the late California Supreme Court Justice Stanley Mosk wrote:

> "A quota is a two-edged device: for every one it includes it cuts someone else out. . . . " [¶] If the Constitution prohibits exclusion of blacks and other minorities on racial grounds, it cannot permit the exclusion of whites on similar grounds; for it must be the exclusion on racial grounds which offends the Constitution, and not the particular skin color of the person excluded.
>
> . . . [D]iscrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of a democratic society.
>
> . . . However it is rationalized, a preference to any group constitutes inherent inequality. Moreover preferences, for any purpose, are anathema to the very process of democracy.

Price v. Civil Service Comm'n, 26 Cal. 3d 257, 289, 299 (1980) (Mosk, J., dissenting). Such preferences, therefore, violate the nation's, and Congress' original understanding of civil rights.

Chief Justice Rehnquist and California Supreme Court Justice Mosk both characterized as "Orwellian" the suggestion that the Civil Rights Act's prohibition of discrimination did not prohibit discrimination in favor of minorities:

> The wry observation of Justice Rehnquist in his dissent in *United Steelworkers v. Weber* (1979) 443 U.S. 193, 219, applies to this case: "In a very real sense, the Court's opinion is ahead of its time: it could more appropriately been handed down five years from now, in 1984, a year coinciding with the title of a book from which the Court's opinion borrows, perhaps subconsciously, at least on idea." That one idea is "doublethink," the tortured abuse of words and phrases so that their meaning and effect become inverted.[FN1] Thus here the majority purport to eliminate discrimination by means of creating discrimination; they construe equality of all persons regardless of race to mean preference of some persons of some races over others; and a hiring program which compels compliance by a reluctant district attorney is described as voluntary. George Orwell is nodding complacently in his grave, as he wins vindication even before 1984 for his dire apprehensions about the misdirection of society.
>
> FN1 In the "doublethink" and "Newspeak" of Orwell's 1984 a key word is "blackwhite." It means a "loyal willingness to say that black is white," but in addition: "the ability to believe that

> black is white, and forget that one has ever believed to the contrary." (Orwell, 1984 (1949) p. 175).

Price, 26 Cal. 3d at 286-87 (Mosk, J., dissenting).

At bottom, the "diversity rationale" urged by the University would deprive non-preferred students of their right to protection under the Fourteenth Amendment. The Ninth Circuit has stated that: "It is heuristically useful, in sorting out the question of whether a classification is made from the question whether the classification is permissible, to hypothesize the same provision in favor of white male firms." *Monterey Mechanical*, 125 F.3d at 711-12.

In his concurrence in the *Adarand* case, Justice Thomas wrote:

> I write separately, however, to express my disagreement with the premise . . . that there is a racial paternalism exception to the principle of equal protection. I believe that there is a "moral [and] constitutional equivalence" . . . between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality. Government cannot make us equal; it can only recognize, respect, and protect us as equal before the law.
>
> That these programs may have been motivated, in part, by good intentions cannot provide refuge from the principle that under our Constitution, the government may not make distinctions on the basis of race. As far as the Constitution is concerned, it is irrelevant whether a government's racial classifications are drawn by those who wish to oppress a race or by

> those who have a sincere desire to help those thought to be disadvantaged. There can be no doubt that the paternalism that appears to lie at the heart of this program is at war with the principle of inherent equality that underlies and infuses our Constitution. . . . [T]here can be no doubt that racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination. So-called "benign" discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence. Inevitably, such programs engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the government's use of race. These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are entitled to preferences.
>
> In my mind, government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice. In each instance, it is discrimination, plain and simple.

Adarand, 515 U.S. at 239 (Thomas, J., concurring).

Significantly, however, granting any agency of government the authority to use race, color or national ancestry to "create diversity," fundamentally contradicts that precious principle of equal treatment under the law for every person. Moreover, the government's use of race, color or national ancestry repudiates the "culture of equality" that has evolved in America over the past sixty years.

No court would stand for a university playing with its admissions policy that in any way downgraded black or Hispanic achievement. The reverse should also hold true.

E. The Diversity Rationale Is Incoherent and Illegitimate.

The University states in its opposition to the petition for certiorari in the *Gratz* case that "LS&A vigorously recruits qualified minority applicants. It does so because in order to provide the educational benefits of racial and ethnic diversity to all students, learning environments must include *meaningful* numbers of minority students." Opposition to Petition at 8 (emphasis added).

As a Regent of the University of California for nearly ten years, Connerly has come to know a great deal about the practices of higher education with respect to the matter of race. Connerly Statement. In Connerly's view, "the professed value of 'diversity' is fraudulently used because no other rationale," for the use of race- and ethnic-based preferences in public education has been permitted by the Court. It is a fig leaf and nothing more than a legally sanctioned excuse to discriminate. But the "diversity" rationale and the Equal Protection Clause of the Fourteenth Amendment are incompatible. They cannot coexist. Even "allowing the use of race as 'one among many factors' is to renounce all for which our nation stands." Connerly Statement.

As a Regent of the University of California, it has also been Connerly's experience that the "universit[ies']" claims about wanting 'diversity' are false." Connerly Statement. "University administrators care little about intellectual diversity and they care even less about ensuring that

students of different backgrounds benefit from the 'diversity' that the University so proudly trumpets." Once they achieve their "critical mass" or as the University put it "meaningful" numbers of "minority" students, "universities create campus institutions and events that are designed to keep students separate on the basis of race – race-based freshmen orientations, race-based dormitories, race-based curriculum, even race-based graduation ceremonies." *Id.* "Of what value is a 'critical mass' [or 'meaningful'] number of 'minority' students if they remain huddled among themselves, rarely venturing out from the racial safe havens created by the university?" *Id.*

"If racial and ethnic 'diversity' – however that term is defined – is of such high value, what are we saying about the quality of education received by those who attend 'historically black colleges' or all-female institutions?" *Id.* "Are we to believe that Martin Luther King Jr. was a man of inferior education because he attended an institution – Morehouse College – not known for its diversity?" *Id.*

Under the University's description, are we to take it that black and Hispanic students are merely guinea pigs or lab rats for the benefit of white's educational experience? The Court should remind the people that "students of color" are not "props" on some great theatrical screen. The Admissions department of a University is not Central Casting. The fact that they are seriously arguing for waivers to educational standards in order to achieve a "look," ought to be troubling.

Diversity based on race is also meaningless given that Americans are increasingly multiracial and no one student can be fairly said to be representative of their race, or even more demeaning, their race's *viewpoint* in class. "Achieving

diversity by stereotyping students does not enhance anyone's educational experience – it diminishes it." Ward Connerly, *Q: Does Diversity in Higher Education Justify Racial Preferences?; A: No: Diversity of Viewpoint, Not Racial Set-Asides Based on Stereotypes, Should Guide Admissions*, Insight on the News, May, 14, 2001, at 40.

"In the course of his famous argument in 1841 before the Supreme Court in behalf of the Africans of the *Amistad*, John Quincy Adam asked a question to which he thought only a negative answer could be given: 'Is it possible that a President of the United States should be so ignorant that the right of personal liberty is individual?'" *Ho*, 147 F.3d at 864 (citing John Quincy Adams, Arguments in the case of United States v. Clinque 82 (Negro Universities Press 1968) (1841)). The University's assumption treats blacks and Hispanics as interchangeable representatives of their race instead of paying respect to their rights and dignity as individuals with viewpoints and opinions that may very well have nothing to do with race or ethnicity. The Court should reject the faulty premise that Americans are little more than the sum of their racial parts.

Extracting any coherence from the diversity rationale is further complicated by the University's lumping consideration of race (black) with ethnicity (Hispanic) for no apparent reason other than underrepresentation or perceived inferiority/inadequacy. Why is it that blacks should be treated the same as Hispanics (which as a group itself has incredible diversity of race and national origin and shares none of the nation's history of slavery and Jim Crow) were it not for a shared perceived inferiority? See *Ho*, 147 F.3d at 863 (noting the irony of race-based preferences in favor of blacks at the expense of Chinese students

in San Francisco's public schools given San Francisco's (and California's) particularly shameful history of discrimination against Chinese immigrants).

Coherence is also made more difficult by even trying to determine what the meaning of race is (and ultimately, why it is important in University admissions). In *Ho v. San Francisco Unified School District*, a case involving the use of race and ethnic assignments in San Francisco public schools, the following exchange took place between the court and counsel at oral argument on appeal:

> THE COURT: Will you tell me what race means?
>
> COUNSEL: I wish I knew.
>
> THE COURT: All right. Thank you.
>
> COUNSEL: I wish I knew what the plaintiffs said it means.
>
> THE COURT: Are you conceding that for the purposes of your client that they do not know what race means?
>
> COUNSEL: I'm saying I don't know what race means.
>
> THE COURT: You're representing the school district.
>
> COUNSEL: Yes.
>
> THE COURT: Does the school district know what race means?
>
> COUNSEL: I don't believe they do. I don't believe that they know more than I do.

> THE COURT: Well, can you say what their position is on race? Are you conceding they don't know what race is?
>
> COUNSEL: I have not attempted to establish for the entire school district what the various viewpoints of the people involved in the school district. . . .
>
> THE COURT: This is the main issue. Will the school district give up its racial forms so that no one has to identify themselves? Will they give it up?
>
> COUNSEL: If Judge Orrick demands that we do so.
>
> THE COURT: No, I'm asking you now.
>
> COUNSEL: . . . But the law does not require that.
>
> THE COURT: On this appeal, will you say that you will no longer . . .
>
> COUNSEL: Absolutely not.
>
> THE COURT: All right. Thank you. But you don't know what it is?
>
> COUNSEL: But because I don't know what it is, I don't know what I'm giving up if I say to you, "Yes, I will give it up."

Ho, 147 F.3d at 861. The truth is, nobody really knows what race means, much less why it is a (supposedly) vital factor in University admissions but for the sake of diversity which is code for racial and ethnic balancing resulting from notions of racial and ethnic inferiority.

Further, "diversity" does not even appear to be the real substantive policy advanced by the University's preferences in that it can not be separately identified from correcting underrepresentation – or put differently, simple racial balancing. The diversity rationale, which is founded upon underrepresentation, could very well be used to justify minority representation until the classroom "mirrors the percentage of minorities in the population as a whole." *Croson*, 488 U.S. at 498. Indeed, because the existence of the University's preference is based on underrepresentation, is there any confidence that the program would not continue *for at least as long* as underrepresentation continued? It appears that diversity has "been coined . . . as a permanent justification for policies seeking racial proportionality in all walks of life." *Lutheran Church-Missouri Synod v. Federal Communications Comm'n*, 141 F.3d 344, 356 (D.C. Cir. 1998).

V CONCLUSION

"The Court should move us in a direction which much of the country craves in which skin color is no longer relevant than one's religion or eye color in the transactions between government and its citizens." Connerly Statement.

At stake here is the full realization of the Equal Protection Clause which is the destination of a long journey by all Americans to leave behind their ancestors' racial baggage so that all can join America and enjoy the blessings of liberty without regard to race.

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Respectfully submitted,

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